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ARTICLES

LORD RADCLIFFE OUT OF TIME

NEIL DUXBURY*

I. INTRODUCTION

MODERN legal philosophy in Britain began, with not quite poetic timing, around a decade before 1963. In the 120 years following the publication of *The Province of Jurisprudence Determined* in 1832, British jurists – what few there were – took no great strides beyond what John Austin had said in those lectures. If we switch our attention from jurists to the judiciary of this period we find, predictably, that most judges showed no interest in approaching law in any way that could properly be described as philosophical. When we look closely, however, it becomes clear that judges were occasionally as disposed to bringing some philosophical slant to their analyses of legal problems as were their juristic counterparts. So it was – to take just a few examples – that Lord Halsbury justified strict *stare decisis*,[1] that Wright sought to demonstrate the illogicality of implied contract analysis,[2] and that Parmoor and Macmillan (and again, Wright) argued that there is a necessary connection between law and morality.[3] Anyone looking for evidence in Britain between the 1830s and the 1950s of something tantamount to philosophising about law would be as well advised to look to the courts as elsewhere.

The figure at the centre of this study was, as British judges go, more philosophical than most, though it would also be right to say that he was much more than a judge. Lord Radcliffe was appointed as a Lord of Appeal in Ordinary in 1949, at the end of the moribund era in British jurisprudence. Within fifteen years he had retired, much of his judicial

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[1] His argument being that a court of last resort must follow its own rulings, because it matters more that decisions at final appeal are consistent and (subject to legislative intervention) conclusive than that individuals are never the casualties of unfortunate precedents: see, e.g., *London Street Tramways Co.* v. *London C.C.* [1898] A.C. 375, 379. (Unless otherwise indicated, all cases cited are House of Lords decisions.)

[2] See, e.g., *Brook's Wharf* v. *Goodman Bros.* [1937] 1 K.B. 534 (C.A.), 545; *Wilsons & Clyde Coal Co.* v. *English* [1938] A.C. 57, 80; *Joseph Constantine Steamship Line* v. *Imperial Smelting Corp.* [1942] A.C. 154, 185.

[3] See C. Cripps [Lord Parmoor], *Do Well and Right and Let the World Sink* (London 1915), p. 16; Lord Macmillan, *Law & Other Things* (Cambridge 1937), p. 49; Lord Wright, "Natural Law and International Law" in P. Sayre (ed.), *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound* (New York 1947), pp. 794–807.

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career having been taken up with committee rather than court work. That he was regularly called on to help with political difficulties by chairing inquiries and writing reports (normally unanimously agreed, and bearing "the unmistakeable imprint of his … magisterial and lapidary" prose[4]) struck some as a serious waste of judicial talent,[5] though Radcliffe might not have seen it that way.[6]

What is certainly clear is that he is as intriguing a figure as one might ever encounter in the history of English law. Even though his judicial career was quite short, and much of the work for which he is remembered was outside the law, he is often, and justly, lauded as one of the great legal minds of the twentieth century. At heart, he was an Aristotelian natural lawyer with anti-utilitarian instincts and a nuanced grasp of how reason shapes human conduct. He generally disliked legislation, to the extent that he did not regard it as authentic law, but he was no common-law glorifier and he appreciated that the proliferation of statute law was a phenomenon that had to be reckoned with. He despaired over what he considered to be the vacuity and vulgarity of the modern world and the pusillanimity of a generation cosseted by social insurance and welfare provision. Yet his view of humanity was essentially optimistic. Like so many men of his generation and upbringing, he was disinclined to show emotion or to say much about himself, and indeed those who have sought to describe him invariably depict an aloof and austere representative of the great and the good (*The Great and the Good* being the appropriate if predictable title of a book about his life). But he was an exemplary communicator, who recognized that expressing his own convictions about the world and its problems meant articulating carefully what he perceived to be the truth of any matter before him, without sidestepping questions that can only be properly answered by revealing personal values and beliefs. Much of what he wrote – even on the dustiest topics – is marked by introspection and a commitment to telling what he understood to be the real story.

The main objectives of this study are to offer an account of Radcliffe's accomplishments as a lawyer, statesman and intellectual, to analyse his conception of law, and to show that he developed an intriguing and challenging, if fairly rudimentary, natural law approach

[4] P. Hennessy, "The Eternal Fireman Who Always Answers the Call of Duty", *The Times* (30 January 1976), p. 16.

[5] See, e.g., Learned Hand's comment on Radcliffe, cited after E. Griswold, "Greeting" in A.E. Sutherland (ed.), *The Path of the Law from 1967* (Cambridge, Mass 1968), pp. 4–8 at 7 ("They do strange things in Britain with their judges. Here is one of the very best they have and he hasn't been doing the judging job for years").

[6] "Though he continued to carry out judicial duties when he was not fully engaged on an inquiry," his *DNB* entry has it, "the law was no longer enough to satisfy his intellectual appetite." R. Armstrong, "Radcliffe, Cyril John (1899–1977)" at www.oxforddnb.com (accessed 18 June 2008). Neither the judicial nor the committee work satisfied him fully: see Lord Radcliffe, *Not in Feather Beds: Some Collected Papers* (London 1968) (hereafter *NFB*), p. x.

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to the question of what constitutes legal authority. The study also has a secondary objective: to counter the common jurisprudential characterization of the judge as courtroom adjudicator and not much else, and to draw attention to the fact that the influence judges have over legal and social policy will sometimes be attributable to their extra-judicial endeavours. Lord Wright, a strong supporter of the defence of contributory negligence, chaired the Law Revision Committee responsible for the report that led to the establishment of contributory negligence as a statutory defence.[7] Lord Kilmuir, who considered himself largely responsible for that defence making it onto the statute books,[8] took pride in "constantly sending subjects on which the law had been criticized to be examined by the Law Reform Committee, and … aimed at getting at least one Law Reform Bill … dealt with every year."[9] Lord Gardiner is remembered primarily for his work as a law reformer, and particularly as the driving force behind the Law Commission in its early years.[10] Since World War II many judges, including lower court judges, have headed royal commissions and departmental committees.[11] Radcliffe, we will see, is an exemplary illustration of the judge who is so much more than a judge; to confine our attention to the cases he decided would reveal little of the mark that he made on law and public life.

II. Radcliffe's Life

"Let a fairy grant me my three wishes," Radcliffe remarked in 1961, "I would gladly use them all in one prayer only, that never again should anyone using pen or typewriter be permitted to employ the word 'Establishment'".[12] In fact, Radcliffe's problem with the word was other peoples' use of it; he felt he knew perfectly well what made someone a member of "the Establishment" and indeed, having made the remark just quoted, proceeded unselfconsciously to explain the concept. What really irked him were those who invoked the term to "set off one more cannibal dance round the idea of authority", who constantly railed against "a force styled 'They'".[13] No doubt many a culprit would have had Radcliffe himself in their sights. He was wealthy,[14] and he made a

[7] See *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* [1936] A.C. 206, 211–2; Law Revision Committee, *Eighth Report: Contributory Negligence* (Chair: Lord Wright) (Cmd. 6032; 1939); Law Reform (Contributory Negligence) Act 1945.

[8] Lord Kilmuir, "Law Reform" (1958) 4 J.S.P.T.L. 75, 81.

[9] Lord Kilmuir, *Political Adventure* (London 1964), p. 302.

[10] See R.F.V. Heuston, *Lives of the Lord Chancellors 1940–1970* (Oxford 1987), pp. 226–39.

[11] For data and commentary covering the period when Radcliffe was a judge, see T.J. Cartwright, *Royal Commissions and Departmental Committees in Britain: A Case-Study in Institutional Adaptiveness and Public Participation in Government* (London 1975), pp. 71–2, 220–1.

[12] Lord Radcliffe, *Censors: The Rede Lecture 1961* (Cambridge 1961) (hereafter *Censors*), p. 22.

[13] *Ibid.*

[14] At death he left over £350,000 net; when his wife died five years later, her estate was valued at almost £600,000 net. P. Hennessy, *Whitehall* (London 1989) (hereafter Hennessy, *Whitehall*), p. 566.

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point of opposing efforts to impose extra taxes on the rich.[15] After World War II he became "unofficial number one" on the list of usual suspects upon whom governments of the period called when seeking to get out of a fix – especially when the fix in question was intellectually demanding.[16] Sir Alan Herbert despaired of government by "Radcliffery" and wondered if ministers might ever again be able to do their jobs "without bothering Lord Radcliffe."[17] Having been made Chancellor of Warwick University in 1967, Radcliffe soon found himself leading an inquiry into the University's handling of information about its students and staff.[18] One of those at the centre of the controversy was in no doubt as to Radcliffe's Establishment credentials: "he belongs securely to – and has been a distinguished member of – a governing class …. We (the governed) are here and he (the governor) is there."[19]

Such characterizations are simplistic – of precisely the type that left Radcliffe exasperated – but hardly surprising. That he was destined for anything other than high office always looked improbable.[20] He was born in 1899, the son of an army captain, and he was educated at Haileybury – originally established by the East India Company as a training college for the civil servants of India – and at New College, Oxford, from where he graduated with a First in classics in 1921. After graduation he was elected a Fellow of All Souls, but he found the academic environment unedifying[21] and in 1937, when his fellowship was due for renewal, he declined to be considered for re-election. By this point, he was a successful chancery barrister.[22] But in 1939 he abandoned his bar work in favour of war work, a move that led to his

[15] See *Royal Commission on the Taxation of Profits and Income: Final Report* (Chair: Lord Radcliffe) (Cmd. 9474; 1955) (hereafter *Taxation*), paras. 73–84; Lord Radcliffe, "Can a Wealth Tax be Justified?" (letter) *The Times* (3 July 1974) 17; *NFB*, p. 119 n *.

[16] Hennessy, *Whitehall*, pp. 566, 548.

[17] A.P. Herbert, *Anything but Action? A Study of the Uses and Abuses of Committees of Inquiry* (London 1960), p. 20.

[18] *Report of the Rt. Hon. Viscount Radcliffe, G.B.E. as to Procedures Followed in the University with regard to Receiving and Retaining of Information about Political Activities of the Staff and of Students, 14th April 1970* (University of Warwick, Coventry 1970) (hereafter *Warwick 14th April Report*); *Report of the Rt. Hon. Viscount Radcliffe, G.B.E., Part II, 26th May 1970* (University of Warwick, Coventry 1970).

[19] E.P. Thompson, *Writing by Candlelight* (London 1980), pp. 36–7.

[20] The following sketch of Radcliffe's life draws on the following sources: Armstrong, above note 6; Anon, "Viscount Radcliffe: A Career of Distinguished Legal and Public Service" (obituary) *The Times* (4 April 1977), p. 14; C.H. Philips, "Obituary: Viscount Radcliffe" (1977) 40 *Bulletin of the School of Oriental and African Studies* 591 (hereafter Philips, "Obituary"); and Edmund Heward's informative but not particularly analytical *The Great and The Good: A Life of Lord Radcliffe* (Chichester 1994) (hereafter *GAG*).

[21] See J. Lowe, *The Warden: A Portrait of John Sparrow* (London 1998), pp. 49–50, 64–5, 167. Oxford dons, Radcliffe felt, had a depressing tendency to treat "everything written or said by anyone else" as if it were "an essay which they are appointed to correct". Cyril Radcliffe to John Sparrow, 5 March 1958, cited after Heward, *GAG*, p. 15.

[22] His income in 1937, two years after he had taken silk, was apparently £17,584: Heward, *GAG*, p. 20. It seems that he acquired a significant amount of work that would have gone to two senior members of his chambers, Wilfred Greene and Gavin Simonds, before they became judges in the mid-1930s. Between 1929 and 1939 he is listed as counsel in sixty cases published in the official law reports, over half of which were heard between March 1937 and July 1939.

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appointment in 1941 as Director-General of Brendan Bracken's Ministry of Information.[23] He returned to the bar in 1945, apparently eschewing a political career on the basis that in the post-war world he should devote his energies to promoting "the independent values of the law".[24] When he was appointed directly to the House of Lords four years later he anticipated that the pace of his work-life would slow.[25] But it is unlikely that it did, and it is certainly the case that the switch from barrister to Law Lord took him away from the law for long periods of time. Two public appointments came his way in 1947: chairmanship of a committee of inquiry into the future of the British Film Institute[26] and, on the passing of the Indian Independence Act, the far more onerous task of negotiating the boundary between India and Pakistan.[27] Although some commentators (most famously Auden) have disparaged Radcliffe in this last role – his unfamiliarity with British India, his reliance on inaccurate information and his completion of the job in a matter of weeks[28] – his efficient handling of the problem made

[23] See C.E. Lysaght, *Brendan Bracken* (London 1979), pp. 192, 231–2.

[24] L. Francis-Williams, *Nothing So Strange* (New York 1970), p. 214.

[25] "I must say that I like the feeling of being a Law Lord …. [F]or though I shall miss, indeed miss very much, the partisan activities and excitements of the Bar, I am beginning to feel that a rather more dignified tempo will not come amiss." (Cyril Radcliffe to Roy Harrod, 10 June 1949, Sir Roy Forbes Harrod correspondence and papers, British Library, Add. MSS 71193 f. 2.)

[26] *Report of the Committee on the British Film Institute* (Chair: C.J. Radcliffe) (Cmd. 7361; 1948).

[27] See *Reports of the Bengal Boundary Commission and Punjab Boundary Commission (Radcliffe Awards)* (New Delhi 1947); K. Young (ed.), *The Diaries of Sir Robert Bruce Lockhart: Volume 2 1939–1965* (London 1980), pp. 623–4 ("Before going out [Radcliffe] made a bargain that the chairman's [i.e., his] decision must be final. This was just as well, for there was no chance of an agreed decision from the beginning"). Radcliffe was unwilling to accept remuneration for the work: Cyril Radcliffe to Christopher Addison [Secretary of State for Commonwealth Relations], 21 August 1947, India Office Records, Political Department Files, L/P&J/7/12500 ff. 18–19 ("I came to the conclusion at an early date that my post was one which I should prefer to regard as being an unpaid one …. [I]t is my desire that I should be enabled formally to relinquish any claim to salary or remuneration …").

[28] See S. Khilnani, *The Idea of India* (London 1997), pp. 200–01; J. Higgins, "Partition in India: The Attlee Government and the Independence of India and Pakistan", in M. Sissons and P. French (eds.), *Age of Austerity* (London 1963), 189 at p. 200 ("Radcliffe was chosen on the grounds that he would be an impartial judge – in other words he had never set foot on Indian soil and had no previous dealings with the country. His briefing at the Colonial Office is said to have lasted no more than thirty minutes, and he left England with no more than this information and a couple of maps"); Cyril Radcliffe to Harry Hodson, 30 May 1966, in H.V. Hodson papers, Hodson Box 3, PP MS 39/01/10, Archives & Special Collections, School of Oriental & African Studies, London ("I did not take the Indian job in order to oblige or humour anyone, nor was I in awe of anybody. I quite realised that I was going to carry a great deal of responsibility in place of others, and I did not expect either reward or approbation"). Radcliffe was pushed by Mountbatten to have the job completed within around a month – something Radcliffe was happy to try to do: see Lord Mountbatten to Cyril Radcliffe, 22 July 1947 and Radcliffe to Mountbatten, 23 July 1947 in P. Moon (ed.), *The Transfer of Power 1942–7: Volume XII* (London 1983), pp. 290–1. That Auden is casual with the occasional fact (Radcliffe travelled by air, and completed his work in just over five weeks) hardly diminishes his poetic account:

> He got down to work, to the task of settling the fate
> Of millions. The maps at his disposal were out of date
> And the Census Returns almost certainly incorrect,
> But there was no time to check them, no time to inspect
> Contested areas. The weather was frightfully hot,
> And a bout of dysentery kept him constantly on the trot,

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him an obvious choice when, in the mid-1950s, the Eden government sought someone to draft a constitution balancing Greek and Turkish interests on Cyprus.[29] By this point he was a chairman in demand, and by 1964 he had led public inquiries into taxation of profits and income, the working of the monetary system and security procedures in the public service.[30] Although he could have the followed in the path of some other Law Lords and sat on the occasional case after retiring, he never did; indeed, having served the fifteen years necessary to qualify for a full judicial pension, he could have waved farewell to all public service. But the inquiry work kept his attention – he was an admirer of consensus-facilitating or "trimmer" tradition in politics, as exemplified by Lord Halifax[31] – and in the decade before his death in 1977 he not only produced the Warwick University report but also chaired committees of Privy counsellors appointed to inquire into official broadcast-restriction requests (D-notices) and the publication of ministerial memoirs.[32]

One could be forgiven for regarding this as a sketch of a grey-suited mandarin. But this impression starts to dissipate once we locate Radcliffe outside the committee room. He collected fine art, particularly Impressionist works.[33] He wrote articles for newspapers and magazines, expressing strong views on topics such as the literary merits of Rudyard Kipling, the question of where the British Library should

> But in seven weeks it was done, the frontiers decided,
> A continent for better or worse divided.
>
> The next day he sailed for England, where he quickly forgot
> The case, as a good lawyer must. Return he would not,
> Afraid, as he told his Club, that he might get shot.

W.H. Auden, "Partition" (1966) in *Collected Poems*, ed. E. Mendelson (London 1976), pp. 803–4.

[29] *Constitutional Proposals for Cyprus: Report Submitted to the Secretary of State for the Colonies by the Rt. Hon. Lord Radcliffe, G.B.E.* (Cmnd. 42; 1956). As with India, Radcliffe spent little time on the ground ("a month or two", by his own account: Lord Radcliffe, "The Problem of Cyprus" (1958) n.s. 49 *United Empire* 15) and completed the work quickly – his report was submitted just short of four months after his first visit to the island.

[30] See *Taxation*; *Committee on the Working of the Monetary System: Report* (Chair: Lord Radcliffe) (Cmnd. 827; 1963) (hereafter *Monetary System*); *Security Procedures in the Public Service* (Chair: Lord Radcliffe) (Cmnd. 1681; 1962) (hereafter *Security Procedures*); *Report of the Tribunal Appointed to Inquire into the Vassall Case and Related Matters* (Chair: Lord Radcliffe) (Cmnd. 2009; 1963) (hereafter *Vassall*).

[31] See, e.g., Lord Radcliffe, "The Fairy Story of Natural Rights" *The Listener* (22 November 1951) 877–79 at p. 879; "The Dissolving Society" *The Spectator* (13 May 1966) 590–92 (hereafter "Dissolving Society") at p. 590; also "Law and Order" (1964) 61 *Law Society Gazette* 820–26 (hereafter "Law and Order") at p. 822. His efforts at trimming were not always received enthusiastically. The final chapter of *Monetary System* – the only chapter which Radcliffe drafted (see *Diaries of Sir Alec Cairncross* (London 1999), p. 3) – concludes that monetary policy requires "a constant and profound diagnosis of the state of the economy which is to serve as patient and a clear perception of the likely effects, indirect as well as direct, of any particular measures" (para. 983). The conclusion was judged in various quarters to be bland and fudged: see, e.g., A. Sheldon (ed.), *Not Unanimous: A Rival Verdict to Radcliffe's on Money* (London 1960).

[32] *Report of the Committee of Privy Counsellors appointed to inquire into "D" notice matters* (Chair: Lord Radcliffe) (Cmnd. 3309; 1967) (hereafter *"D" notice matters*); *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (Chair: Lord Radcliffe) (Cmnd. 6386; 1976).

[33] He owned originals by, among others, Renoir, Degas and Pissaro: see Heward, *GAG*, pp. 179–80.

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be sited and the dangers of allowing the world's greatest art treasures to go to the highest bidders.[34] His tastes were not exclusively highbrow: he played tennis and golf and was a cinema devotee.[35] While he disapproved of flippancy, jokes and eagerness to impress in judicial decisions,[36] he considered mordancy to be "an important part of the make-up of a lawyer"[37] and knew how and when to offer a dry observation.[38] Most interestingly of all, his regard for others was not dictated by convention: he married a divorcee with two children, and befriended and was immensely loyal to people – Bracken is an example, as is the art collector and philanthropist, Calouste Gulbenkian[39] – whom many of his professional associates might have kept at arm's length.

It would be stating the obvious to say that the deeper one delves into the detail of Radcliffe's life, the more nuanced is the character that emerges, and one might fairly ask if there is a point in delving to any depth whatsoever if the exercise amounts essentially to talking up someone's character with a bit of biography. Anyone so sceptically inclined should be warned that we are not done with the biography yet. The essay will conclude with something approximating

[34] See, e.g., C. Radcliffe, "Kipling and the World He Knew" *The Listener* (25 December 1947), p. 1107; "The Bloomsbury Cabinet" *The Listener* (21 March 1974), p. 376; "The Poor Relation at Trafalgar Square" *The Listener* (2 January 1956), p. 173 (reprinted at (1956) 56 Museums Jnl. 3); "Spoilation by Purse: The International Struggle for Art" *Daily Telegraph* (29 January 1959), p. 8. Radcliffe was particularly disgusted by the duplicity of Harold Wilson's first government when it ignored representations of British Museum trustees regarding the appropriate location for its new library: see Lord Radcliffe, "Decision on National Library: History of 'Consultation'" (letter) *The Times* (31 October 1967), p. 11; HL Deb. (5th series) vol. 287 cols. 1130–41 (13 December 1967); *Government by Contempt: A Speech in the House of Lords by Lord Radcliffe, with some Relevant Documents* (London 1968); Cyril Radcliffe to Roy Harrod, 14 August 1968, Harrod papers, British Library, Add. MSS 71611 f. 190 ("I loathe and despise his [Wilson's] government which has debased and degraded my country"). This last assessment was probably prompted as much by the brouhaha over D-notices (see below) as by anything else.

[35] See Heward, *GAG*, pp. 2, 62.

[36] "Heaven defend us from the funny judge or the flippant judge or, for that matter, from the 'with it' judge. The last causes me the same sort of discomfort as those Prime Ministers who select public honours for popular entertainers." Lord Radcliffe, "Foreword" in L. Blom-Cooper (ed.), *The Language of the Law: An Anthology of Legal Prose* (London 1965), ix-xv (hereafter "Foreword") at p. xiv.

[37] *NFB*, p. 79.

[38] See, e.g., *NFB*, p. 238 ("'Let the great world spin for ever Down the ringing grooves of change,' said the poet Tennyson, excitable, neurotic, and gravely misunderstanding the principles of railway traction").

[39] On Bracken, see Cyril Radcliffe to Violet Bonham Carter, 12 September 1963, in Lady Violet Bonham Carter correspondence and papers, MS Bonham Carter 194 f. 2, Department of Special Collections, Bodleian Library, Oxford ("He was someone for whom I feel a very real love and I shall always miss him"); Lord Radcliffe, "Heart in the New Building" *Financial Times* (12 July 1963), p. 10. On Gulbenkian, see N. Gulbenkian, *Pantaxaria* (London 1965), pp. 245–7. Calouste Gulbenkian's will stipulated that the bulk of his fortune should be used to establish a charitable foundation in Portugal, and named Radcliffe as a trustee and as chairman. The other trustees disagreed with Radcliffe as to the intended benefit of the foundation: Radcliffe insisted that Gulbenkian's intention had been that although the foundation should be a Portuguese institution it should operate and apply its resources throughout the world, whereas the other trustees argued that the it was only to carry out its activities in and for the benefit of Portugal. See *ibid.* 260–82, 323–69. There was a stalemate, and consequently Radcliffe felt precluded (to his immense disappointment) from becoming chairman of the foundation: see Anon., "Gulbenkian Trustees: Lord Radcliffe Not to Accept Office" *The Times* (16 June 1956), p. 6.

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a denouement – a brief analysis of a period in Radcliffe's life which seems to reveal more about him than does anything mentioned so far. But it should also be emphasized that this essay is not intended as a biography. It concerns Radcliffe's beliefs and arguments rather than his life, but builds from the premise that it is not possible to attend to the former without providing some account of the latter: the beliefs and arguments have contexts and ends, and we are unlikely to derive much from what Radcliffe had to say unless we have some idea of where and why he said it. Because we are now equipped with a sketch of his life, it should be easier to contextualize his beliefs and arguments economically once we begin to analyse them.

III. Liberal Authoritarian?

As good a place as any to set about trying to understand Radcliffe's beliefs and arguments is the account of the man to be found in Robert Stevens's magisterial *Law and Politics*.[40] Although Stevens is unimpressed by Radcliffe's natural law instincts, his overall assessment of Radcliffe's contribution to law and public affairs is incisive and generous; in particular, he does a thorough job of showing that Radcliffe had a sophisticated understanding of the common law, the judicial function, and the relationship between the judiciary and the executive. Stevens considers Radcliffe torn, however, between "the needs for order and the support of authority on the one hand and his instinct for civil liberties on the other".[41] Was Radcliffe really torn thus?

He certainly stood up for civil liberties. There exists, he argued, a "complex of liberties which are needed to preserve the freedom of the human spirit" – "marital and parental relationships, freedom of religious worship, freedom of labour, and freedom of artistic and productive expression" – "which deserve special protection from outside invasion".[42] These liberties are not always those preferred by the majority: the "real art" of the political theorist – that of "analysing and expounding the circumstances and occasions upon which … the wishes of a majority … ought not to be given effect to at the expense of a minority" – is one in which "our public life is almost totally deficient."[43] This deficiency combined unfortunately, he argued, with a tendency on the part of administrators "to believe that authority will not survive unless it can be a judge in its own cause, safe from being

[40] R. Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Chapel Hill, NC 1978) (hereafter Stevens, *Law and Politics*), pp. 445–59.
[41] Stevens, *Law and Politics*, p. 454.
[42] Lord Radcliffe, *The Law & Its Compass* (London 1960), p. 66 (hereafter *LAC*).
[43] "Dissolving Society", p. 59.

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held wrong by someone else."[44] At the Ministry of Information in the early 1940s, he stuck to the principle that war-time censorship is deleterious to public morale and permissible on security grounds only.[45] After Lord Atkin excoriated the majority's upholding of detention without trial in *Liversidge* v. *Anderson*,[46] Radcliffe wrote to congratulate him.[47] Although the House of Lords was convention-bound not to depart from *Liversidge* before 1966, Radcliffe had begun to mark out the path of judicial retreat from the decision as early as 1950.[48] The first of his many letters to appear over a half century in *The Times* questioned whether Sacco and Vanzetti had been granted due process of the law.[49] In his judgments he opposed state interception of written communications between married couples,[50] extradition of fugitives to their countries of origin where doing so would endanger their lives or where their offences are political in character,[51] and upheld land occupants' complaints that public authorities had acted *ultra vires* in seeking to remove or relocate them.[52] In parliamentary debate he argued that the BBC must be kept "free from interference, whether it is from the Executive, or from Parliament, or from anybody else",[53] and in his Warwick report he backed the right of students and staff to encourage local trades union militancy.[54] He was no less inclined to make the case for freedom of information. The Warwick students should have a right to see their personal files, he contended, and those files should not be used to record legal convictions and medical histories.[55] While, as the chair and author of committees and reports on security procedures, he endorsed rigorous vetting of officials on whose integrity national security depended, he also encouraged government

[44] C. Radcliffe, "Russell of Killowen and the Idea of Law" *The Listener* (29 January 1948) 174–75 (hereafter "Russell of Killowen") at p. 174.

[45] See I. McLaine, *Ministry of Morale: Home Front Morale and the Ministry of Information in World War II* (London 1979), pp. 240–81.

[46] *Liversidge* v. *Anderson* [1942] A.C. 206, 244–5.

[47] "I only wanted to say how entirely I agreed with every line of your judgment and what a very valuable thing it was that you were there to deliver it. I know how widely the general public responded to the view you took, and I do privately hope that it is the one that will somehow prevail before things go much further." Cyril Radcliffe to Lord Atkin, 19 November 1941, James Richard Atkin papers, ATK1/JUD/2/2/41, Gray's Inn Library, London.

[48] See *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 (P.C.), 76–7. For continuation on the path, see *I.R.C.* v. *Rossminster* [1980] A.C. 952, 1011 *per* Lord Diplock; *R* v. *Home Secretary, ex p Khawaja* [1984] A.C. 74, 110 *per* Lord Scarman; and T. Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford 2000), p. 22.

[49] C. Radcliffe, "Sacco and Vanzetti" *The Times* (12 August 1927), p. 11.

[50] See *Rumping* v. *D.P.P.* [1964] A.C. 814, 845–7.

[51] *Zacharia* v. *Republic of Cyprus* [1963] A.C. 634, 664–76; *Schtraks* v. *Israel* [1964] A.C. 556, 585–92 (Radcliffe's argument in this instance being that the appellant had not committed a political offence).

[52] See, e.g., *Belfast Corporation* v. *O.D. Cars Ltd.* [1960] A.C. 490, 522–3; *Chertsey D.C.* v. *Mixnam's Properties Ltd.* [1965] A.C. 735, 752–7.

[53] HL Deb. (5th series) vol. 172 col. 1268 (25 July 1951).

[54] See *Warwick 14th April Report*, paras. 41–67; also Philips, "Obituary", 593 ("He was incensed at the growing tendency to deny free speech").

[55] See *Warwick 14th April Report*, paras. 29–31.

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departments to be less uptight about downgrading and declassifying information.[56]

That he was not in thrall to authority is particularly evident from his response to the Wilson government's D-notice debacle. When *The Daily Express* published an article in February 1967 which the government thought in breach of D-notice procedures, Harold Wilson appointed Radcliffe and two other Privy Councillors to report on the matter. Once Wilson got wind of what the report was going to find – that, all things considered, "it would not be right to say that the article amounted to a breach of the 'D' notices"[57] – he arranged for the simultaneous publication of a White Paper which concluded that "the article was inaccurate in matters of fact and misleading", and that "[t]he view of all those concerned on the Government side … is that the 'D' notices do apply, and always have applied, to the activities now at issue."[58] Everyone in Wilson's cabinet appears to have considered this a foolish manoeuvre: "I shouldn't have thought there was a single person there", Richard Crossman recalled, "who thought that it was a good thing to publish a White Paper instead of accepting the Radcliffe Report."[59]

When, in July 1967, Radcliffe spoke to the matter in Parliament, "he took apart the Government's case with the artistry of a surgeon, and at the end left it scattered about the operating theatre headless and limbless."[60] The White Paper, he said, traded in "general statements about significance to security, … breach of security, [and] national security"[61] as if "what is called security is the only important thing … which is indulged in by this country" and as "if anybody [who] has committed what" the government "call[s] a breach of security … has done wrong."[62] Since the reality of the matter is that

[56] Though "[w]hen all that has been said, the decision must still lie with governments and no one else how much they are to make public and at what point of time they are to do so." Lord Radcliffe, *Freedom of Information: A Human Right* (Glasgow 1953) (hereafter *FOI*), p. 19. In *Security Procedures* the committee concluded that positive vetting, though an important practice in the civil service, has inherent weaknesses which might be eradicated were the rules regarding vetting procedure made clearer: *Security Procedures*, paras. 60–78. One of the main findings of *Vassall*, which concerned the case of a homosexual admiralty clerk blackmailed into spying for Russia, was that positive vetting had been conducted only superficially: *Vassall*, paras. 82–4. (Radcliffe was called on to preside over *Vassall* in November 1962. *Hedley Byrne* v. *Heller* had just come before a House of Lords composed of Radcliffe and Lords MacDermott, Jenkins, Guest and Cohen, but Radcliffe's appointment, one of the then junior counsel for the respondents recalls, meant that the case had to be abandoned after the first day's hearing: Louis Blom-Cooper, letter to author, 10 June 2009. The case did not come back to the House until February 1963, when it was heard by a different panel: *Hedley Byrne & Co Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.)

[57] *"D" notice matters*, para. 60.

[58] *The "D" Notice System: Presented to Parliament by the Prime Minister by Command of Her Majesty* (Cmnd. 3312; 1967) (hereafter *The "D" Notice System*), paras. 22, 25.

[59] R. Crossman, *Diaries of a Cabinet Minister, Volume 2: Lord President of the Council and Leader of the House of Commons 1966–68* (London 1976), p. 381.

[60] H. Noyes, "D notices White Paper savaged: Scathing attack by Lord Radcliffe" *The Times* (7 July 1967) 1.

[61] HL Deb. (5th series) vol. 284 col. 778 (6 July 1967).

[62] *Ibid.* col. 781.

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governments "want not … a free Press, but a managed … Press", there is no reason to think "that the Press … should always give way to", or recognize a "duty … to have complete trust in what is advanced to" it by, "the Government."[63] Just "what the purpose of"[64] the White Paper was supposed to be – with its emphasis on how accurate reporting is "fundamental to national security and the public interest"[65] – was lost on Radcliffe, not least because all the security rhetoric in the world cannot disguise the fact that a free press will resist management by fiat. The managers of the press, rather, must earn the respect of the press:

> you cannot order complete trust by a White Paper. People will give you a measure of confidence if your acts over a period coincide with your words and if your words are found out to be true. But that has to be worked for and earned.[66]

There were Wilsonite retorts to the effect that Radcliffe was a "libertarian" who lacked "objectivity",[67] that he espoused a "liberal philosophy" which led him to be "over-simplistic" in his "comments on security."[68] But these were the complaints of the flustered. The more common response echoed Crossman's: that Radcliffe's speech "was annihilating and unanswerable", "the most effective quiet rebuke of a P.M. by a public servant of modern time."[69]

It seems beyond controversy to say that Radcliffe was liberal in outlook. The notion that he was also authoritarian is more difficult to demonstrate. His assessment of *Liversidge* as a lamentable decision did not stop him from believing that the judiciary sometimes should defer to executive decision-making,[70] and that government surveillance could

[63] *Ibid.* cols. 781–2.
[64] *Ibid.* col. 778.
[65] *The "D" Notice System*, para. 19.
[66] HL Deb. (5th series) vol. 284 col. 783 (6 July 1967).
[67] *Ibid.* col. 817 (Lord Goodman).
[68] *Ibid.* col. 836 (Lord Chalfont).
[69] Crossman, above note 59, pp. 413, 414.
[70] See Lord Radcliffe, review of L. Blom-Cooper & G. Drewry, *Final Appeal* (1973) 36 M.L.R. 559 (hereafter "review of *Final Appeal*"), 564–5 ("[T]he judicial side … cannot take over any supreme supervisory role in all decision-making without raiding the legislative field on the one hand and the area of a large part of the country's practical business on the other. The filching of a jurisdiction that does not belong to one is no more admirable than any other act of theft"); *LAC*, pp. 80–4; also Radcliffe, "Some Reflections on Law and Lawyers" (1950) 10 C.L.J. 361, 361–2 (hereafter "Some Reflections") ("[L]awyers are at heart anarchists, in that by training they believe all executive power to be evil"). For examples of Radcliffe's own deference in this regard, see *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736, 766–70 (finding that a statute ousting the right to legal proceedings in compulsory purchase cases was not an abuse of power, notwithstanding an allegation that the power had been used in bad faith); *Chandler* v. *D.P.P.* [1964] A.C. 763, 792–99 (appellants' liberty to engage in non-violent civil disobedience denied because they intended to commit a criminal offence contrary to the Official Secrets Act 1911, s. 1); and *Burmah Oil Co. Ltd.* v. *Lord Advocate* [1965] A.C. 75, 134 ("[W]here war damage is concerned, … absence of … jurisdiction in the courts to award compensation is based on sound considerations of public policy …. [I]t is for those who fill and empty the public purse to decide when, by whom, on what conditions and within what limitations such compensation is to be made available").

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be "exercise[d] … for a right national purpose".[71] But such beliefs show that he understood that civil liberties cannot go unfettered rather than that he had an authoritarian disposition. He was, none the less, not averse to offering the occasional reactionary reflection which suggested that the description of him as authoritarian might not be completely inappropriate. Respect for legal authority, he remarked to a Cambridge University audience in October 1949, "is not yet a cause for contempt …. [T]here remains the great mass of us who believe that we should keep the law, even if it is inconvenient to us", and there are still those who, out of "good commonsense", regard the judge "as a symbol of the wrath that visits the wrongdoer".[72] But in his address to the Law Society in October 1964, he saw matters very differently: "[o]ut of the few institutions of this country that ought to be accorded national status, one" – presumably he meant the Trades Union Congress – "blindly perpetuates a radical myth that finds its enemy in all authority, and the other" – presumably he meant the Labour Party, which had been elected to government the week before he spoke – "clings to an outmoded formula that denies the acceptance of any law beyond that of its own will …. [I]t is a serious question whether England is not rapidly becoming … an ungovernable country."[73] "We have by now lived for too many generations in a revolutionary climate of opinion" which is "gradually eroding by criticism the rock of its institutions and its faiths but failing to form any solid substance to take their place", he told an audience at the London School of Economics the following year; we need today more self-confident statesmanship or "[n]avigation", "more persons of experience and authority to speak and act boldly and sincerely, without deference to the subtleties of public relations or the imputed susceptibilities of youth or of egalitarian opinion."[74]

One of Radcliffe's own bold, deference-free proclamations showed him to be not so much authoritarian as naïve. When, in February 1969, he lectured to the Institute of Race Relations on the "country's immigration problem",[75] he began by remarking that although "all good men must have in mind … the promotion of harmony and mutual acceptance"[76] there has clearly opened up a "resentful gap … between a

[71] HL Deb. (5th series) vol. 284 col. 779 (6 July 1967).
[72] Radcliffe, "Some Reflections", pp. 365, 367.
[73] "Law and Order", p. 826. By the beginning of the 1970s he was, not surprisingly, claiming that the Labour Government had succumbed to the unions: "now industrial chaos and strikes are rampant" and "it will be interesting" – this was a fortnight before Harold Wilson's surprise defeat to the Conservatives under Edward Heath in the general election – "to see how far failure of achievement and palpable ineptitude … prove themselves a popular attraction to the electorate." Lord Radcliffe, "Minority View" *The Times* (2 June 1970), p. 10.
[74] Radcliffe, "Dissolving Society", pp. 590, 591, 592, 590.
[75] Lord Radcliffe, "Immigration and Settlement: Some General Considerations" (1969) 11 Race 35 (hereafter "Immigration and Settlement") at p. 35.
[76] "Immigration and Settlement", p. 36.

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very large part of the population of this country … and those whom they see as responsible for the wave of coloured immigration."[77] Closing this gap, and also ensuring that immigrant communities did not "limit their chances of that full equality of treatment which the citizens of one country should share with each other",[78] was partly the responsibility of immigrants themselves: they had to abandon their "determined, perhaps … growing, rejection of the idea of integration"[79] and their "'chip on the shoulder' grievances".[80] How does one integrate "into a fairly complex urban and industrial civilization a large alien wedge, which in many ways is as ready to isolate itself within that community as some members of the community are to keep it isolated"?[81] "[P]atient and sober attention" to the problem reveals that the key to progress rests in "a large scale, continuous, nationwide campaign of persuasion."[82]

Persuasion as to what? Radcliffe seemed intent on persuading his audience of only one thing: that "prejudice and discrimination" – "the two key words" in race discourse – need not "carry any ordinary association of moral ill-doing",[83] since one could be making distinctions deliberately in favour of *A* to the disadvantage of *B* on grounds which are reasonable and commendable. "I try to distinguish in my mind between an act of discrimination and an act of preference," Radcliffe confessed, "and each time my attempt breaks down."[84] In both instances one is making distinctions of value as between persons or things. The "substance" of the Race Relations Act 1968 seems to be simply that "[y]ou must not have 'bad thoughts'",[85] an injunction which ignores completely the fact that "persons such as employers and landlords" cannot be prevented from discriminating or being prejudiced in the sense of exercising "preference as between members of the public that they serve".[86] Laudable though it is to emphasize the principle of "honest dealing between man and man"[87] and to encourage indigenous citizens to be less afraid or suspicious of the "strangeness" of the immigrant,[88] and as important as it is that the immigrant community does not "cling[] to its native ways and so limit[] continually … real

[77] *Ibid.* p. 37.
[78] *Ibid.* p. 43.
[79] *Ibid.* p. 44.
[80] *Ibid.* Radcliffe did not characterize all immigrants' grievances thus. Immigrants could legitimately complain, for example, that they were often being treated unfairly by housing authorities: see *ibid.* 48–51.
[81] *Ibid.* p. 39.
[82] *Ibid.* p. 36.
[83] *Ibid.* p. 45.
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.* p. 46.
[87] *Ibid.* p. 48.
[88] *Ibid.* p. 47.

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outside contacts",[89] trying to teach people not to discriminate or be prejudiced is futile and wrongheaded.

Anthony Lester, responding to Radcliffe's lecture, wondered how Radcliffe could have failed to see that "immigrants … must be entitled to equal rights and liberties on the basis of their common citizenship".[90] Radcliffe's lament that the failure of immigrants to integrate would be an obstacle to their "full equality of treatment" suggests he grasped the point well enough.[91] Even if the criticism had been well aimed, however, it would hardly have been Lester's most damning. Radcliffe, he argued, seemed not to see that racial discrimination – bigotry – cannot be equated with private preference or discernment,[92] and that the race legislation outlawed bad conduct rather than bad thoughts.[93] Perhaps the greatest weakness of all in Radcliffe's lecture was his combining of an idiosyncratic and, in context, largely irrelevant argument – that progress depends upon persuading people that there is no strong analytical distinction to be made between discrimination and preference – with language which (again considering the context) was anything but sensitive: the description of the immigrant population as "a large alien wedge" with "'chip on the shoulder' grievances" would not have been out of place in the notorious "rivers of blood" speech which Enoch Powell had delivered the previous year.[94] If this typified the bold and sincere language that Radcliffe wanted to hear from people in authority, perhaps it is no bad thing that his appeal seemed generally to be regarded, as he put it, as "very old-fashioned".[95]

[89] *Ibid.* p. 48.

[90] A. Lester, "The Broken Compass" (1969) 119 N.L.J. 443–45 at p. 443.

[91] Though he cautioned against straightforward arguments in favour of equality of treatment. For example he admired Mountstuart Elphinstone, who served as Governor of Bombay from 1819–1827, because Elphinstone could see how the idea of equality before the law grated on the sensibilities of Indians who accepted caste ranking: see Lord Radcliffe, *Mountstuart Elphinstone* (Oxford 1962), p. 26.

[92] See Lester, "The Broken Compass", above note 90, pp. 443–4; also A. Lester and G. Bindman, *Race and the Law in Great Britain* (Cambridge, Mass 1972), pp. 92–3 (distinguishing "discriminating *between*" and "discriminating *against*").

[93] See Lester, "The Broken Compass", above note 90, p. 444.

[94] See E. Powell, Address to the Birmingham Conservative Association, 20 April 1968, at http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html (accessed 30 June 2009): "To be integrated into a population means to become for all practical purposes indistinguishable from its other members …. But to imagine that such a thing enters the heads of a great and growing majority of immigrants and their descendants is a ludicrous misconception, and a dangerous one … [W]e are seeing the growth of positive forces acting against integration, of vested interests in the preservation and sharpening of racial and religious differences, with a view to the exercise of actual domination, first over fellow-immigrants and then over the rest of the population." It is perhaps not surprising that Lester should recall Radcliffe as a Powellite: Anthony Lester, email to author, 4 June 2009.

[95] *NFB*, p. 241.

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IV. Disenchantment and Curiosity

Even if we accept the characterization of Radcliffe as liberal and authoritarian, the notion that he struggled to reconcile his "libertarianism and authoritarianism"[96] does not quite ring true. That Radcliffe defended liberty on some occasions and argued for its restriction on others indicates not that he suffered from some "internal conflict,"[97] but that he believed, quite sensibly, that authority works to sustain as well as stymie liberty, and that judges and other public decision-makers must determine not if but how particular freedoms are to be regulated. The assessment of one of his former committee cohorts points us in the right direction: "Radcliffe was a Conservative in the best English sense of that term – he cared very much about liberty and he believed that liberty and fair treatment can only be secured by stable institutions and particularly by stable laws which define and circumscribe the limits of individual freedom in society."[98] Since Radcliffe came increasingly to question whether we have stable institutions and laws – recall his lament regarding lack of navigation from those in authority – it is hardly surprising that he appeared to consider the prospects for liberty and fair treatment, along with other values that he cherished, to be imperilled in the modern world. "'The world has gone beyond me': I believe that it always did," he wrote, "even from the earliest years".[99]

That he was a man out of time Radcliffe was in no doubt. "[T]he 'universal man' admired of earlier centuries" – whose training tended to be a "general literary education" and who felt no obligation "to relate [his] opinions … exclusively to the canons of economic science or to identify public morality with the enlargement of the Gross National Product" – would be "lost" in an era which places so much value on "the specialisation of learning".[100] Anyone of "the 'good old school'" would probably also be bewildered by "the vogue to present today as if it were necessarily better than yesterday", since those who accept this "shallow and almost perverted idea of progress" never seem to explain why "the alteration" of "the conditions under which human life has to be lived" will change "in any important way the terms of the human dilemma itself", or why law should always expected to move with the times rather than that "changing ideas [should] sometimes adapt themselves to law".[101] To be progressive-minded, to belong to this

[96] Stevens, *Law and Politics*, p. 455.
[97] *Ibid.* p. 454.
[98] N. Kaldor, *The Scourge of Monetarism* (Oxford 1982), p. 2.
[99] Cyril Radcliffe to Roy Harrod, 27 July 1968, Harrod papers, British Library, Add. MSS 71611 f. 187.
[100] *NFB*, pp. 260, 68, 231, 68–9; also *LAC*, pp. 92–3.
[101] *NFB*, pp. 188, 224, 238, 71, 269.

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"revolutionary world, must be intensely exciting", but while "the excitement … communicates itself to the general public … it does not", Radcliffe confessed, "communicate itself to me. I wish that it did."[102]

That last sentence bears consideration. Radcliffe was indeed "deeply out of sympathy with his age", and possessed of an "acute sense of tragedy in a postwar society whose condition, in one way or another, he had spent long hours dissecting in committee rooms."[103] But note that he was disenchanted with, not disengaged from, the modern world. People fascinated him,[104] and though he was prone to outbursts of despair he believed that "one cannot run a lifelong estrangement from one's times" and that one must "try, however crustily, to be vigilant always to discern the best among much that one can neither comprehend nor admire."[105] Thus his observation that while the younger generation of today – this was 1961 – may be depressingly anti-authoritarian, we should commend their "marked self-reliance", their "courteous lack of interest either in institutions or in conventions", and their "almost puritan attention to the importance of an integrated individual personality".[106] The state might act as censor, as too might timorous editors and media organizations intent on celebrating "sheer inanity" – Radcliffe took Oliver Wendell Holmes's view that the best test of truth is the free trade of ideas – but this generation "is not … likely to consent to a rationing of ideas or to be embarrassed by words."[107] Radcliffe was not one to dismiss all that held no appeal for him.[108] Rather, he wanted to make sense of many facets of the modern world which he found unsettling and alienating but which were accepted or welcomed by others. "After all, what kills ideas is disillusion."[109] The alien should be an intellectual challenge.

So it is that we get to the heart of this essay. Radcliffe believed that human fulfilment depends upon the maintenance of liberty, fairness and other goods, and that such goods cannot be maintained without the stability of law.[110] He also doubted that there is stability of law, and

[102] *NFB*, p. 70.
[103] Hennessy, *Whitehall*, pp. 566–7.
[104] See, e.g., "Law and Order", p. 823.
[105] *NFB*, p. xviii.
[106] *Censors*, p. 30.
[107] See *Censors*, pp. 2, 32, 7–8 (citing Justice Holmes's dissent in the U.S. Supreme Court in *Abrams* v. *U.S.* 250 U.S. 616, 630 (1919)), 30.
[108] "Soft drinks have backed a new play at the Royal Court Theatre, razor blades the Open Air Theatre in Regent's Park …. As a purist and a critic, I raise my eyebrows. As a lover of arts, … I am delighted at what is going on." *NFB*, p. 123.
[109] Lord Radcliffe, *The Problem of Power: The Reith Memorial Lectures 1951* (London 1952) (hereafter *POP*), p. 4.
[110] See, e.g., Radcliffe, "Some Reflections", pp. 364–5 ("In this country law … has contributed much to the formation of national character …. To take one instance, … [the doctrine of freedom of] contract … is the way to teach men to think for themselves … a symbol of a great emancipation of the human spirit"). Not that Radcliffe was uncritical of *laissez-faire*. He thought it "a mistake for the courts to treat freedom of contract as if it were the master freedom overshadowing all others"

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so he was worried that these goods might somehow be endangered. But this was his starting point, not his conclusion. What we find developed throughout Radcliffe's work is a highly original account of mid-twentieth century law in crisis, and an argument to the effect that the crisis might be overcome were we to take a mature and philosophical approach to the question of how authority is appropriately maintained through law. Let us next consider how he explained law, and what he understood the crisis surrounding law to be, before turning to his reflections on authority.

V. An Imperfect Art

"[E]minent lawyers", Macaulay wrote, make "arguments … abounding with … analogies and … refined distinctions" worthy of "perfect masters of logic. But if a question arises as to the postulates on which their whole system rests …, these very men often talk the language of savages or of children."[111] Radcliffe transcribed the observation in his commonplace book,[112] no doubt because he concurred. Lawyers who argue by logical deduction are looking "to put the icing on the cake, not to bake it", he claimed, for the truth they seek to demonstrate is intelligible only "if you have already been converted to the truth" (leave aside the fact that a "professor of logic would find in even famous judgments some sad howlers").[113] The assumption that one "possesse[s] … logical power … independent of … other powers … has not persisted with me", he added, for "[i]t seems … that thinking is a function of the whole of one's personality, with all the interplay of emotions that … claim and receive recognition from one's reason", and that the judge therefore brings to a decision "not … only his command of the reasoning process or his knowledge and learning … but his experience of life and the structure of thought and belief that he has built upon it."[114] It seems difficult, Radcliffe surmised, to imagine any lawyer concluding otherwise: "I have the impression that lawyers more or less unconsciously accept that their formal process is not their real one."[115] Whatever they might think, it is surely obvious – though

and considered more desirable "a theory of contract … which starts from the necessity of a fundamental decency in private relations." *LAC*, pp. 61, 63. The specifics of such a theory he did not develop, though he did advocate the "just and reasonable" in preference to the presumed common intention approach to frustration and other contracts problems: see *Davis* v. *Fareham U.D.C.* [1956] A.C. 696, 728; also *Tsakiroglou* v. *Noblee Thorl* [1962] A.C. 93, 122–3; *Bridge* v. *Campbell* [1962] A.C. 600, 622. He stopped short, nevertheless, of arguing that restitution for unjust enrichment ought to be a discrete category of obligations in English law: see *Boissevain* v. *Weil* [1950] A.C. 327, 340–1.

111 T.B. Macaulay, *Life of Samuel Johnson* (New York 1896), p. 67.
112 See Heward, *GAG*, p. 245.
113 *NFB*, pp. 215, 214, 73.
114 *NFB*, pp. xvi, 214.
115 *NFB*, p. 74.

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Radcliffe thought the point needed regular repetition – that law is not science.[116] Rather, it entails "the exercise of an art": "in the Law we practise an imperfect art," whereby "the judgments which [judges] pass … are valid only within the terms which [they] impose upon the insoluble complexity of life."[117]

Radcliffe looks to be making the familiar point that judges, though subject to various external and self-imposed constraints, adjudicate creatively. But this is not what he wants us to grasp. Of course, judges cannot help but be lawmakers. There is no "more sterile controversy than" that of "whether a judge makes law", given that the "personal element in the judicial decision" is "inescapable".[118] Even the judge who "commend[s] himself to the most rigid principle of adherence to precedent" will find that, "when he repeats" what "his predecessors … decided before him[,] … their words … mean something materially different in his mouth …. The context is different; the range of reference is different; and, whatever his intention, the hallowed words of authority themselves are a fresh coinage newly minted in his speech."[119] Yet if all judicial decisions add to the law in some way or other, the concept of judicial creativity is otiose – unless we can show that some creative initiatives are inherently more valuable than others. It is unclear, for Radcliffe, how we could ever show anything of the sort. "Is it creative to reject a principle previously accepted and not creative to accept it and treat it as a base for further reasoning? Is it creative to decide that the law does not afford a remedy in a particular case where an administrative act is challenged? – or can it only be creative if the decision allows the act to be upset?"[120] Creativity can only be a valuable category for the purpose of assessing judicial decision-making if it helps us to answer such questions. Beware, he insisted, the language of judicial timidity and boldness: "it is quite possible for a man to be quite bold and yet think that the law has no place in interfering in this particular field, and it is not really due to 'timidity.'"[121]

[116] See *NFB*, pp. 74, 213, 215, 274, 275–6.
[117] *NFB*, pp. 276, 79.
[118] *NFB*, pp. 215, 212.
[119] *NFB*, p. 271.
[120] Radcliffe, review of *Final Appeal*, p.563.
[121] Lord Radcliffe, interview (conducted by Alan Paterson), 12 January 1973, Dep. C 955 f. 186, Department of Special Collections, Bodleian Library, Oxford. *Cf.* F. Pollock, "Judicial Caution and Valour" (1929) 45 L.Q.R. 293 and *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164 (C.A.), 178 *per* Denning L.J. ("the timorous souls … were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed") with Radcliffe, review of *Final Appeal*, p. 564 ("What we have here is romantic writing, and it can be useful only to fellow romantic spirits. The differences of point of view that are being alluded to are intellectual differences to which epithets of heroism and gallantry are comically inappropriate. It is, I think, a great pity that fustian like this is becoming so fashionable …").

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Judges are lawmakers, then, but it makes sense to be circumspect about the language of judicial creativity.[122] Likewise, we should pause before speaking of judicial legislation. Judges are not, should not try to be, and should not draw attention to those instances where they seem to be mimicking, legislative lawmakers.[123] Furthermore, "a court of law is not, and is not free to be, a court of ethics"[124] – which is not to deny that courts are entitled to "work[] out and giv[e] shape" to "rules of fair conduct",[125] or that judges err when they "dissociat[e] their decisions from any moral or social significance whatsoever".[126] Although the case-by-case nature of judicial lawmaking means that the common law develops at glacier pace,[127] it is beyond doubt that development does occur.[128] "True, judges do not reverse principles" – this was Radcliffe writing apropos of Law Lords and their own decisions before the *Practice Statement* of 1966[129] – "but they do modify them, extend them, restrict them or even deny their applicability" in "the light of new combinations of facts", so that there is added to "the body of the law … a new element … which in some degree modifies the whole."[130]

Radcliffe's own approach to judicial lawmaking was, by the standards of his day, candid, occasionally bordering on radical. Like Lord Gardiner, he doubted the need for the House of Lords as a judicial body[131] (this after spending fifteen years as a Law Lord) and was of the view, unlike Lord Reid, that if the House of Lords was to endure as a

[122] Though Radcliffe did not quite eschew such language: see, e.g., "Law and Order", p. 821; *NFB*, p. 271.

[123] See *NFB*, pp. 27–8, 271–3; *Workington Harbour and Dock Board* v. *Towerfield* [1951] A.C. 112, 159 ("[T]here is nothing in the wording of [the Harbours, Docks and Piers Clauses Act 1874, s. 74] that would justify us reading into it … a qualification [to the effect that the shipowners were not to be answerable if the harbour authority could be convicted of contributory negligence]. If we did we should be amending the section, whereas our function is limited to construing it"); also *Galloway* v. *Galloway* [1956] A.C. 299, 322–3; *Goodrich* v. *Paisner* [1957] A.C. 65, 90 (it is not "open to the courts to make a law for themselves" where a "statute leaves it unresolved by what tests the question of degree is to be determined"). Though he appreciated that courts may have to interpolate *faute de mieux* where legislators have "concealed their intention with more than a Baconian obscurity" (*I.R.C.* v. *Dowdall, O'Mahoney & Co.* [1952] A.C. 401, 423; also, similarly, *Langford Property Co. Ltd.* v. *Batten* [1951] A.C. 223, 240–41); and he was no less wary of "statute-makers [trying] to do the judge's work for him in advance by regulating in detail what they cannot even dimly envisage" ("Law and Order", p. 822). His approach to statutory interpretation depended on the clarity of the statute: *cf.*, e.g., *St. Aubyn* v. *A.G.* [1952] A.C. 15, 52–3 (favouring purposive construction; see also *LAC*, pp. 52–4) with *Welham* v. *D.P.P.* [1961] A.C. 103, 123 ("the words … in the Act must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act"); and see also Lord Radcliffe, *Law and the Democratic State* (Birmingham 1955) (hereafter *LDS*), p. 7.

[124] *NFB*, p. 78.

[125] *LDS*, pp. 17 and 16 respectively.

[126] *LAC*, p. 56.

[127] See *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, 592 *per* Lord Radcliffe ("Its movement may not be perceptible at any distinct point of time …").

[128] See "Law and Order", pp. 824–5.

[129] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.

[130] "Law and Order", p. 821.

[131] See Radcliffe, review of *Final Appeal*, p. 565 (on "the sheer undesirability of a second appeal, with the expense, uncertainty and delay that are its concomitant"). Gardiner had made the case in G. Gardiner and A. Martin, *Law Reform* Now (London 1963).

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final court of appeal then it should at least abandon the practice of delivering multi-opinion decisions.[132] Ambiguity in judicial opinions, he suggested, is not always something to be lamented,[133] and he counselled against attaching "too much weight to particular phrases or passages in the body of a decision"[134] (as if a precedent offered up what Frederick Pollock once termed an "authentic form of words"[135]). Lawyers and judges do well to resist the modern "tendency … to discover leading cases before they have proved that they have in them the quality to lead",[136] and precedents should not be followed complacently or slavishly or approached over-reverently;[137] a judge would "be a great fool if" he "thought a particular precedent was wrong" but he felt unable to "put it aside and develop something else".[138] When, in 1966, the House of Lords abandoned its convention of being bound by its own precedents, it "cast aside the shackles it probably never should have worn."[139] Radcliffe's own judgments – all pre-1966 – show that he never considered the shackles to be particularly constraining. The ambiguity as to the facts of, and the peculiarity of the pleadings in, some of the cases on which he sat led him to declare that they had little or no value as precedents.[140] Tax law precedents caused him especial concern: the law of taxation is changed annually with the budget, and so "the judge needs to be particularly circumspect" when assessing the authority of earlier judicial decisions, he insisted, given the strong possibility that case law has been superseded by finance legislation.[141] Although, in the tax law cases in which he participated, he did not – could not – explicitly overrule House of Lords precedents, he did sometimes decline to apply authorities which he considered "unfortunate",[142] or confined

[132] See "Law and Order", p. 823; and A. Paterson, *The Law Lords* (London 1982), pp. 98, 185–6.

[133] See *NFB*, p. 78. He considered the juristic argument that courts should "tidy [the law] up into a neater and more logical arrangement" (*ibid.* p. 32) to be "sterile" (31), because it ignores the fact that if the common law were made into "a coherent body … with coherent principles" (35), its "special quality", its capacity to adapt while remaining largely unchanged, "would disappear" (32).

[134] "Law and Order", p. 822; and see also *NFB*, p. 8.

[135] F. Pollock, *A First Book of Jurisprudence for Students of the Common Law* (London 1896), 239. Pollock's point being that precedents rarely offer up anything of the sort.

[136] *NFB*, p. 216. As had happened, Radcliffe felt, with *Rookes* v. *Barnard* [1964] A.C. 1129: see *NFB*, p. 220.

[137] See Lord Radcliffe, "The Place of Law Courts in a Society" *The Listener* (20 August 1953) 298–99 (hereafter "The Place of Law Courts") at p. 299 ("It can only do good to encourage the courts … not to be over-reverent about precedents"); *POP*, p. xvi ("We shall not think aright if we take our thinking in the form of pre-digested food. It is no good following authority unless you have some comprehension of what it stands for").

[138] Radcliffe, Paterson interview, above note 121, f. 164.

[139] *NFB*, p. 273.

[140] See *Caminer* v. *Northern & London Investment Trust Ltd.* [1951] A.C. 88, 111–12; *Esso Petroleum Co.* v. *Southport Corp.* [1956] A.C. 218, 241.

[141] "Law and Order", p. 822; see also Heward, *GAG*, p. 72.

[142] See *Unit Construction Co. Ltd.* v. *Bullock* [1960] A.C. 351, 368; also *Sanderson* v. *I.R.C.* [1956] A.C. 491, 500.

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to their facts rather than establishing a general principle.[143] The *Practice Statement* had been unnecessary if not "foolish", he stated privately in 1973, because 'if you kept your head and sat back, you could give what you thought was the right decision anyway".[144]

Much of what Radcliffe had to say about the judicial function makes it tempting to place him squarely within that tradition of English jurisprudence which praises the common law as a self-revising repository of legal wisdom. It matters, he argued, how law is created: there is a "very great difference in psychological impact between"[145] statute law, whereby "the citizen's rights and duties are made for him, as it were, overnight",[146] and law which emerges from "custom" – "*the* great spring of law"[147] – so that it becomes "established in the very bones of your society."[148] "[I]n the life of any people" there is an "inner instinctive sense of purpose and responsibility that neither social sanction nor Act of Parliament has power either to loose or to bind".[149] Statute law is unlike the common law, moreover, because statutes "do not share any common legal principles", indeed because they seem to lawyers "not quite the equivalent of real law"[150] – more "ideas of law" than "law itself".[151] "[L]awyer's law" is "judge-made law".[152] We do well, Radcliffe urged, to remember that judges have a responsibility to differentiate their authority from that of legislatures, that a task of the courts "is to settle, if you like to redefine, the general principles and conceptions of the law we are to live under and then to find a way of bringing governor and governed together before [them], when they are at issue, without turning the judge either into a mere administrator or into a mere obstacle to administration."[153]

For two reasons, however, it would be oversimplifying matters to conclude that Radcliffe lauded the common law tradition. First, the

[143] See *Nash* v. *Tamplin & Sons* [1952] A.C. 231, 256–8; *I.R.C.* v. *F.S. Securities Ltd.* [1965] A.C. 631, 653–4. In the 1950s, Radcliffe became something of an expert on tax matters – the Royal Commission's *Taxation* report appeared in June 1955 – so it is not surprising that his reasoning in taxation cases (which easily compose the majority of the cases on which he sat) should often be remarkably sophisticated and confident: in *Independent Television Authority* v. *I.R.C.* [1961] A.C. 427, 438–44 he observed that the Inland Revenue was apparently unaware of the fact that it was leaving various sources of stamp duty revenue untapped; in *I.R.C.* v. *Frere* [1965] A.C. 402, 429 he criticized the Revenue's system of extra-statutory tax concessions; in *Rendel* v. *Went* [1964] 1 W.L.R. 650, 658 he persuaded the House that the appeal was "hopeless"; and in *I.R.C.* v. *Hinchy* [1960] A.C. 748, 777 he berated Parliament for failing to undertake a review of tax penalties in line with, among other things, his own committee's recommendations in *Taxation*.

[144] Radcliffe, Paterson interview, above note 121, ff. 164–5.

[145] *LDS*, p. 5.

[146] "Some Reflections", p. 367.

[147] *Ibid.* p. 366.

[148] *LDS*, p. 5.

[149] C. Radcliffe, "Thoughts on India as 'the Page is Turned'" *The Listener* (2 October 1947) 557–58 at p. 558.

[150] "The Place of Law Courts", p. 298.

[151] *NFB*, p. 272. See also *LDS*, pp. 8–9.

[152] "The Place of Law Courts", p. 298.

[153] "Russell of Killowen", p. 174.

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rhetoric of principle, though he was happy to use it occasionally, left him unconvinced: the assumption "that there are major principles at the back" of the common law "to which detailed rules can be made to conform" is one which – given that "[t]he English common law seems … rather short on philosophy and rather uncertain in logic" – probably cannot be "push[ed] … very far."[154] Secondly, and more importantly, although Radcliffe was generally uncomplimentary about legislation, he knew that, in the second half of the twentieth century, it was facile to think of law purely or even mainly as common law[155] (the significance of which seemed to be declining[156]) and important to recognize that Parliament was markedly extending the realm of statute law year upon year. The continual growth of statute law represented, for him, "the real [legal] crisis"[157] of modern times. While legislation is sometimes necessary and even desirable,[158] the general explosion of "[p]ara-law" – statutes, orders, by-laws, regulations, directions – has resulted in the blurring of "the usual line of division"[159] between legislative and executive action: "laws, even on matters of critical importance, pop out, play around, and disappear again, like rabbits in a warren …. [T]he legislature has become merely the law-making agent of the Executive …. [W]e are operating … the system that … the framers of the American Constitution … insisted … it must be scrupulous to guard itself against."[160]

This development represented a crisis, Radcliffe believed, because it put the future of legal authority in peril. "[M]ost judges", he observed in 1949, would probably "say that in a large proportion of the cases that come before them the rights of the parties are, if not determined, at any rate substantially affected by the terms of some recent Act or Order …. The respect for law … cannot survive the spectacle of its continual making and remaking before our eyes."[161] The problem

[154] "The Place of Law Courts", p. 299; and see generally C.J. Radcliffe, "Trusts for or Powers of Sale in Relation to The Rule of Perpetuities" (1925) 41 L.Q.R. 52; also his observations, in *British Transport Commission* v. *Westmorland C.C.* [1958] A.C. 126, 152, on "[h]ow flickering is the illumination which the[] authorities throw upon the main principle of law" at stake in that case. The real "virtue" of the common law, Radcliffe argued, rests "in … its readiness to keep its nose to the grindstone" ("The Place of Law Courts", p. 299), and in the fact "that it is always there … keeping a little, but only just a little, below the level of the people whose law it is" ("Russell of Killowen", p. 174).

[155] "I sometimes feel that we turn rather too easily down the by-ways that lead so pleasantly to park and manorhouse and old world cottages and the village green; and that there is something to be said for keeping to the ugly modern highway with its roaring traffic and its straight harsh lines." *LDS*, p. 1. See also *NFB*, pp. 265–6.

[156] See "Some Reflections", p. 361 ("The daily life of the ordinary man today is regulated far less by anything that can be called the common law of the kingdom than at any period that can be studied in our history").

[157] "Some Reflections", p. 366.

[158] See *NFB*, p. 221.

[159] *LDS*, p. 4.

[160] *NFB*, pp. 239–40; and see also "Some Reflections", p. 362.

[161] "Some Reflections", p. 366.

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was not simply that there was too much para-law, or that many legal officials regarded this law as "either an impediment to be got rid of or a servant to execute their orders."[162] There was also the modern misapprehension that legislation is not only "an expression of the popular will" but in need of "no other justification than that it is such an expression".[163] If all we require of law is that it represents the will of the majority, legal decisions might as well be based on opinion polls, "as if they were themselves the determinant of value judgments in political life"[164]; within such a system there is "hardly … much place for judges."[165] The fact is that legal officials who take their duties seriously do more than just "draw [upon] … the current volumes of Statutory Rules and Orders";[166] rather, the very system of law is something which, "in the last resort[,] … holds their respect and their allegiance"[167] because "the reasoning" informing its rules constitutes "a force outside themselves, to whose impulses they are bound to submit."[168] One of the classic modern analytical-jurisprudential explanations of legal authority – that legal rules are authoritative because they offer reasons for action which cut off the need for independent deliberation by actors[169] – would not have been lost on Radcliffe.

VI. The Problem of Authority

Radcliffe thought that the solution to the crisis in mid-twentieth century law might be the development of a philosophical approach to the question of how a legal order maintains genuine authority, rather than mere control, over citizens.[170] Austinian positivism was not the answer;[171] nor, Radcliffe believed, was "the material one needs" for an answer to be found in Kelsen's Pure Theory of Law, Maine's historical jurisprudence or the writings of the American legal realists.[172] Although the claim that legal authority depends upon the capacity of rules to operate as exclusionary reasons would have made perfect sense to him, furthermore, the argument that he sought to advance was rather different, and will take some unravelling.

[162] *NFB*, p. xi.
[163] *LDS*, p. 9.
[164] *NFB*, p. 231.
[165] *LDS*, p. 9.
[166] "Some Reflections", p. 368.
[167] *NFB*, p. 277.
[168] *NFB*, pp. 219–20. See also "Some Reflections", p. 364.
[169] See, e.g., J. Raz, *Practical Reason and Norms*, 2nd ed. (Oxford 1999), pp. 35–48; H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford 1982), pp. 243–68.
[170] "We badly need to develop a modern philosophy of authority for future use instead of just chanting the old choruses of rebellion": *Censors*, p. 26.
[171] See "Some Reflections", pp. 365, 367–8: "… what law is not, in essence, is the command of a ruler", for "the sources upon which [the ruler's laws] draw for their hold upon men's conduct are painfully thin. They are force, … and they are loyalty to the [ruler] …. I do not think that a healthy legal system can be maintained indefinitely along those lines."
[172] *LAC*, p. 9.

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The easiest place to start is with that remark of Radcliffe's, reported earlier, in relation to the Wilson government's D-notice fiasco: trust has to be worked for and earned. Likewise legal authority: "Respect for law for its own sake is a slow growth."[173] But how is this respect to be accumulated? Indeed, "[w]hat really prevents men who have authority from abusing their authority? … [W]hat is it, if it is not force, that leads men to give obedience to authority?"[174] To the question of "how it is" that the law "commands the allegiance of the best part of [our]selves", Radcliffe confessed, "I can supply no convincing answer".[175] The fact that we do not, and probably cannot, know "the whole truth" about something, however, does not mean that it is pointless trying "to come to closer terms" with that truth.[176] When, in 1957, Radcliffe was invited to the Northwestern University School of Law to deliver the Rosenthal Lectures, he initially declined. But after some cajoling from Northwestern's Dean,[177] he had a change of heart.[178] In the mid- to late-1950s he had written privately of his interest in natural law – "not [as] a fixed set … of principles" but as "a certain approach to the nature of law and of its relation to the whole of man's life"[179] – and the Rosenthal Lectures provided him with an occasion to develop his reflections on the theme. Natural law, he argued, invariably occupies the margins of jurisprudence – "too impalpable to destroy and yet too enduring ever to be forgotten" – for it "was never intended primarily for lawyers" and is unlikely ever to be "more than a minor formative influence upon the work of the judge."[180] Nevertheless, "[w]e must never … lose touch with the idea of Natural Law or give up the belief that all positive law bears some relation to it."[181]

Why not? Because a "system of law … needs a standard of reference outside itself by which to assess and reassess its own results"; it "must be related to some more fundamental assessment of human values and

[173] *LDS*, p. 4.
[174] Lord Radcliffe, "Power and the State" *The Listener* (8 November 1951) 771–2, 797 at p. 771. *Cf.* M. Oakeshott, "Political Power" *The Spectator* (4 April 1952) 451–2 at p. 452 ("It seems to him … that even very great power is not always abused … But … for every example of a great concentration of power not being abused, a hundred examples could be cited to the contrary").
[175] *LAC*, p. 12.
[176] *NFB*, pp. 266, 268.
[177] John Ritchie III to Cyril Radcliffe, 14 October 1958, in John Ritchie papers, Northwestern University Archives, series 17/23, box 46, folder 18, Pritzker Legal Research Center, Northwestern University School of Law, Chicago.
[178] Cyril Radcliffe to John Ritchie, 29 October 1958, *ibid.* ("I have reconsidered my first feeling that … I would never be able to prepare anything worthy of the occasion. I have overcome it …").
[179] Cyril Radcliffe to William Haley, 23 June [195?], in William John Haley correspondence, 1949–64, Churchill/Haley/8/8, Archives Centre, Churchill College, Cambridge. I am grateful to Matthew Kramer at Churchill College for helping me to track down this letter. It seems reasonable to infer from the dates of the accompanying correspondence in folder 8 that the letter was written some time between 1955 and 1959.
[180] *LAC*, pp. 8, 95, 94.
[181] *LAC*, p. 93. See also *NFB*, p. 276 ("… finding in the law a reflection of living ideas about the realities of human conduct and the nature of the destiny of men").

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of the purposes of society."[182] The relevant standard of reference, according to Radcliffe, is human flourishing. "We must see ourselves … as committed for good to the principle that the purpose of society and all its institutions is to nourish and enrich the growth of each individual human spirit …. This is the only permanent public policy", for "the only freedom of the individual that has ever mattered absolutely" is "the freedom of every man to discern what is good and to choose it for himself."[183] So it is that he commits himself to the idea, noted earlier, there is a complex of liberties the preservation of which is essential if people are to be able to choose how "to form their characters".[184] The argument is not that these liberties should be preserved for the sake of human happiness – that, Radcliffe regularly insisted, cannot be the correct criterion.[185] "We may not" – he liked to quote these words reputedly spoken by Thomas More – "look at our pleasure to go to heaven in feather beds; it is not the way."[186] A "choice that has been deliberately made" may cause the chooser unhappiness – consider those of Hitler's compatriots who opposed his "overwhelming armament of evil with no certainty but that of their own destruction, with the knowledge that they brought ruin upon their families and their associates" – and yet still be the choice for "good suffering", for "what [the chooser] hold[s] to be good and right in human life".[187]

The maintenance of legal authority depends, Radcliffe believed, upon the willingness of legal officials to abide by this natural law perspective on the world.[188] Officials who do not abide by this perspective – this time he took the words from Edmund Burke – will sleep upon their watch.[189] Officials who do so abide will treat as

[182] *LAC*, pp. 24, 53.
[183] *LAC*, pp. 65, 76.
[184] *LAC*, p. 71. See also *NFB*, pp. 81 ("There is really not much to be said for Law unless it is thought of as representing absolute standards of right and wrong, even at far remove"), 239 ("Laws … have a unique power of illuminating dramatically the structure which the individual can count upon for the building and development of his own life"), 226–7 ("escapism, a sort of Beatnik political philosophy … is unworthy of that larger spirit of earlier days when … liberty and freedom meant a positive claim to displace outside authority by the more arduous responsibility of ordering oneself").
[185] See, e.g., Lord Radcliffe, "The Individual and the State" *The Listener* (13 December 1951) 1017–19 at p. 1018; *POP*, p. 89; *Censors*, pp. 9–10; "Marked Lowering in Public Tone" *The Times* (25 February 1958), p. 9 ("It does very greatly matter that each individual should be free to form, hold, and honour his own belief as to the meaning of human life and its relationship to a spiritual universe that lies beyond it …. It does not matter at all that people should become more and more comfortable or that they should travel faster, or that they should visit more and more places. It is not of any supreme importance that anyone should be happy in any sense of that word which does not beg the question").
[186] W. Roper, *The Life of Thomas More*, rev. ed. (London 1822), p. 26; and see also *NFB*, epigram, p. 147; *LAC*, p. 85.
[187] *LAC*, pp. 72, 85, 88.
[188] For Radcliffe it is indeed the attitude of officials, rather than that of the "the ordinary citizen", that is crucial: *POP*, p. 14.
[189] See *LAC*, p. 96; also E. Burke, "Thoughts on the Cause of the Present Discontents" (1770) in E.J. Payne (ed.), *Burke: Select Works*, (Oxford 1922), vol. I, 1, 90 ("Publick life is a situation of power

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non-expendable[190] and "of greater value than themselves"[191] those "rules of dealing between man and man … which are just as valid for the powers of government as they are for the Court of law or ordinary private life".[192] But we know that Radcliffe wondered whether the country was becoming ungovernable and from where the next breed of navigators – those with the capacity to steer by law's compass[193] – might emerge. "This is a generation that has seen the powers of evil menacingly at large", he observed in 1952, and "it is not easy to feel sure that the virtues which one was taught to admire … are not survivals from a different order of things for which society is coming to have no use."[194] Over and again throughout his writings there are exhortations to the effect that the lasting legitimacy of a solution depends upon its being devised and implemented by "wise and public-spirited men",[195] "gather[ed] together" from "the cultured classes" and sharing "the common ground of enlightened opinion"[196] (though even these "enlightened and intelligent men", it seemed, would have to be "set … a course of reading" if they were to "have some coherent idea of the principles upon which they should exercise their enormous responsibility"[197]).

Radcliffe's belief that there is a genuine body of the great and good which can serve as society's much-needed navigator-class, upholding and maintaining those values which are integral to human fulfilment, contrasts somewhat with his gloomier reflections on the world. "The gulf between the present and the past, which gets wider and deeper with startling speed," he wrote in 1958, "marks the general inability which afflicts society not merely to agree with earlier beliefs about the place and purpose of human life in its temporal existence but even to have any beliefs about that matter at all."[198] Modern citizens appeared to him to be all too often lax, undisciplined, little if at all concerned with self-improvement or -enlightenment: "there is in effect no searching of heart or mind as to [human] possibilities or … duties".[199] This "abdication of personal responsibility of judgment" seemed to have "come about … because the majority of members of society … always beg not

and energy; he trespasses against his duty who sleeps upon his watch, as well as he that goes over to the enemy").

[190] See *NFB*, pp. 267–8.
[191] *LDS*, p. 4.
[192] *LDS*, pp. 16–17.
[193] See *LAC*, pp. 77–8.
[194] *POP*, p. 5. See also Radcliffe, "Foreword", p. xiii ("I envy the dignified certainties on moral or social issues, eloquent of the eighteenth century").
[195] *FOI*, p. 29. See also Radcliffe, "The Problem of Cyprus", above note 29, p. 18 ("a well-educated and enlightened group of people …"); "Law and Order", p. 823 ("A trained man …"); "Immigration and Settlement", p. 36 ("men of good will").
[196] *NFB*, p. 69.
[197] *Censors*, p. 4.
[198] Lord Radcliffe, "Social Need for New Values" *The Times* (24 February 1958), p. 9.
[199] *Ibid.*

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to be required to keep themselves in training."[200] H.L.A. Hart confessed to being confounded by this outlook. "Presumably [Radcliffe] values a Christian society", he commented, but, if he does, "[h]ow can he reconcile this with his low estimate of the importance of kindness, benevolence and good will"?[201]

Hart did not quite have the measure of the man: although Radcliffe did sometimes struggle to reconcile his natural law instincts with events in the world – the "considered, theorised denial of any common bond uniting man with man" which must have preceded the atomic bombing of Japan in August 1945 he found especially shocking[202] – the very fact that he had those instincts indicates that he viewed human potential optimistically.[203] The real cause of Radcliffe's pessimism was a set of modern conventions, developments and ideologies which, as he saw it, contrived to extinguish such potential. The "sheer inanity" of our "Age of Credulity" – the "pervading vulgarity and cheapness of tone", the absence of "any adult conception of the nature or dignity of Authority", the public's "perpetual and aimless grin"[204] – is lamentable enough. Nor should we be anything other than embarrassed about the fact "that, as our technical mastery of the means of communication increases, there is a corresponding decrease in our power to employ those means in any way that it worthy of their possibilities."[205] Yet worst of all is the spectacle of a world gone soft on welfare and insurance:[206] a world in which citizens are armed to the hilt with rights yet minimally encumbered with duties,[207] in which "needs" are assumed to "generate remedies"[208] and the public expects solutions to problems to be "hand[ed] out" rather "as a doctor writes a prescription for a patient",[209] in which many people seem to have lost sight of the fact that "life has to go on, and [that] in a progressive society it is better that grievances, if they are not vital grievances, should be forgotten, rather than put right at the expense of public time and energy."[210] That "mere living"[211] is

[200] Radcliffe, "Marked Lowering in Public Tone", above note 185, p. 9.
[201] H.L.A. Hart, "Purpose of Politics" (letter) *The Times* (1 March 1958), p. 7.
[202] *FOI*, p. 13.
[203] A fact which is borne out by one of the essays to which Hart was responding: see Radcliffe, "Marked Lowering in Public Tone", note 185 above, 9 ("… it can never be too early for people in this country to take stock of their beliefs and aspirations …. They still have the great opportunity …").
[204] *NFB*, pp. 181, 7, 20, 226, 42.
[205] *NFB*, p. 67; and see also "Law and Order", 825 ("It is one of the great vulgarities of our current mass-communication society that it wants to sell all ideas and all beliefs as if they were merchandise that must be got off the shelves at all costs").
[206] See "The Place of Law Courts", p. 299.
[207] See *FOI*, pp. 13–14, 26.
[208] *NFB*, p. 234.
[209] *FOI*, p. 27.
[210] "The Place of Law Courts", p. 299. Note, though, that when Radcliffe felt aggrieved over inadequate public funding for the arts, life did not just have to "go on"; rather, "we must go on complaining of this until it is mended" (*NFB*, p. 41).
[211] *NFB*, p. 42.

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something to be cherished made it all the more difficult for Radcliffe not to despair over attitudes and expectations which, as he saw it, were responsible for the intellectual, cultural and spiritual impoverishment blighting so many modern lives. The apparent inescapability of this despair was, for him, reason enough to be convinced that he would never belong to the era in which he lived.

VII. Darkness at Noon

Why did Radcliffe feel this way? There is an obvious hazard in looking to his life-story for an answer to this question, for when we seek to explain something about a person by reference to some event or events in his history, we place ourselves at the mercy of the non-verifiable counterfactual: since we have no knowledge of how that person would have turned out had his life experiences been different, we cannot be sure how the life experiences he did have shaped the person he became and the actions he took. In Radcliffe's case, nevertheless, there is good reason to think (as did Radcliffe himself) that his experience of World War I shaped his character and formed his outlook for the rest of his life.

Before becoming an undergraduate at New College in 1919, Radcliffe was in military service. Owing to poor eyesight he was graded medically unfit for fighting and so he was commissioned as a subaltern in the Labour Corps. His medal card at the National Archives (ref. WO372/16) shows that he was sent to France in the summer of 1918. Little can be established about his experiences there – there are few records of the activities and locations of Labour Corps units – though it appears that on arrival he travelled eastwards through the Loire Valley, to Paris, and eventually to Alsace.[212] The likelihood is that his unit was responsible for carrying equipment and supplies and, under the supervision of the Royal Engineers, for helping to maintain railways, roads and bridges, and water and power supplies. It is almost inevitable that the unit would have come under fire – many from the ranks of the Labour Corps returned home wounded – and it is even possible that it would have been deployed as emergency infantry.

Radcliffe's demobilization coincided with the publication of a volume of poems he had written throughout the war years.[213] One of his contemporaries at New College, Maurice Bowra, wrote that they "reflected with much dexterity the influence of A.E. Housman and Austin Dobson",[214] though the likelihood is that Radcliffe's own honest

[212] See Heward, *GAG*, pp. 10–11.

[213] C[yril] J[ohn] R[adcliffe], *Spring's Highway. Being Poems Written Between the Ages of 14 and 19* (London 1919) (herafter *SH*).

[214] C.M. Bowra, *Memories 1898–1939* (Cambridge, Mass 1967), p. 93. The praise counted for little. Bowra thought Radcliffe aloof and unemotional (see L. Mitchell, *Maurice Bowra: A Life* (Oxford

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assessment of the poems – he appears never to have drawn attention to them in later life – would have been that they showed a fairly limited imagination and technical ability. He invariably used iambic pentameter, favoured writing in quatrains, and the dominant – rather overwrought – theme in the earliest poems is death, separation and the possibility of reconciliation in an afterlife.[215] The poems shift up a gear, nevertheless, when Radcliffe's attention turns to those "dear friends we knew a year ago", who "died across the seas."[216] "All these poor flowers Life's chilling frosts have nipped";[217] "[t]hey will never hear the April music more."[218] Yet while he would have "give[n his] life … to have them back again",[219] he would "sigh not at all for the past, but dream of an endless to-morrow."[220] "For all the grief that dims my eyes," he declared, "I would not have it otherwise."[221]

> I will not sigh for things that may not be.
> I will go back from here with clearer eyes,
> Sadder mayhap, at least from fancies free.
> For me no more the rainbow in the sky,
> The magic and the glamour of the morn;
> Only I know that where such blossoms die
> Some fruit is born.[222]

Radcliffe's emphasis on optimism and regeneration, on "[t]he new life … begun"[223] rather than on "sorrow for things past",[224] is deceptive. For although the war was not the only harrowing spectacle he ever experienced – his settling of the boundary between India and Pakistan "in the knowledge that pogrom lurked either side of almost every line he drew" clearly troubled him in later life[225] – it was the one which seemed to scar him most deeply. Contributing to the centenary issue of his school's magazine in 1962, he recalled Haileybury before and after

2009), pp. 58–9), while Radcliffe regarded Bowra as someone who never grew up (see *ibid.* pp. 170, 242).

[215] See, e.g., "Sleep", in *SH*, p. 10 ("We may sleep with the loved who are dead …"); "After", in *SH*, p. 18 ("For you, dear heart, the long day's task is done;/For us there's many a mile still left to run./ But when this life below at length is o'er,/We know whose voice will greet us at the door.").

[216] "Amicis Emeritis", in *SH*, p. 21. See also "In Memoriam", in *SH*, p. 26 ("These, before the dawn had broken,/Gave their lives, O God, to Thee").

[217] "A Burial", in *SH*, p. 41.

[218] "Spring, 1916", in *SH*, p. 45.

[219] "Amico Dilecto", in *SH*, p. 28.

[220] "Melbury Moor", in *SH*, p. 52.

[221] "By the River", in *SH*, p. 30.

[222] "A Burial", in *SH*, p. 42.

[223] "Whom the Gods Love", in *SH*, p. 46.

[224] "The Stairway, 1918", in *SH*, p. 49.

[225] P. Hennessy, *Never Again: Britain 1945–51* (London 1992), p. 236. The settlement continued to attract criticism long after Radcliffe's death. "The award of Cyril Radcliffe as announced on 17 August, 1947," one commentator complained in the 1980s, "illegally and unjustifiably deprived Pakistan of a number of contiguous Muslim majority areas …. A great injustice was done to Pakistan by and under the Radcliffe award". S.S. Pirzada, "Radcliffe Award, A Note" (1984) 36 *All Pakistan Legal Decisions: Journal* (Lahore) 35 at pp. 48–9, 57.

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August 1914. His first two years there "seem[ed] sunlit. There was a mellow light over England …. Games were our great concern" and "the future … seemed to lie in the capable hands of a benevolent order."[226] But "[t]he outbreak of war changed all that …. Soon names began to appear on the Roll of Honour that was kept posted up at the Lodge."[227]

> In a quiet and passionate way the School, which had been so self-contained, was flung into the full experience of the war. There was such brevity in the transition from schoolboy to soldier that no isolation was possible. Only nine months or so separated the Prefect crossing the Quad from the young officer in the trenches and many of them would hurry back, on their scanted leaves, to revisit the buildings, the fields and their friends. Often it was to be a last visit. My years at Haileybury were intense and happy, but I do not wonder that, when I look back, I see the war years under a shadow.[228]

The shadow never really lifted. "[T]here must always be some darkness at high noon," Radcliffe observed in 1953, "there will always be a line of shadow against the sun."[229] Fifteen years later he noted how his own "reaction to life was formed by the War of 1914–18," of how it had "made [him] its own."[230] In a passage so personal, tender and well crafted that it warrants one last long block-quotation, he elaborated: with the war,

> [t]he Spring had gone out of the year, and it never came back. I know that, for myself, I never expected it to. I have now lived for more than three times the span of years that was allowed to contemporaries of mine at school whom I loved and who perished in the storm, yet much of what happened then is clearer to me in memory than anything that has happened since. What stands out so clearly, so clearly that it remains as the dominant impression, is a certain uncomplainingness, and acceptance, without dramatics and without self-pity, of their sad and untimely fortune. Those young men, who were only promoted boys, took their lot with a dignity that we now forget. There was nothing in this of stupidity, nothing sheep-like …. [T]hroughout there shone a brightness of spirit that no fate dimmed, and I have carried with me into the long years of growing up a settled admiration for that special kind of courage that, without illusion, sustains an unequal burden to whatever the end may be.[231]

The core sentiment here – that the dignity of the past, even if it might never be recovered, ought always to be remembered – is a

[226] Lord Radcliffe, "1914: The First World War", in *The Haileyburian & Imperial Service College Chronicle* (22 June 1962), pp. 58–9 at 58.
[227] *Ibid.*
[228] *Ibid.* p. 59.
[229] *FOI*, p. 13.
[230] *NFB*, pp. xvi-xvii.
[231] *NFB*, p. xvii.

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familiar one. But this makes it no less compelling an explanation of why Radcliffe should have been the man that he was. His emphasis on the relationship between choice and character-formation and on human capacity for self-fulfilment, his intense admiration for the martyr, his commitment to public service and his devotion to culture, his desire to understand rather than recoil from the unusual and the unfamiliar, his disdain for the feckless, the shallow, the complacent, the bearer of the petty grievance and those who would hold the world to be somehow in debt to them – all of these characteristics begin to make sense once we see him as a man emerging sadder and wiser from World War I. It was noted earlier that he shared Holmes's belief that the best test of truth is the marketplace of ideas. This is not all that these two men shared: both discerned complacency among those who, unlike themselves, had not experienced war at first hand. "Men are apt to prize" advantages such as liberty "the less the longer we enjoy them", Radcliffe observed,[232] much as Holmes thought that "[w]e have been comfortable for so long that we are apt to take it for granted that everything will be all right without our taking any trouble."[233] "[I]n the easy times", Radcliffe lamented, "the light dims";[234] we begin to "take so much for granted … and by so doing … impose such heavy strains on our good sense."[235] When this good sense is compromised, we stop appreciating that toil, privation and misfortune are among life's blessings, that suffering "toughen[s] our intellectual and imaginative fibres"[236] and prompts us to make the best of what we have.[237] By the middle of the twentieth century it seemed to Radcliffe that this basic insight into the human condition was fast becoming, if indeed it was not already, lost to the modern world.

[232] Lord Radcliffe, "Some Impressions of India" (1948) 15 *Kipling Journal* 5, 6.
[233] O.W. Holmes to Frederick Pollock, 19 September 1919 in M. DeWolfe Howe (ed.), *The Pollock-Holmes Letters: Correspondence of Sir Frederick Pollock and Mr Justice Holmes 1874–1932* (Cambridge 1942), vol. II, p. 25.
[234] *LAC*, p. 84.
[235] "Dissolving Society", p. 591.
[236] "Law and Order", p. 825.
[237] "People have lost the sense of tragedy in life that gives quality to action and thought. A sense of gravity is part of the makeup of society." Radcliffe interviewed in Hennessy, "The Eternal Fireman", above note 4, p. 16.

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