The Jurisprudence of Lord Denning
A Study in Legal History
Volume II
The Last of England:
Lord Denning's Englishry and the Law

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By

Charles Stephens

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I would not find the burning domes and sands
Where reigns the sun, nor dare the deathly snows,
Nor seek in mountains dark the hidden lands
Of men long lost to whom no pathway goes;
I heed no call of clamant bell that rings
Iron-tongued in the towers of earthly kings.
Here on the stones and trees there lives a spell
Of unforgotten loss, of memory more blest
Than mortal wealth. Here undefeated dwell
The Folk Immortal under withered elms,
Alalminore [England] once in ancient realms.

—Tolkien, J.R.R. *The Book of Lost Tales I* [1983] p. 43

Written in Warwick between November 21st and 28th 1915 while on leave from military training.

Turn your face from the green world, and look where all seems barren and cold,' said Gandalf.

Then Aragorn turned, and there was a stony slope behind him running down from the skirts of the snow; and as he looked he was aware that alone in the waste a growing thing stood. And he climbed to it, and saw that out of the very edge of the snow there sprang a sapling tree no more than three foot high. Already it had put forth young leaves long and shapely, dark above and silver beneath, and upon its slender crown it bore one small cluster of flowers whose white petals shone like the sunlit snow.

—Tolkien, J.R.R. *The Return of the King* [1955] pp. 249-50

And yet England is not as Nineveh or Tyre, nor as Rome, nor as Spain. Herodotus relates how the Athenians, returning to their city after it had been sacked and burnt by Xerxes and the Persian army, were astonished to find, alive and flourishing in the midst of the blackened ruins, the sacred olive tree, the native symbol of their country. So we today at the heart of a vanished empire, amid the fragments of demolished glory, seem to find, like one of her own oak trees, sturdy and growing, the sap still rising from her ancient roots to meet the spring, England herself……There was this deep, this providential difference, between our empire and those others, that the nationhood of the mother country remained unaltered through it all, almost unconscious of the strange, fantastic structure built around her – in modern parlance 'uninvolved'.

—Powell, J.E. Speech to the Royal Society of St. George, 22nd April 1961

Powell was buried in 1998 in Warwick, a city which, some say, is the heart of England.

Grau, teurer Freund, ist alle Theorie,
und grun des Lebens goldner Baum.

—Goethe, J.W., *'Faust: Erster Teil'* (Frankfurt am Main 1979) iv. p. 61

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FOREWORD

I dedicate my work on Lord Denning, which is also a contribution to the study of English identity and the nature of English history, to three friends: Nirad C. Chaudhuri, Hamish Henderson and Michael Stenton.

In Oxford, during the winter of 1975-6 Mr Chaudhuri, or Nirad Babu as he should properly be called, the author of *The Autobiography of an Unknown Indian*, *A Passage to England* and *Thy Hand Great Anarch*, introduced me to the tragic history of the Bengali nation. In so doing, he reminded me that great nations can die, as well as be born and flourish. Like Lord Denning, Mr Chaudhuri lived to be 100.

In 1977, and over the following years until his death in 2002, Hamish Henderson shared his love of the Scottish nation with me and taught me to respect and honour that people. Hamish, a great poet, author of *Freedom Come All Ye* and the translator of Antonio Gramsci, was a 'man of the Left' but he was amused and touched by the fact that one of his poems appeared on the same double facing page as one of those written by Enoch Powell in an anthology of war poems entitled *The Terrible Rain: The War Poets 1939-1945*, edited by Brian Gardner and published by Methuen in 1966. The other poem on that double facing page was written by Frank Thompson, the brother of E.P. Thompson, author of *The Making of the English Working Class*; Frank Thompson was executed by agents of Stalin in Bulgaria in 1944. Enoch Powell retained the friendship of Michael Foot throughout his life; Tony Benn attended his memorial service. Serious students of the proper history of nations are not concerned with 'Left' or 'Right', designations emanating from the French revolutionary entity and progenitor of the 'Terror' known as the National Convention, but with piety, patriotism and loyalty; perennial virtues which were known to Herodotus and Thucydides as well at to Livy and Tacitus.

Between 1991 and 1997, in Cambridge, Michael Stenton and I taught students from the United States, Japan, Germany, France, Russia, Denmark and many other nations about the nature of English national identity. During those hot July and August days, when the Treaty of Maastricht was debated, turbulently, in Parliament, and the Conservative government slowly declined into sad incoherence and abject disgrace, Michael, a member of Peterhouse, instructed me in the continuities and complexities of English history. This work was conceived, if not

completed, during that period.

The German philosopher G.W.F. Hegel observed that “wenn die Philosophie ihr Grau in Grau malt, dann ist eine Gestalt des Lebens alt geworden, und mit Grau in Grau läßt sie sich nicht verjüngen, sondern nur erkennen; die Eule der Minerva beginnt erst mit der einbrechenden Dämmerung ihren Flug“ [Grundlinien der Philosophie des Rechts [1821] Vorrede]. It may be that the long story of England has not yet entered its *dämmerung* but, whether or whenever that eventuality may come to pass, Lord Denning will surely have an honoured place amongst the wisest of its many worthies.

ACKNOWLEDGMENTS

My wife Karin has been unfailingly supportive and optimistic. In 1998, she gave me a copy of Lord Denning's *The Family Story* for my birthday; it has proved to be an indispensable *vade mecum* and a valued *enchiridion*. I have heard it said that lawyers who use too much Latin are probably practiced deceivers and we all know that we must be on guard against Greeks bearing gifts; perhaps those who attend to the wisdom of both Rome and Greece, listening to both, but deferring to neither, are protected from the perils of fraudulent misrepresentation and sudden assault. My students at Birkbeck College, the Open University and Queen's College in Harley Street enabled me to retain a sense of proportion and to realise that my lucubrations about Lord Denning, the Law and the nature of English identity had points of contact with the quotidian world.

I am also beholden to Professor Patrick Hanafin and Dr. Piyel Haldar. Along with their colleagues at Birkbeck College's Department of Law, they guided me, with a 'kindly light', through the rebarbative thickets of 'critical legal theory'; a practice which might, by its detractors, be aptly named 'foul smelling and loathsome', as Peter Goodrich, one of its notable practitioners once described the common law. This experience provided me with a metaphorical, but indispensable, grindstone on which I sharpened the blade of my delight in the traditional patriotic verities espoused by Lord Denning whose portrait presides, in what must often be baffled perplexity, over the varied proceedings which take place in the Council Room of Birkbeck College.

Professor Gary Slapper has provided me with support and encouragement. We share a common affection for the work of the late Peter Cook. In the course of swapping favourite Peter Cook sketches by means of YouTube, I was reminded of the ways in which the lives of Peter Cook and Lord Denning were intertwined, not least in the case of *Goldsmith v Sperrings Ltd* in 1977. Like a white knight, Lord Denning came to the aid of *Private Eye* when that noble vehicle of true journalistic endeavour faced a grim nemesis in the form of Sir Jams Fishpaste. Lord Denning often joked that he possessed 'every Christian virtue, except resignation'. I recall, from the early 1980s, a cartoon in *Private Eye* which made use of this phrase to good effect. I feel that Lord Denning was the only judge of whom *Private Eye* might have approved. He was not quite

Mr Justice Cocklecarrot, once memorably played by Clive Dunn, but I feel that he could have been depicted on the stage by an actor made up from bits and pieces of all of those who entertained us in *Dad's Army*, except perhaps for the very Scottish John Laurie. H.E. Bates, like Lord Denning, a lover of Kent and of the kinder aspects of the English character, could have written the script. 'Pop' Larkin would have certainly been an attractive litigant in Lord Denning's eyes and I am quite certain that, just as Mandy Rice Davies thought him 'the nicest judge I have ever met', so Mariette and Primrose Larkin would have reminded him of the days when 'it was bluebell time in Kent'.

I owe a particular debt of gratitude to Professor Tony Lentin. We first met as trainee tutors for the Open University's pioneering foundation course in Law: *Rules, Rights and Justice: An Introduction to Law*. We were introduced to each other by Professor Gary Slapper as fellow historians. A facile comment by another trainee tutor about Lord Denning's 'racism' drew us together in shared indignation. I was already engrossed in the research on which this study of Lord Denning's jurisprudence is based. We spent the evening in pleasant discussion of Lord Denning, Lloyd-George, Lord Sumner and many other congenial matters. Professor Lentin shares my profound admiration for Lord Denning and has provided me with the support and encouragement which has enabled me to maintain the enthusiasm and determination necessary to bring my work to a successful conclusion. Unlike Professor Lentin, who corresponded with him and watched him in court, I never met Lord Denning, knowing him only from my study of the Law. On the final page of his biography of Lord Sumner, a very different, but equally great judge, Professor Lentin wrote these words:

> As an honorary Fellow of Magdalen and a frequent visitor to Oxford, Sumner often dined in College. On one such occasion in the early 1920s, a shy young law student was ushered into his presence. 'I was invited into the Senior Common Room to meet him. Even on that short occasion, I felt that he was a rather formidable character. He looked stern. He did not have an easy manner with young people like me'. The young student was the future Lord Denning, [Lentin, A. *The Last Political Law Lord: Lord Sumner [1859-1934]* Cambridge Scholars Publishing 2008 p. 258]

As I was growing up and coming to know the world, I always felt reassured by Lord Denning's presence in our national life. At the back of my mind I felt that we were all safe as long as he was Master of the Rolls. The origins of this project lie in those memories. In 1998, I started an LLB at Birkbeck College, of which Lord Denning had been President between

1953 and 1983. My first steps in the Law were taken while he was still alive and, though I never met him in person, there was not a week in which I did not look with affection at his portrait in the Council Room of Birkbeck College. Lord Denning is therefore the other person to whom I owe a debt of gratitude. It might seem a banal comment but without the particular warmth and humanity of his presence I should never have been able to spend nearly ten years of my life preparing this work which is dedicated to the preservation of his memory.

CHAPTER ONE

THE DEBATE ABOUT ENGLISH IDENTITY

National identity became an object of intellectual enquiry in the late eighteenth century and has remained an object of anxiety ever since that time.[1] The theory of national identity, in the German, and more broadly Romantic, tradition of thought was associated with organic and biological as opposed to mechanical metaphors such as those which suffused the liberal and utilitarian analyses of political order which developed in the aftermath of the American and French revolutions of the late eighteenth century.[2] Although strongly criticised in the Marxist tradition of analysis, and severely compromised by the wars and disasters of the twentieth century, which were associated with an excess of it, national identity has, since the 1970s, attracted the sustained attention of critical theorists.[3] At the beginning of the twenty-first century, national identity is as important as an object of critical attention as it has been at any time since it first attracted the critical gaze in the late eighteenth century.[4]

Recent approaches to the critique of 'national identity' have ranged from those which are hostile, envisaging national identity as being oppressive, exclusive and contributing to the deformations of the social and political order of the world,[5] to those which seek to draw attention to the complexities, incoherences and contradictions which are subsumed within the category of 'national identity',[6] and those which regard 'national identity' either as an unavoidable attribute of the human, or else consider it to be a potentially positive resource for the future development of modern society.[7] At first an object of interest for critical theorists who were concerned with the catastrophic history of European nationalism, 'national identity' became a focus of attention for those who were concerned with the emergence of new nation states in the aftermath of decolonisation in the 1950s.[8] 'National identity' has also become a major concern for theorists of 'globalisation' and 'post-coloniality'.[9]

Until the 1980s, 'English identity' had seemed to enjoy an immunity from this kind of critical attention.[10] However, since the 1980s, there has been a rapid proliferation of critical discourses concerning 'English identity' combined with a developing awareness of the problematics

associated with that identity.[11] By the beginning of the twenty-first century it seemed plain that 'English identity' had become the object of sustained critical attention,[12] that the national identity which had always been claimed to be unique by its proponents and, in accordance with its traditional self-evaluation in terms of pragmatism and 'common sense', beyond critical attention, was now in a state of acute and developing crisis.[13]

The existence of this state of crisis was demonstrated by a public debate on the subject *In Search of England* which was held in the Beveridge Hall, University of London on July 9th 2002 as part of the 16th Annual Conference of the Institute of Contemporary History. Robert Colls,[14] whose recently published *Identity of England*[15] was a prime focus of attention during the debate, opened the proceedings by pointing out that when he had tried to publish research on 'English identity' in the early 1980s, no publishers could understand the point of the project. He linked the current focus on 'English identity' to, what he described as, the historic changes of the 1980s, arguing that 'English identity' had emerged as an issue at a time when it was 'post-everything' and therefore by definition problematic. Colls referred to the erosion of the distinction between town and country, to the deindustrialisation of the north and the industrialisation of the countryside which had become a locus of menace and disease rather than a bucolic idyll, the development of heritage industries, and also the persistence of acute poverty in the both the north and south of England, for example in Margate and Ramsgate. According to Colls, these erosions of established patterns undermined traditional conceptions of 'Englishness'. The old English trope of many being joined into one, visible in Priestley's *English Journey*,[16] had been replaced by a polyvalent reality; identity by difference, progress by anxiety about the future. The Whig theory of history no longer made any sense. Colls was aware of a loss of confidence about the future, such confidence, in his view, being intrinsic to any viable national identity. He asserted that Tony Benn's concept of the radical tradition of liberty was irrelevant to the present day and contended that Beveridge's ambition to slay the 5 'giants', a key myth of early twentieth century 'Englishness', was inconceivable in today's political climate. He ended by posing a series of questions: *Is belief in 'nation' possible if there is a loss in confidence in the State*? *Is belief in the State possible in the absence of national identity*? *If there is no belief in State or Nation how can confidence be restored*? *Can civil society exist without a shared identity*? Colls did not believe that everything was 'constructed'. He contended that within long historical periods there were things that endured, that were consistent, and argued that the 'return of history' was

the basis for the remaking of culture.

In the discussion which followed Colls' paper, Steven Howe[17] confessed that until recently 'Englishness' had been, for him, enemy territory, a place of racism and reaction; he had regarded 'Britishness' as being a much more flexible and inclusive identity. His preference hitherto had been for local or transnational loci of identity rather than, what he considered to be, the claustrophobic nation. He referred to the recent publications of Scruton[18] and Heffer[19] and others as being permeated by lamentations of resentment at 'national decline'. He noted that Scruton, in his judgment, the most intelligent of the reactionary commentators, saw England as a 'place', whereas Billy Bragg, a contributor from the floor, saw it as a 'space'. Howe maintained that the 'enchantment of place', piously revered by Scruton, could just as well come about through newness and hybridity as by means of tradition. However, in recent years, Howe had come to believe that 'Englishness', for all its darknesses, could be something worth contesting; the uncertainty, which typified modern 'Englishness', could be liberating. He contended that contemporary England was not a bad place, that the English were not cynical, that they trusted one another, that these qualities could be the basis on which to contest 'English identity' against what he designated as the lamentatory Right.

Catherine Hall[20] said that she had first come to comprehend 'Englishness' through encountering the 'other', against which that identity was defined, as a white woman in Jamaica in the 1960s. She contended that 'English identity' could no longer be understood as an 'island story', that it was always a contested and particular formation, a project constructed by the dominant class for others to inhabit. 'Englishness' was hegemonic in relation to other identities, always privileged as being better, superior. It was an 'imagined community' based on inclusion and exclusion whose markings changed in different conjunctures. There were always hesitances and resistances, based on race and gender, which marked 'Englishness' at any given time. English subjects were always raced and gendered. 'English identity' was constituted by what it was not, what it excluded. The 'other' was the constitutive 'outside' which had created 'English identity'. Since the sixteenth century, 'English identity' had been completely defined by the imperial and colonial 'other' over which it had sought to establish hegemony. 'Englishness' was therefore not self-sufficient, it was constructed by means of a mutual exchange with the colonial 'other'. It was based on power relations and was historically specific, contested and subject to mutation. Catherine Hall ended by quoting Henry James' remark that Trollope was the 'quintessential

Englishman', noting that Trollope was also a travel writer whose 'Englishness' was created by his encounter with Ireland; an encounter which, though hardly adverted to in his novels, was the crucial encounter with the 'other', raced and gendered, which instituted his 'quintessential' categories of 'English identity'.

Catherine Hall's *Civilising Subjects: Metropole and Colony in the English imagination 1830-1867*[21] is concerned with the way in which the universalism of the English anti-slavery movement, embraced by the evangelical and baptist missionaries who sought to convert the former slaves and so include them within the universal Christian family, was displaced, during the 1850s, by a racial sense of difference between black and white whereby the former slaves of Jamaica came to be perceived as the 'other' rather than potential English Christians. For Hall the anti-slavery movement, and the ideals of the missionaries, represented a radical, universalist tradition of 'Englishness' that was typical of the seventeenth and eighteenth centuries, but which later became overwhelmed by a more inward looking and xenophobic attitude. In this respect Hall's approach to 'English identity' is clearly informed by, and related to, that of E.P. Thompson[22] and Christopher Hill[23]. Hall counterpoints the evolution of the attitudes of missionaries in Jamaica between 1830 and 1867, between the emancipation of the slaves and the Morant Bay rebellion of 1865, brutally suppressed by Governor Eyre, an act which was applauded by many in England in overtly racist terms, with the development of opinion in Birningham, a place which had strong links with missionary activity and was therefore influenced by Christian universalism in the 1830s, but which became, notoriously in the 1960s, the centre of British racial conflict and a locus, exemplified by the career of Enoch Powell, of anxiety about the threat to 'English identity' posed by the presence of black immigrants.

Simon Gikandi[24] focused on the images and representations of England which he had encountered during his education in Kenya. He had first come to England in the early 1980s and was taken aback by the contrast between these representations and the reality of economic decline and imperial rhetoric of the Thatcher years. Gikandi was sceptical about concepts of 'organic community' and 'common consciousness', noting the emergence, during the 1980s, of racial and gendered challenges to the hegemonic identity which Thatcher sought to impose on Britain. He focused on a 'rhetoric of resistance' which defied Norman Tebbitt's 'cricket test' and the presumptions of the British Nationality Act 1981, engendering subtle changes since the 1980s in the identity of Britain. He concluded by noting that in 2001, in Kew Gardens, the epitome of the

literary ‘Englishness’ which had formed part of his colonial education, at the moment when Robert Mugabe was being vilified by the right wing press, there was an exhibition of Zimbabwean soapstone sculpture. He wondered what this conjuncture said about the nature of contemporary ‘Englishness’.

Points from the floor raised questions about the relationship between ‘Englishness’ and Chrisitianity; the way in which the experience of Empire had led, eventually, to an awareness of a wider world community; the role of the local history movement in relation to national identity; the significance of the joint appearance of the Irish tricolour and the St George flag during the World Cup, an event which also coincided with the first St Patrick Day’s march down Whitehall; the elusiveness and reticence of ‘English identity’; whether identity had objective existence or was constructed; whether the State was trying to shape identity or catch up with a more plural, particularised society; the way in which race was elided from ‘English identity’ despite the fact that many black people had been living in England since the sixteenth century and that a third of the merchant seamen in the Battle of the Atlantic were black; the development of English regionalism, a phenomenon strongly encouraged by the State which perhaps regarded ‘Englishness’ as being too intractable to be the basis of a political settlement. It was also pointed out, in relation to the ‘construction’ of identity, that Marx had always contended that we make our identities, but not under circumstances or conditions over which we have any choice.

In their final summing up the panel made the following points. Simon Gikandi referred to Raymond Williams’ statement that he was Welsh and European and indicated that ‘Englishness’ was of necessity fragmented and complex, that it could not be brought into a unity and that in fact it had been constructed in the colonies as a result of the insecurity created by the encounter between the English and the colonial ‘other’, that ‘Englishness’ was something invented to produce educated colonials into their place within the imperial order.

Catherine Hall stressed that ‘English identity’ was constructed in relation to difference and otherness, that it could not be self-sufficient. For her, ‘Englishness’ was a creation of the Empire, premised on the presumption of privilege and superiority, basic necessities of any imperial project. She also stressed that ‘Englishness’ had always been, and would always be, a contested site and that Blair’s current alignment with Bush, contending for civilisation against barbarism, was yet another version of definition of identity in relation to the ‘other’ which had to be contested and resisted.

Stephen Howe adverted to the need for shared values in society, contending that such values should be premised on ethics rather than religion and wondering whether such values had to be 'thick' or 'thin'. Howe believed that the current Home Secretary, David Blunkett, was asking the right questions, even if he was uncomfortable with his answers.

Robert Colls spoke of the two desires which animated the historical imagination: the desire for alterity, the encounter with the 'other', and the desire for design and wholeness, for a teleology. He contended that the moment of alterity was being displaced by a more teleological desire which sought to uncover what was held in common through the long duree of English history. Colls asserted that 'this is my country, I have no choice but to understand it', that 'English identity' had always been contested but that the English were marked by their intense historical awareness of each other. In the past, Liberalism had been the model for 'English identity' but Colls maintained that in the future the Imperial mix and match model, together with the Tory model of 'common lore', might prove more relevant than Liberal traditions of tolerance, openness and acceptance of difference under an umbrella of 'thin' shared ethical values such as individualism, freedom of contract and so forth.

In an article in the *London Review of Books*,[25] a few months after this conference, Paul Laity discussed four books on the subject of 'English identity' which had been published during 2002.[26] In his article Laity drew attention to the development of academic and journalistic debate on the subject of 'English identity' which, he argued, had been initiated by the publication in 1993 of Linda Colley's *Britons: Forging the Nation 1707-1837*. The debate about 'English identity' had subsequently been extended by contributions from, amongst others, Patrick Wright,[27] Sebastian Faulks,[28] Simon Heffer[29] and Roger Scruton.[30]

Laity argued that Linda Colley's analysis of the creation of British identity between 1707 and 1837 suggested that an earlier 'English' identity had been subsumed within a British identity, created to ensure the cohesion of the unions with Scotland and Ireland, which was organised around industriousness, protestantism, providence, empire, liberty and prosperity and expressed as aggression against France; a posture which led to a series of wars in which a British empire, based on trade and colonies, was created. The implication of Colley's analysis was that the conditions which brought Britishness into being in the eighteenth century have passed away rendering that British identity redundant and revealing it as patently constructed. The consequence of this would be that new identities, including an 'English' identity, would emerge to replace the now otiose 'British' identity.

According to Laity, Richard Weight's analysis in his book *Patriots*, using that of Colley as a starting point, asserted that British identity was based on 'greed, religious and racial bigotry, fear and contempt...elitism, xenophobia and imperial aggression' but that a rather different, core 'English identity' was emerging in the wake of the collapse of that British identity and Scottish devolution. This emergent identity had shed the unattractive 'class, race, gender and religious' values of the old British identity in favour of an identity, according to Weight, which owed a great deal to George Orwell's radical patriotism and espousal of decency during the Second World War; a set of values expressed in the creation of the National Health Service in 1948. Weight went on to argue that the 1960s saw the development of a more open and democratic identity, strongly influenced by American values, which successfully challenged the 'establishment' of the 1950s in which older, reprehensible versions of British identity had lingered. Despite some enthusiasm for 'Cool Brittania' and the rebranding of Britain during the early phases of the Blair administration and a residual optimism that harks back to the 1960s, Weight was unsure about the future of 'English identity'.

Nairn's analysis in *Pariah: the Misfortunes of the British Kingdom* focused on the failure, as he saw it, of the Blair adminstration to revitalise British identity. Nairn defined the policies of the Blair administration in terms of 'hormone replacement therapy' for his familiar target of *Ukania*, the 'elective autocracy' of the old British state, which Nairn saw as being a twenty first century version of Robert Musil's Austro-Hungarian Empire, *Kakania*, as depicted in *Der Mann ohne Eigenschaften*.[31] Nairn contended that there was a deepening gulf between the English people and the state, which remained in the thrall of the financial interests of the City of London and was a virtual dependency of the United States. This predicament, according to Nairn, could only be resolved by a democratic English 'revolution', velvet or otherwise, which would make possible the expression of a democratic 'English identity' in the form of a modernised English state. Nairn dismissed the dangers of a racist and reactionary expression of 'English identity' as being a function of *Ukania*, the analogue of Musil's *Kakania*. The solution to the problem of *Ukania*, according to Nairn, was the creation of a modern, democratic state. Laity was sceptical of this analysis which, he argued, underestimated the degree of loyalty to the British state that remained and exaggerated the *Kakanian* features of the present British state.

According to Laity, Colls offered a very different evaluation of the nature of 'English identity' in his book, *Identity of England*. Although, like Weight, Colls considered that the present condition of 'English

identity' could be described in terms of a 'diagnosis of national disorientation', he argued that the British identity delineated by Weight, and described by Colley, was imposed on the English people in an almost colonial manner by the governing and social elite. The people 'looked on, gawped, and deferred' in the phraseology of Bagehot. Colls contended that 'English identity' survived beneath this imposition. This identity was a matter of climate, landscape, work and region, as much rooted in the north of England as the south, 'a great collective memory rolling subliminally beneath the state'. However, Colls also pointed to the long history of the English state, which he traced back to the Anglo-saxon period, distinguishing this long duree, associated with an undertow of popular identity, from the specific features of the British state which had been constructed in the eighteenth century. Although his analysis could be reconciled with that of Colley, Colls suggested that there was more to the English state than the constructions of the eighteenth century. More specifically, given his sharp focus on the 'Englishness' of the north east, Colls was concerned that the decline of industrial culture, the vehicle for the popular 'English identity' which he considered crucial, had left a vacuum implausibly filled by 'heritage' culture. Colls' vision of 'English identity' was based on a sense of the long duree of the English state and an awareness of the importance of the contribution of the regions of England to that identity. His unease at the present situation was specifically associated with, what he perceived to be, the decline of the state, in particular its ability to deliver welfare and social protection, together with the collapse of regional economies and cultures, both rural and industrial, during the 1980s.

Ackroyd, as perhaps befits a professional writer of popular literary fiction, developed an altogether more idiosyncratic assessment of 'Englishness' in his literary confection *Albion*. Ackroyd emphasised the distinctiveness, conveyed in his reading of English literature, of its landscape and cityscape. He placed particular emphasis on the importance of locality and the 'dislike of abstract thought and theory' which he maintained to be typical of the English sense of identity. He emphasised, on the basis of rather idiosyncratic, literary *exempla*, that the English were 'down to earth, liberated and empirical' and were also enthusiasts for fantasy, horror, ghost stories, dreams and melacholia; that they revered the past but also had a genius for assimilation, embraced the heterogeneous and were good at absorbing European influences and immigrants. For Ackroyd, the English were a 'mixed and mongrel' race. Interestingly Ackroyd emphasised the continuing influence of the Catholic tradition of English culture, despite the rupture of the Reformation.

Ackroyd's vision of *Albion* is perhaps engaging, but hardly authoritative. It is a personal vision based on a predilection for Anglo-Saxon literature, the Authorised Version of the Bible, Herbert, Bunyan, Blake and the peculiar highways and byways of London, certainly English, but only a small part of the picture. Although redeemed by a certain quirky awkwardness, Ackroyd's vision is not unlike the nostalgic laments of Scruton, who deplored the decline of the gentleman, the hedgerow and the parish Church, or Heffer who complained that English folk-songs were no longer taught in schools. Although more open to European culture, at least the traditional Catholic version of that culture, Ackroyd's analysis of the English is haunted, like those of Scruton and Heffer, by an abject terror of absorption into a European state. In many ways, this fear has more to do with nostalgia and quirky exceptionalism than any real concern at the democratic deficit of the emerging European state, or its bias towards the market and globalisation; an anxiety of *Kulturpessimismus*, of a vaguely Spenglerian variety, rather than evidence of genuine political acuity. In this respect the analysis of writers such as Ackroyd, Scruton and Heffer contrasted sharply, and to their considerable disadvantage, with that of Orwell, an English thinker much admired by both Colls and Weight.

At the end of his survey of 'English identity' at the turn of the Third Millenium, Laity found himself unpersuaded by the argument that the decline of Britain was irreversible and that some kind of reawakened 'English identity', with a concomitant political and state expression, must emerge to fill the vacuum, a view held, in some degree, by all the writers which he discussed, with the probable exception of Ackroyd, whose focus was relentlessly literary and decidedly lacking in political sophistication. With an element of bathos, Laity concluded that 'God may not, after all, be an Englishman' but that England, held within some kind of British state, would continue much as before. This is a plausible assessment but one whose authority, once almost platitudinous, has been much diminished over the past thirty or so years.

It is clear from this summary of the debate held in 2002 and Laity's survey article that there are a wide variety of contemporary assessments as to the nature of 'English identity'. While there is no consensus whatsoever on the subject, indeed a very obvious agonistic conflict between differing interpretations of that identity, it is obvious that, during the past twenty years or so, 'English identity' has been transformed from being an unexamined and uncontested presupposition to being the subject of intense debate. It has become an object of desire which is manifestly unstable, while remaining decidedly obscure.

The development of a critical approach to the relationship between

'English identity' and the legal order has been pioneered by Peter Fitzpatrick, some of the legal scholars who contributed to the collection of essays entitled *Dangerous Supplements* which he edited, and Peter Goodrich. The publication of the collection of essays entitled *Dangerous Supplements*[32] in 1991 marked an important moment in the development of a critical approach to the study of the common law. In his introduction, Peter Fitzpatrick noted the importance of the relationship between law and the nation, a relationship which, he contended, was overlooked by most of those who wrote about jurisprudence at that time:

> Law's dependence on nation has been a constant affront to jurisprudential elevations of law [beyond contingency]. One resolution has been to endow the nation with the superordinate qualities of universal reason, and so on, attributed to law. It has been done, not least in terms of 'Englishness'. 'Englishness' itself is fast becoming a major intellectual concern.

Fitzpatrick was attentive to the fact that, in 1991, it was still possible to consider the 'Englishness' of English law either as unproblematic, or else as a supplement to the traditional virtues of the common law - reason, pragmatism, flexibility, avoidance of the abstract and theoretical and so forth.

1991[33] was a propitious moment for the publication of a set of essays, two of which set out both to explore the problematics of 'English identity' and also to develop a critical analysis of the fundamentals of English law. Not only had that *epigone* of 'Englishness', Margaret Thatcher, been unceremoniously bundled out of Downing Street at the end of the previous year, but the new government was in the process of negotiating what became the Treaty on European Union. The ratification of that treaty was, in constitutional terms, as important as that of the Treaty of Rome in 1972, raising profound questions about the nature of national sovereignty and provoking acute anxiety about the stability of British, and consequentially English, identity.[34]

The two essays in *Dangerous Supplements* which were of particular importance in relation to the development of critical perspectives on 'English identity' in relation to the Common law were David Sugarman's 'A Hatred of Disorder: Legal Science, Liberalism and Imperialism'[35] and Tony Carty's 'English Constitutional Law from a Post-modernist Perspective'.[36]

Sugarman set out to explain why the Common law, in contrast with that of the civilian jurisdictions, was not subjected to effective critical scrutiny until the 1980s. Sugarman pointed out that the judiciary, independent of the Crown and the Executive since 1701, had exerted an

unqualified control over legal education by means of their influence over the Inns of Court, institutions which provided most legal education until well into the nineteenth century. Solicitors were trained in the manner of apprentices learning a craft, there was no academic or critical component to their education whatsoever. The dominance of the judiciary over legal education was reinforced by the insistence of Dicey that the 'rule of law', a central part of the English constitution, was dependent on the autonomy of the judiciary and that it was that autonomy which legitimised the state.[37]

The development of legal textbooks, from the middle of the nineteenth century, took the form of what became known as 'black letter law'. The writers of the textbooks were deferential to the judiciary and sought to set out the law in their textbooks in the form of a commentary which aspired to be a virtual codification of the *ratio decidendi* of judicial decisions. However, although the development of textbooks may have aspired to be a form of codification, they possessed no authority of their own. Judges took no notice of textbooks, they were merely a means for students to learn about the law as practised by the judges. The authority of the judges remained beyond question. In this sense, Victorian textbook writers such as Anson and Pollock created a 'codification' that was limited in its impact to the narrow field of legal education. Bentham's ambition of creating a complete codification of English law resulted in nothing more than the creation of a series of textbooks marked by their extreme deference towards the judiciary. The works of these academic commentators were ignored when it came to the business of shaping the law; a prerogative which remained exclusive to the judiciary. Works of commentary, famously, have no authority in the English courts.

Between 1914, the date by which the major textbook authorities on English law had been composed, and the 1980s, legal education at London, Oxford and Cambridge was dominated by the study of these works combined with a modicum of Roman Law[38] which was known to be useless to practitioners and skimped by all but the most academic of students.[39] Austin's attempt, in the 1830s, to establish a university department in which a genuinely critical study of law could take place had, seemingly, come to nothing.

The dominance of the 'black letter' textbooks meant that the study of law at university was a matter of cramming for examinations by means of the rote learning of highly specialised technical facts. The academic staff, most of whom were also practitioners, concentrated their attention on teaching, supplemented by professional activity, rather than research. Outside London, Oxford and Cambridge the teaching of law was dominated by part-time solicitors and barristers rather than academics. For

students the only point of doing a law degree was that it gained an exemption of a year from the professional qualifications for the Bar and the Law Society enabling them to spend three undemanding years at university followed by a rapid induction into the mysteries of the profession and a high standard of living. It was hardly surprising that, in this atmosphere, a critical approach to the study of law failed to develop. Sugarman also drew attention to the fact that the writers of the textbooks on constitutional law, whose work remained influential until the 1980s, if not beyond, such as Dicey, Maine and Bryce, were emphatically not democrats.[40] These writers conceived the English constitution as being subject to law, as interpreted by the judiciary who acted as its guardians, rather than being determined by the popular will.

Sugarman also noted that, besides reproducing the personnel of the profession, until the 1940s, the other purpose of the study of law at English universities was to train imperial administrators.[41] If one strand of Benthamite radicalism ended up in the proliferation of deferential legal textbooks then the other was applied to the process of legal reform initiated by the Government of India during the mid nineteenth century; a period during which some aspects of indigenous Indian law were codifed for the purposes of imperial governance. In these ways, according to Sugarman, the radicalism of Bentham and Austin, which might have formed the basis for the serious critical study of law in England, thereby facilitating the reform of the legal system itself, was diverted to the uses of empire and the futility of 'black letter' law textbook composition.

Sugarman presented a dispiriting, but salutary, history of the academic study of law in England. It is clear from his article that, certainly until the 1980s, there was no serious critical study of law in England, instead there was a 'faith and belief in law'.[42] Judges were the 'high priests of law';[43] the law schools at the universities were like seminaries devoted to the worship of 'our lady of the common law'.[44] The education of lawyers made them, in the Coleridgean sense, a secular clerisy, a brotherhood of 'organic intellectuals' of a 'civil religion'.[45] It is worth noting that the current generation of Law Lords and Appelate judges was educated during this period of, what academics such as Sugarman, would deem to be 'darkness' and 'ignorance'.

In contrast with the United States, where the 'New Deal' era of the 1930s introduced legal realism into the academy, its concern with the social and economic dimensions of law enabling American legal academics, such as Karl Llewellyn, Rosco Pound and Lon Fuller, to challenge the dominance of the casebook based Langdellian approach, the English tradition of legal education remained innocent of such concerns,

immune to their radical potential for the development of a critical approach to legal studies. English lawyers, deprived of such influences during their education, would be incapable of sympathising with a critical approach which conceptualised law as a 'human construct embodying political and moral choice'.[46] For the English lawyer 'to challenge the dominant tradition risks being cast out like a pariah',[47] 'aspiration to respectability is purchased only at the price of abandoning one's critical edge'.[48] It was clear, according to Sugarman, that the failure of the English legal academy to develop an intelligent critical tradition meant that legal education, and therefore the attitudes and assumptions of lawyers, remained profoundly conservative and complacent until, first socialist lawyers in the early 1980s, and then, in the 1990s, radical critical legal academics began their 'long march' through the institutions of the legal academies enabling them to influence the teaching of law and thence the minds of lawyers. Given the enclosed, critically illiterate and self-protective nature of the legal profession, with its deferential attitude to the judiciary who remained in ultimate control of the profession, it was not surprising that it had taken so long for the law to be subjected to proper scrutiny and for lawyers to develop critical intelligence.

If Sugarman revealed the poverty of English legal philosophy, Carty put forward a theoretical approach to the English constitution which offered a means, to the perplexed aspirant English critical legal theorist, of moving forward from the poverty of legal philosophy identified by Sugarman to something altogether more alluring.

At the commencement of his argument, Carty focused on Hooker, rather than Hobbes, the starting point for H.L.A. Hart, whose modest contribution to critical legal theory dominated the academy until the 1990s. Carty argued that Hooker was the first legal theorist to grasp the jurisprudential significance of the Act of Supremacy in that he realised that it had created 'a single national interpretative authority'.[49] For Hooker, the 'English people were a single, complete church'.[50] This unity of law and people was secularised during the eighteenth century into the national legal establishment based on Parliamentary sovereignty that successfully defeated the challenge of the French revolution. Dicey separated this national sovereignty from history by asserting it to be an abstract principle, immune to rational criticism or genealogical analysis, upon which the distinctiveness and homogeneity of the English state was founded.[51] Hart rearticulated this principle as the basis of a legal system, subject to official interpretation of the 'rules of recognition'. The English constitutional order, as envisaged by Hart, was founded on the unquestionable 'sovereignty of Parliament', the source of the 'rules of

recognition'. Officials interpreted and implemented decisions emanating from an unquestionable authority which could not be evaluated in terms of those 'rules of recognition'.[52]

When first theorised by Hooker, at the time of the wars against Spain and the persecution of Catholics, the English legal order was defining itself in opposition to Europe and to the alien who was a Catholic. In such a context, the legal order was an indispensable means of preserving the physical survival of the nascent English state. By the time of Hart the English legal order had been detached from history, and all objective political meaning, to become abstract and vapid, the perfect legal conceptualisation for the bureaucratic state of administrative capitalism in the era of the 'end of ideology'.[53] As Carty put it 'the soul has gone out of a culture. What we are studying are fossils, ghosts, dead memories'.[54] According to Carty, the assertion, shorn of the history and politics which enlivened the thinking of Hooker, of the primacy of 'Parliamentary sovereignty' by Dicey engendered a constitution which had no outside, no possibility of critical appraisal. 'Parliamentary sovereignty' was beyond critique, an unquestioned and unquestionable foundation of the legal order.

Continuing his analysis, Carty referred to Karl Schmitt's essay on Hobbes[55] in which Schmitt, in the year of Munich, asserted that outside the state there is no law',[56] a fair statement of the jurisprudential consequence of the doctrine of 'Parliamentary sovereignty', although Schmitt would, primarily, have had in mind the Fuhrer's new order in Germany as an *exemplum* of such a legal order rather than the sovereignty of Crown in Parliament. The secularised, abstracted version of Hooker's jurisprudence put forward by Dicey was an example of the 'secularised theology' which Schmitt took to be the basis of a jurisprudence of the state and the constitution. The scope of such a jurisprudence of the state and the constitution was not limited by the constraints of either Catholic natural law or covenanting presbyterianism[57]; a state based on the 'sovereignty of Parliament', like that based on the 'Fuhrerprinzip', could not be limited with regard to its capacity to impose its unquestionable authority. Catholic natural law would subject the state to the constraints of a higher order; covenanting presbyterianism to the contract between God and his chosen people. When secularised, the jurisprudences of Catholic natural law, covenanting Presbyterianism or the natural law Anglicanism of Hooker which was rooted in the values of a specific community, would subject the state to some form of universal authority or else to popular sovereignty. However, no such restraint of the power of the state was possible in a legal order founded on a jurisprudence based on an abstract 'sovereignty of Parliament' detached from history. As Carty concluded, Dicey 'cuts

English constitutional theory off from the History which gave it a sense' thereby emptying it of any meaningful content.[58]

When reading Hooker it is clear that the English legal order was constructed as a means of ensuring national survival in a hostile world. Even when reading Hobbes it is plain that his conceptualisation of that order was a response to the challenge to the existence of a viable legal order posed by the civil wars and the execution of the King. When reading Dicey or Hart there seems to be little at stake other than the need to justify the existing legal order; the pressures of national existence or avoidance of civil war are no longer sensible, all that remains is a legal order based on a power that is unlimited and unquestioned, a legal order whose principles resist any critique by blind assertion. If that is the basis of English constitutional jurisprudence, as defined by Dicey and Hart, a jurisprudence with alarming similarities to that of Schmitt, the legal theorist of the 'thousand year Reich', then it is clear that the time for the adoption of a more critical stance towards the English legal order is overdue. Mrs Thatcher's invocation of Hayek's version of legal realism had reopened English jurisprudence to questions of politics, sociology and economics.[59] Carty demonstrated that the time had come for a re-evaluation of a constitution which was based on a barren, abstract doctrine which, if ever there was an English 'Fuhrer', could be deployed, without restraint, to infamous effect.

In his introduction to *Nationalism, Racism and the 'rule of law''*,[60] Peter Fitzpatrick observed that 'the story of modern law is integral to that of the nation'.[61] He continued, invoking the authority of Carl Schmitt, by noting that the national legal order 'will provide the 'exception' allowing for an almost unconstrained exercise of the state's political power where this was deemed by authority to be necessary'.[62] Not only was law integral to the nation, but the nature of the legal order conferred on the nation unlimited authority and power, an unregulated capacity for violence which could be directed at everything 'outside' its encompassing protection. In moments of 'emergency' that same unlimited power could be directed against its own legal subjects, if the exercise of such violence were necessary to preserve the integrity of the legal order.

Although the insights of Schmitt's jurisprudence were engendered by his struggle to conceptualise the legal order of Germany during the period 1918 to 1945, they have, as Fitzpatrick suggests, a wider relevance in that any 'national' legal order will be founded upon exclusion of all that is 'exterior' to that order; that the foundations of that same order will not be part of that order, rather they are the 'exception' which creates the space of possibility necessary for the formation of any legal order, an 'exception'

which is necessary to the existence of that order, but which cannot be subject to that order if that order is to be sustained in its authority. The origination of a legal order cannot be subjected to review by that order without unmaking that order. In this sense, any national legal order, most specifically that of England, is bounded by that which is 'exterior' to it and also by that which is anterior to it, its source of origin, situated at a time which is outside the time of the legal order itself.

In his essay 'Nationalism and Racism'[63] in the same collection, Fitzpatrick goes on to suggest that not only is the national legal order founded on an 'exception' which is not subject to that order and bounded by an exterior which allows it to define itself by means of exclusion, but that the national legal order is inescapably marked and shaped by that which it excludes. The excluded returns to mark, colour and form that which it seeks to exclude in order to define its own identity. Fitzpatrick quotes Slavoj Zizek's insight that 'the threatening intruder is nothing but an outside projection, an embodiment of our own inherent antagonism'[64] to support his contention that the exclusion which is fundamental to the nature of any national legal order will mark that from which the excluded is excluded, namely the notionally 'pure' national legal subject; 'embodying what remains 'within' the identity formed by its exclusion....the domain of formation of identity always remains within the identity itself'.[65] Fitzpatrick goes on to point out that, in the modern world, there is no transcendant exterior to the nation, just a negation of that which is within the national legal order. As Fitzpatrick points out, quoting Zizek again, a wholeness based on negation is inherently unstable[66] because any such wholeness will retain within itself a 'shadow' of that which it has excluded; identity created by negation cannot escape being coloured by that negation. If this is so then a 'nation cannot have a secure or settled identity'[67] because that identity is always open to being destabilised, or deconstructed, by scrutiny of the instability of its purportedly pure identity. Fitzpatrick concludes that, on the basis of this analysis, a nation is no more than the 'name for a certain radical impossibility'.[68] As far as Fitzpatrick is concerned, the nation is not a closed, stable legal order but an unstable, questionable myth.

In a notable article published in 1992,[69] Peter Goodrich set out a prospectus for the future of critical legal studies in England. In his article Goodrich adverted to the lack of 'a recognised domestic tradition of radicalism or legal non-conformism'[70] upon which an 'English' school of critical legal studies might draw and spent much time describing the marginality of critical legal studies in relation to the legal academy. These qualifications made, Goodrich's article, and the work that he has published