The broader project

It is commonly asserted that there is no concept of state in the Anglo-American tradition (Dyson 2010). Among the consequences recently claimed for this alleged absence is the normative impoverishment of British public law, the ease with which privatisation was effected in the 1980s, the fact that there is no way of imagining who owes the public debt, and the porous nature of the public private distinction. This project tests whether British legal thought indeed lacks a concept of the state, how the state might manifest itself, and why we may fail to see it. The early chapters aim to both explain the predominance of the current orthodoxy, and also to recover lost or suppressed normative resources which might help us analyse contemporary legal controversies. The later chapters will attempt to use these resources to analyse some of the problems that now present themselves such as conflicts along the public private divide and where international law notions of state meet domestic legal notions.

This is a law centred version of the state story. Legal sources, including case law, legislation and scholarly writings, have the capacity to absorb and reflect external intellectual currents. Sometimes, however, lawyers will have their own conceptual and internal commitments and will resist such outside forces. As a consequence, the legal story of statehood may offer an interesting independent narrative to contribute to the history of ideas.

We pick up the story at the beginning of the nineteenth century. Chapter two contains a discussion of Blackstone and Bentham who both prefigure the period in question. Blackstone has been credited with giving expression to a Hobbesian theory of state in English legal thought in his Commentaries (1765). In the introductory essay, Blackstone portrays the state as a persona ficta with a distinct moral personality which represents the unified multitude. In other parts of the Commentaries this representation of the state is identified as the King who unites “all the rays of the people and reduces them to one”. Blackstone engrafts the Hobbesian theory of state onto older medieval ideas of the King’s two bodies. The King simultaneously embodies the body natural who dies and the body politic which is perpetual. In these concepts we locate the state represented as a fictitious moral person in British legal thought.

Shortly after the Commentaries were published, Blackstone became the target of a vehement critique by Bentham. Bentham suggested that Blackstone’s indulgence in fictions involving political compacts, and absolutist sounding sovereigns should be avoided altogether in legal thought. For Bentham, what constitutes rulers is not normative, and neither is it the product of political theory: it is a fact of power. He urges that we should focus on real powers and on real people, and that we should avoid abstractions, such as King and Crown, which do not do any real work.

Skinner (2009) laments that it has been Bentham’s anti-statist approach that has dominated British political thought. He suggests that at the end of the century, Maitland would revive the conception of the state as a distinct moral and legal person, but that this would become part of a suppressed tradition. The draft chapter for discussion traces what happened in British legal thought in the period after Blackstone and Bentham and before Maitland.
In the last chapter we encountered an oppositional narrative that associates Blackstone with a normative statist view (the state as a personne morale) and Bentham with a normatively impoverished anti-statist view (no state, only real people exercising real power). In this chapter we shall complicate these dichotomies. We shall trace some of important legal developments which occurred between the first and second Parliamentary Reform Acts and how these would affect ideas of statehood and normative conceptions of the public realm. We shall encounter normative accounts of the state which did not depend on its taking the form of a personne morale, alongside others which did. The state was sometimes taken to represent the public and, at other times, the government of the day. Public norms would apply to officers and institutions which were not considered part of the state. A normative justification would be developed for attaching liability rules to individuals rather than to the state as a whole. Many of these ways in which “the public” would be imagined in British legal thought during this period cannot easily be captured by the broad labels statist and anti-statist. There is, then, a general problem with the oppositional narrative with which we began.

There is another, more particular, problem with the oppositional narrative that pits Blackstone and Bentham against each other. Blackstone’s abstract conception of the state and Bentham’s focus on “real persons and real power”, share an important element in common. They are both concerned with authority. Blackstone and Bentham each imagine a sovereign power which is able to effect its will. Blackstone speaks in terms of a unified will that resides in the sovereign: he writes of the King in Hobbesian terms as the person who unites “those several wills and reduce[s] them to one” and as the “will of the state united in a single person.”

Every public act must be traced back to this authoritative source. Bentham too, is concerned with unifying sovereign will and authority – if in much more practical ways. While Bentham is worried about Blackstone’s grand abstractions which might license a sovereign to abuse its powers, he is also concerned about the potential for officials to disobey or fail to fulfil the sovereign will. How can the sovereign rely on agents to pursue the greatest good for the greatest number, when “sinister interests” (especially those of politicians and lawyers) will be want to pursue their own interests at the expense of the common good?

2 W Blackstone, I Commentaries on the Laws of England (1765) 245, 52
The two traditions would not disagree about the need for unified authority. Where they would part company was in how such authority should be exercised. Blackstone’s followers would imagine authority exercised in a diffuse, tacit, common law way; Bentham’s followers would imagine authority in a much more practically unified and, ultimately, bureaucratic way. The point of apparent agreement would lead to major practical controversy. The traditional retelling of the clash between Blackstone and Bentham downplays this particular site of conflict.

In the early nineteenth century, it would be the utilitarians who would ask the question of how to make dispersed political authority dependent on the sovereign will. Paradoxically, in light of the anti-statist label that has been attached to them, it would be they who would be engaged in a defence of a centralised state drawn along French lines.

The question of how the sovereign would exercise its unified authority *in practice* would be critical to how the state would be conceived in British legal thought. In the first half of the chapter we will explore how the exercise of “sovereign will” was conceived in relation to the British administrative apparatus as it existed at the beginning of the century and how that conception changed alongside democratization and industrialization. It is the story of how abstract common law notions of “united sovereign will” came to be replaced by a more unified “political will” located in the central government. The accompanying debate was transacted at times in the language of “statehood”. As central government self-consciously aggregated power to itself, the accompanying political struggle and resistance would often include direct comparisons with the French state. Centralisation challenged, and was seen at the time to challenge, the essential features of the common law system and all that it entailed. Significantly, later there would be concerted, apparently self-conscious, collective legal amnesia both about these developments and the debates surrounding their meaning. Dicey’s late nineteenth century partial remembering of the century past would become the dominant orthodoxy in legal thought. Centralized bureaucracy would come to be regarded by lawyers as the late product of a new collectivism, and not as the deliberate development of a period in which laissez-faire rhetoric prevailed. What *would* last in legal memory would be a strong notion of sovereignty, usually understood in positivist terms.

These developments and expanding functions of government would also have consequences for how the Crown would be imagined. How unified will was conceived in relation to the administrative apparatus would have an effect on whether the Crown could be conceived as a
personne morale. One might have expected that as more power was aggregated to the centre, the Crown would have come to represent the whole administrative apparatus to which unified “public law” norms would apply. In fact, the opposite happened. The judges re-conceived of the Crown in formalistic rather than normative ways. Much that had been and would remain “public” would fall outside of the special legal framework that applied to the Crown. This would set the scene for how the law would develop in the twentieth century and for how the judges would see their role. The notion of the “public” would move to the peripheries of government and the judges’ role would shift from that of a central organ of executive government to an instrument of external control.3

The chapter will begin by describing some of the major administrative reforms of the nineteenth century. This is not intended to be exhaustive or an attempt to tell in any detailed way the story of a lost administrative law tradition – those books are yet to be written. It aims, instead, to mark out the major directions of change and their wider significance to law and its intellectual traditions. What was left out by the constitutional lawyers writing at the end of the century and why? The second part of the chapter will be more speculative. It will explore the related question of why the common law judges, reacting to this emerging new administrative apparatus, were unable to conceive of an abstract concept of the Crown that would represent the whole of the resulting centralised mechanism, as might have been expected. Finally, we will discuss how normative conceptions of “publicness” would become increasingly fragmented. The moral character of the public realm would come to be defined and regulated by a number of different legal regimes. There would be no unified normative conception of the public sphere.

**Real Persons, Real Power: Centralization as State Making**

It has been well-established that by the end of the eighteenth century, Britain already had a centralized, efficient and well-established “fiscal-military state”.4 Funding the American and French wars had required very high levels of taxation and an efficient centralised customs and excise administration to extract it.5 The sovereign will to tax, wage war, expand empire, and protect the country’s economic interests on the high seas (all powers originally associated

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5 Ibid.
with the common law prerogatives of the King) was manifest and the envy of Europe. The Treasury, under Sir George Harrison,\(^6\) had already begun to assert its centralized controlling authority and to organize itself in a hierarchical and collective way – and in so doing had self-consciously borrowed to itself overtly monarchical ideas of the prerogative and royal dignity.\(^7\)

The Treasury would continue to increase its power and control after 1829. And while it would attract some of the critics of the “new centralization”, it would not be their main target. The debate about centralization would be much more vehement in relation to new areas and techniques by which the central government claimed greater authority over the localities. Why the central-local struggle mattered so much was that so many of the new challenges posed by industrialization were most acute in the localities. There were no systematic mechanisms for dealing with pressing issues spawned by the industrial revolution arising in areas such as policing, prisons, poor laws, public health, gas, water and drainage, and the regulation of factories. These were not issues in any way associated with either royal dignity or prerogative power, or central government.

The issue of centralization would play out differently in different parts of the UK and Empire. This is an important caveat to all that follows. This narrative is essentially an English story. Ireland had often been the experimental canvass for centralizing power. “The most conventional of Englishmen were willing to experiment in Ireland on lines which they were not prepared to contemplate or tolerate at home.”\(^8\) Reforms to policing, poor laws and so on had long been tried out there first. Dispersed protestant elites in the localities had needed all the centralized authority they could draw on. Scottish local authorities, on the other hand, had been the earliest recipients of general powers of improvement, general policing powers and so on – though they had not been quick to use them. Different parts of the wider Empire would enjoy different degrees of independence over this time. No doubt these colonial experiments informed the English debate (as we shall see in at least one instance) but those important interactions and divergences are not the immediate focus of our attention here.

\(^7\) Ibid pp 86-87.
\(^8\) O MacDonagh, “The Nineteenth Century Revolution in Government: A Reappraisal” 1 The Historical Journal (1958) 52, 62 (quoting W L Burn). See also, for example, the discussion in O MacDonagh, *Early Victorian Government 1830-1870* Holmes and Meir NY 1977 at 181ff.
Before we can understand what the opponents of centralization were reacting against, we need a sense of how executive functions were organised in the early part of the nineteenth century. If Bentham was interested in real persons and real powers, it was because, at the time he was writing, both legislation and administration were largely understood in those terms. English domestic government was characterised by a system of personal, localised and dispersed powers in which the King’s Judges and Justices of the Peace were essential actors as well as overseers. Justices of the Peace, for example, decided after hearing evidence whether a local road was needed, where to build it, whose land would be acquired on which to build it, what the owners of such land should be compensated and where best to find the building materials. The fact-finding, particularistic, decision-making processes represented by the common law provided a model for all decision making – whether legislative or administrative. Private legislation too, for example, was formulated out of a process of petition and response before a committee, and costs might even be awarded against those promoters or opponents of legislation who were judged to be unreasonable or vexatious.9 Even the new “bureaucrats” – the “surveyors” and inspectors who would emerge during the century – would initially engage in similar fact-finding processes, except this time bringing to such processes their own expertise, rather than local knowledge and personal standing.

Only a highly reified account of “sovereign will and authority” would be able to explain how such a system could have the King or Crown as its centre or provide any sense in which this will was “unified”. It would be the King’s Ministers, the King in Parliament and the King’s judges who would do the governing, according to Blackstone’s account, drawing as it does on natural law theories of obligation and earlier notions of authority.10 Blackstonian versions of the constitutional story would remain resilient, even as the political facts became increasingly strained. In his 1886 text, for example, W E Hearn organises his chapter headings under the titles “The Legal Expression of the Royal Will in the Judicature”, “The Legal Expression of the Royal Will in Administration” and so on.11 Much of the administrative effort throughout this century, however, would be devoted to making law and administration more rational, efficient, and responsive. Officials would become increasingly dependent on sovereign will, meaning now “political” will and that “will” would come to be officially located in Parliament and answered for by ministers.

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9 1865 Cap 27.
How was power dispersed and later aggregated and how would that impact on notions of a “unified sovereign will”? We begin with the concept of “office”. Scholars disagree about the extent to which office holders retained real as opposed to merely formal independence from a bureaucratic hierarchy into the nineteenth century. There would, of course, have been a patchwork of different types of administrative and legislative organisation, and degrees of independence from the centre would have varied. For the moment we shall be dealing in generalities. In the second part we shall focus in more detail on one particular office: the Commissioners of Woods and Estates. What is important, for present purposes, is to appreciate the different ways in which “sovereign will” was conceived at the beginning as opposed to the end of the century.

Real Persons

Near the beginning of the nineteenth century there was a serious want of reliable agents. Melbourne, Peel, Gladstone, and Lincoln each expressed a desire for agents answerable to them. Politicians at the time had the choice between amateur but conscientious JPs who stood between the centre and the localities, (and who during this period received an increased criminal workload) oligarchic corporations, semi literate overseers, unresponsive parishes, or statutory commissioners of whom Parliamentarians were jealous and localities suspicious and resistant. There was a limited cadre of salaried civil servants at the centre but these appointments tended to depend on patronage. Even after a number of reforms to some of the worst abuses of office, Trevelyan would describe the public service in 1854 as attracting “the dregs of all other professions.”


15 Northcote and Trevelyan Papers on the Reorganisation of the Civil Service 1854 -5 Vol XX 1 413.
Many offices were “for profit” and so were conceived as a form of property. Such offices represented dispersed personal power that was independent both of administrative hierarchy and of parliamentary appropriation. In formal legal terms agents were often not answerable in any direct way to political masters. While some officers may also have received a salary, their main source of income was usually by way of fee taking for the services they rendered. Such fees paid their expenses and the salaries of their staff. Staff changed with the office holder. Fees in surplus could be treated as an officer’s own: “He might use the balance in hand as if it were his own money.”

Officers could be made answerable indirectly to the Crown and the public through the common law. The mechanisms that controlled officers were primarily legal rather than political and the ways in which these controls operated was to reinforce personal duty and personal responsibility. All public officers, whether or not appointed by the Crown, were understood in law as exercising primary responsibility for the powers and duties conferred on them personally, rather than as delegates of any political superior. They, in turn, were only responsible for those actions of their employees which they had directed or from which they profited: they were not vicariously liable. Wilful breach of office could lead to an action for its forfeiture, and failures to act could attract writs of mandamus or quo warranto. Tort law, and especially the public law torts such as false imprisonment, also played a regulatory role and focused on the person who actually committed the act.

Criminal law was a particularly important means of keeping officials in check. An officer would be answerable in criminal law for abuses of money and power. Indeed, statutes make frequent provision throughout the first half of the nineteenth century for subordinate officers to pay a surety or bond upon appointment to cover any potential fines they might incur for non-performance or negligent performance of their duties. For a time, criminal law, through penalties of fines and forfeiture, seemed to be the preferred means to enforce both sides of the regulatory administrative process. Members of the public could be fined for breaching

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16 Patronage, was of course, a very potent source of influence, if not accountability.
18 The sheriff was an exception see the discussion in Selway above n 13, p 215.
19 In 1843 a statute acknowledging an increase in mandamus actions was passed to make the writ procedurally easier to obtain (6 & 7 Vict, Cap 67).
20 R v Bembridge (1783) 3 Dougl 327,332; 99 ER 679,681.
21 So for example, a statute regulating Irish linen manufacture in 1835 empowered a committee to make rules to regulate sealmasters of linens. The sealmasters in turn were required to pay sureties upon appointment to cover any subsequent fines they might incur for neglect of such regulations. Breach of regulations by linen manufacturers also incurred fines and forfeiture (5 & 6 Gul IV c 27).
regulations: officers could be fined for failing to enforce regulations. Chester suggests that the use of criminal forfeiture as a punishment declined as office holding was replaced by employee employer relationships. Chester suggests that the use of criminal forfeiture as a punishment declined as office holding was replaced by employee employer relationships. Certainly these measures seem to become less frequent as the century wears on, though as late as 1867 a centralised system would be devised for the guaranteeing of such penalties.

Criminal penalties for maladministration or neglect of official duties were not only statutory but were also available under the common law. In the late eighteenth century case of R v Bembridge, Lord Mansfield set out very broad general principles on which a criminal sanction could be based:

“There is another principle, too, and that is this - where there is a breach of trust, a fraud, or an imposition on a subject concerning the public which as between subject and subject would only be actionable by a civil action, yet, as that concerns the King and the public (I use them as synonymous terms), it is indictable.”

It is striking that in Lord Mansfield’s formulation, the Crown does not represent the “unified political will” of the state apparatus. The unified will of the sovereign here means the will to do right: it is the will to uphold the law. The idea that the King could do no wrong was understood to go beyond mere immunity. The Crown is the moral exemplar ensuring that right be done by her subjects. Of course this is a legal fiction, and the results were almost certainly chaotic, unsystematic and subject to the vagaries of litigation. Even so, it is evident that the common law sometimes imagined the monarch as wronged along with his subjects by the wrongful actions of his officials. In other words, he does not represent the state apparatus itself, but is above it and simultaneously represents the public or the people. The King is harmed when the people are harmed by public officials.

There is no unified sovereign will here in any tangible organisational or political sense. Such controls as existed could only be exercised episodically and after administrative failure. Many controls relied on the actions of individuals (eg laying an information before a magistrate) rather than on mechanisms of central scrutiny. The concept of office would be a counterweight to attempts to centralise power especially given that the political authority of

22 Chester n 17, 141-142.
23 30 & 31 Vict cap cviii 1867.
24 (1783) 22 State Trials 1 at 151.
office often came from the locality and not from the sovereign, and office was frequently associated with financial and political independence.

Real Power

Such personal, independent, particularistic administration would not have necessarily worried the early Victorian. Legislated powers too were often personal, particularised and temporarily conferred – also modelled on common law methods of “rule-making”. Maitland’s observation that in the eighteenth century age of reason, “the British Parliament seems rarely to rise to the dignity of a general proposition” remained true for the nineteenth century even after the first Parliamentary reform.

The organisation and content of the statute book helps us to enter the Victorian mind. Lord Melbourne 1834-1846 thought that Parliament’s function was primarily an executive one and the statute book still largely reflected this during his time. Both Public General Acts and Private Local Acts contained little by way of general rules. For example, power would be given to build a road between x and y as marked in pink on a map deposited in a particular room at a named address. In similar fashion, persons and offices would often be referred to interchangeably. Individuals would be named by statute to official positions. Named individuals would be honoured, receive pensions for service, suffer illnesses which would require their removal from office, become naturalised or obtain divorces. Bentham, that great advocate of general rules, must have had mixed feelings from beyond the grave about the Public General Act, which conferred compensation on him by name for non-performance of the contract relating to Millbank Prison.

Though legislation was categorised into Public General and Local Private legislation, the labels were often misleading in both cases. While Public General statutes did contain matters we would broadly associate with the central government and the prerogative (such as the army (annual mutiny acts), taxation, customs and excise, the colonies, Irish and Scottish matters, treaties (especially anti-slavery measures during this time), appropriation and crown lands), they also contained much that was temporary, personal, and executive in nature.

26 The office of Secretary of State remained a prerogative position and was exceptional in the sense that different people could share the powers conferred.
27 For example Cap 88 1853.
28 6 & 7 Vict cap 76 1843.
This division did not necessarily mark the general nature or public importance of the subject matter, but rather where the legislation was initiated and the processes by which it was enacted. Local Acts were initiated by local promoters through Parliamentary agents and solicitors who served notice on interested parties and, if opposed, brought petitions to select committees. Select committees, chaired by the Local Member, would hear evidence from promoters and opponents of the Bills and onerous standing orders had to be observed.\(^{29}\)

It was these so-called Private Local Acts that dealt with many of the matters that were the most critical to the new industrial economy. They typically conferred powers on particular railway companies, banks, friendly societies, improvement commissioners, municipal corporations, and joint stock corporations, effected particular inclosures, and concerned the building of particular roads, water works and drains.\(^{30}\) The preponderance of such legislation is partly explained by the fact that corporations were not considered persons in law and their powers had to be explicitly conferred. Parliament was jealous of these powers and there was money to be made by lawyers and parliamentary agents from the processes associated with acquiring them. So, for example, when the local government of England and Wales was reformed by the Municipal Corporations Act 1835, the new corporations did not enjoy inherent powers to make by-laws or run trusts as the old common law or chartered corporations had done. If the new Corporations needed powers they were required to seek them through a Local Act.\(^{31}\) In many of the new infrastructural areas, corporations were increasingly interfering with private common law and especially property rights and needed to be statutorily empowered to do so. ‘Private’ legislation is a misnomer in the double sense that it was used to create artificial persons and to give them powers over natural persons and their property. If the locality wanted to address pressing social needs it had to negotiate a costly and expensive legal process. If a locality chose instead to ignore the need for drains and clean water (there were cholera and typhoid outbreaks during this time) there was nothing central government could do about it.

The statutes convey an overall impression that in the first half of the nineteenth century, most public power was still very much conceived as personal and dispersed, and it was dispensed through patronage (either central or local) to deal with individual cases. If, later in the

\(^{29}\) Even by 1848 for a Bill to be passed 18 different motions had to be put each giving an opportunity for debate, Chester above n 13, 111.

\(^{30}\) The King’s highways were regulated by Public General Acts.

\(^{31}\) The Scottish Municipal Act 1833 conferred more general and generous powers, though in both Scots and English law it was accepted that a corporation was not a person and could not undertake anything which was not permitted by statute.
century, the superiority of the common law would be asserted against statutes, in the first half of the century many statutes were still the products of common law methods and particularistic decision-making, and were made in its image.

Centralizing moves

Moves towards centralization came from a number of different political impulses – some conservative and fiscal, some Whiggish and utilitarian and some pragmatic responses to social needs (often driven by evangelical concerns).

Many of the reforms to the central bureaucracy were prompted by the same tendencies to fiscal conservatism as had developed the fiscal military state. Good Victorian government should be cheap and efficient government. Government spent less in 1850 than it had in 1780. By reforming the worst abuses of Old Corruption, the fitness to rule of Tory elites might be confirmed and defended. Harling describes the reforms wrought between the late eighteenth and the mid-nineteenth century as remaking “civil service [from] a form of private property to the notion that it was a public trust”. Even before our period, the worst abuses of office had begun to be targeted. There had been Commissions as early as the 1780s to enquire into fee taking and the public accounts. A series of legislative measures had been passed to abolish the worst sinecures, the right to grant office in reversion and the right to exercise office by means of a deputy. Statutes also prohibited the buying and selling of offices and the use of office as a bribe. The numerous compensation provisions for lost offices scattered throughout the statute testify to ongoing reform. The Municipal Corporations Act 1835 was both a Whiggish reform measure (it extended the franchise for boroughs beyond that of the 1832 parliamentary reforms) and part of the project to enhance public trust. It dedicated the corporate funds of the boroughs, which had previously been treated as private in the hands of municipal office holders, to public purposes. Property concepts would, however, linger. The relevant provisions of the Municipal Corporation Act would need to be tested by litigation before the change in status of municipal property would be confirmed as a matter of law.

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33 P Harling, above n 32 p 14.
34 Commissioners for Examining Taking and Stating the Public Accounts 1780-87; Commissioners for Inquiries into Fees in Public Office 1786-8 Commissioner for Enquiry into Fees 1786 discussed in J Torrance above n 6.
36 Attorney-General v Aspinall 2 My and Cr 613; 40 Eng Rep 773; Attorney-General v Corporation of Poole 4 My and Cr 27; 41 Eng Rep 11; Attorney-General v Corporation of Lichfield 11beav 119; S C 17 LJ Ch 472.
The Civil Service Gazette would carry the offer of a sale of a government position as late as 1855.37 Statutes by themselves do not change cultures and real change came slowly and often by way of changes to internal procedures. Thomas Macaulay and Charles Trevelyan, who had first used the East India Company as a “staging ground” from which to attack the Old Corruption,38 would work to increase salaries and pension arrangements, reform the government banking system so that money could be paid in daily and earn interest for the Exchequer rather than the office holder, make more government spending subject to formal appropriation, and bring the exchequer account at the Bank of England under tighter Treasury control.39 By the 1850s individuals entering the civil service would be required to take entrance exams. A system whereby civil servants were appointed on merit, who were answerable to a hierarchy and survived changes of government, very gradually began to evolve. The legal instrument for reforms of this kind would typically be the prerogative order rather than legislation. The use of prerogative orders would mark an association with Kingly authority. Officials above party politics would claim to represent the “state above parties” after 1830. The Crown would become a “symbol less of royalty than of the corporate power and prestige of officialdom”.40 After 1830, and contrary to the hopes of many of the supporters of the Trevelyan reforms, the Treasury would also become increasingly aristocratic.41 By 1855 Sir Charles Trevelyan could claim that the Treasury was the Chief Office of Government.

One centralizing trend, then, was continuous with the forces which had developed the fiscal military state of the late eighteenth century and had as its primary objects the improvement of efficiency and propriety. Some of the impetus for centralization, however, would also be radical and reformist. Both Whigs and utilitarians favoured centralized government despite their apparently shared preference for laissez-faire policies. Tories, by contrast, on the whole

38 T Alborn, Conceiving Companies: Joint Stock Politics in Victorian England Routledge London 1998 p 12. This reform response was not only intended to deflect pressure from parliamentary reform and not to concede to attacks on aristocratic rule but to reaffirm a belief in aristocratic rule as the natural and best form of government.
39 In 1835, for example, Parliament thought it necessary to make clear that the fees taken by a Surveyor of the Highways, on his death became the property of his successor, and that his executor could be sued for them. Preservation of Public Highways Act 5 and 6 Guileimi IV c 50 sxlii. It was still a patchwork at this time but real efforts at rationalisation were beginning to occur by the 1850s. By 1850 7 different classes of appropriation listed in Act –and we can begin to see more clearly the extent of employment relationships.
41 Torrance p 78. But J Hart suggests that support for Trevelyan largely came from those seeking to limit aristocratic influence.
disapproved of laissez-faire policies, but tended to favour localism which was in practice the
surest mechanism for delivering laissez-faire policies.\textsuperscript{42} Paradoxically, centralization, forged
at a time when laissez-faire was the dominant ideology, would make many social reforms and
a paternalistic state possible.

After the first Parliamentary Reform we begin to see a few but very important legislative
examples of the more radical reforms usually associated with the Whigs and the utilitarians.
This legislation tended to state more general rules, and to provide more general empowering
provisions. With these general rules came the emergence of more bureaucracy and more
systematic regulation. Some measures were necessitated by greater religious toleration
requiring secular administrative institutions such as registrars of birth and death. Many were a
response to novel social pressures. These included factories legislation, improvement and
public heath schemes, the regulation of passenger ships, the alkali acts using new scientific
techniques to reduce air borne pollution\textsuperscript{43} and statutes creating the new tithe and poor law
commissions, all of which involved new forms of centralized administration. All of these
initiatives would have a centralizing tendency and would depend on new administrative
techniques. They would rely on inspection, audit, statistical methods, experts, and reporting
to central agencies. Political controversies over these new methods were ongoing and some of
these experiments would prove to be temporary.\textsuperscript{44}

Government gradually acquired more formal control over legislative initiatives in Parliament,
after the first Reform Act.\textsuperscript{45} At the same time it also acquired more general rule making
power over the localities – though not as we would understand it today. This more general
legislation did not so much control local government and administration as moderate the
central government’s relationship with the localities. Permissive legislation became more
common – so for example, Parliament would now pass model sets of improvement powers
which individual municipal corporations could adopt by local Act (lowering the legal cost of
local initiatives).\textsuperscript{46} In 1846 it set up a system of “preliminary inquiry” whereby a surveyor

\textsuperscript{42} D Roberts, “Tory Paternalism and Social Reform in early Victorian England” 63 The American Historical
Review no 2 (1958) 323, 335. Roberts suggests that “localism was another form of laissez-faire” (335).
\textsuperscript{43} R M MacLeod, “The Alkali Acts Administration, 1863-84: The Emergence of the Civil Scientist” 9 Victorian
\textsuperscript{44} Eg Public Health Act 1848, Poor Laws Act 1833. While the General Board of health was abolished in 1854, it
was turned into a department of State.
\textsuperscript{45} Government would only achieve formal priority for its legislative initiatives in 1835 (Anderson n 13, 334)
though some commentators put government control of the legislative programme as late as 1870 (Chester n 13,
113). The Parliamentary Counsel Office was not established until 1867.
\textsuperscript{46} For example, Town Improvement Clauses Act 1847.
made a local examination of a district and made a recommendation to Parliament in relation to the district’s need for paving, cleansing, waterworks and associated powers. The Public Health Act 1848 (much hated in certain quarters) conferred extensive powers on a central General Board of Health, but these powers were only triggered by an above average death rate, local petition or independent inquiry. The General Inclosure Act 47 empowered Commissioners to make local inquiry and to make provisional orders subject to Parliamentary approval. The cost of such orders was thereafter borne out of the consolidated fund rather than by local agents. Through these different processes we can see that general rule making is gradually becoming disentangled from administrative decision-making and more and more of that general rule making would become the product of central government initiative. A general system for joint stock company creation by a system of registration is all of a piece with these movements (as we shall see in chapter 4).

Private Local Acts still continued to be significant in terms of their volume and the demands they placed on Parliamentary time, but a new system of central direction and control was beginning to emerge. The processes associated with local Acts themselves began to be the subject of procedural reform. By mid-century, concerns were beginning to be expressed about the expense, time and nature of these procedures. Joseph Hume, a prominent committee member and utilitarian, 48 suggested that local bills though private in name, commonly affected the public interest – and that the views of the public were not represented in the existing quasi-judicialised process. This was perhaps one of the earliest critiques of the common law model and of its attempt to instantiate the “public interest” through the representation of narrow sectional interests. Instead it was to be bureaucracy which would somehow better represent the public – a general public policy preference which was to become a motif of British administrative law for most of the twentieth century. In response to these various concerns, legislation was passed to allow preliminary enquiries to be undertaken at the local level by professional surveyors who would report to the House of Commons. 49 New measures ensured that the procedures for enacting local acts became more

47 9 and 10 Vict cap XVI.
48 Hume had made his fortune by way of the East India Company which enabled him to buy a seat in the Commons. “Having thus profited handsomely from the Old Corruption he made his political reputation by relentlessly attacking it.” P Harling above n 33, p 172.
49 9 and 10 Vict Cap CVI.
public, more bureaucratic, more official and were no longer chaired by the local member. Some categories of bills would begin to receive prior scrutiny from a central bureaucracy.

One particularly marked trend was the increase in the powers of the Board of Trade. So, for example, Parliament in 1840 gave the Board powers to scrutinise and disallow railway by-laws, powers which had previously been exercised by JPs. At the same time the Board acquired from JPs jurisdiction over disputes relating to railway land. Even more striking is the Railways Act 1844 which conferred on Government a general option to purchase railways which made more than 10% annual profit, and required as a condition of any company seeking new powers that it offer a cheap daily return fare. The assessment of whether railways had exceeded their by-law making powers was reposed in the Board of Trade inspectors, and the Board of Trade was able to dispense with legislated conditions without being liable for the prescribed penalties. Enforcement no longer relied on an information procedure before Justices, but rested with an inspectorate and the Board of Trade which advised the Attorney General or Advocate General whether to bring an action. Thus regulation of the railway industry was achieved through centralized inspection, audit, a power of sanction and the threat of ultimate sanction – nationalisation of the industry. It would become a model for the regulation of monopoly that would be copied elsewhere. Sponsored by Gladstone (a free trade opponent of the corn laws), these are not policies usually associated with a period of laissez-faire – though as measures aimed at ensuring competition they are not necessarily incompatible with it. They also demonstrate that the administrative techniques which so outraged Dicey in *Law and Opinion* (techniques which he regarded as

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50 The Preliminary Inquiries Act reforms were not entirely successful and those procedures had to be revisited see S Anderson above n 13 p 334.
51 Eg Improvement bills.
52 The Board of Trade’s full title was The Lords of the Committee of the Privy Council appointed for consideration of matters relating to trade and foreign Plantations (created by o in c 23 August 1786). The Vice President of the Board of Trade held a junior ministerial position. Gladstone while a Minister in Peel’s govt was the President for a time. Privy Council had about 250 members and did not really meet. Board of Trade had a number of departments – and performed a lot of real work including in relation to railways.
53 Cap XCVII 1840
54 See further I McLean and C Foster, “The Political Economy of Regulation: Interests, Ideology, Voters, And the UK Regulation of Railways Act” ???
55 See for the detailed discussion of other examples of delegated power O MacDonagh, “Delegated Legislation and Administrative Discretions in the 1850’s: A Particular Study” 2 Victorian Studies (1958) 29.
56 By the 1845 Railways Consolidation Act, railways were given general authorization for specified works – along with an obligation to pay damages. Such generalised authorisation would not have been possible without an inspectorate.
57 This is not entirely unlike the way in which the East India Company had been regulated.
the product of a dangerous new collectivism) had precedents during what he considered to be the individualistic golden age.58

MacDonagh describes the “progress” of centralization and systematisation as stuttering – as a matter of advance and resistance, and by no means inevitable.59 Many legislative interventions were provoked by public opinion and cause celebres and often the administrative responses proved ill-judged or inadequate and had to be revisited.

There was, nevertheless, a significant shift from personal and particular power, to hierarchical and bureaucratic power and to the use of experts. But the move from personal powers, associated with office, to delegated power, associated with bureaucratic hierarchy, leaves a legal responsibility gap. The shift from a Parliament primarily devoted to issues of administration to one now concerned with general rules leaves a political responsibility gap. How then to square the circle? How to unify will in both political and legal senses?

Legal responsibility for office did indeed change as we shall see in more detail in the second part of this chapter. At the apex of government, legal notions of liability would for most practical purposes be replaced by political notions of responsibility. The Crown and its servants would enjoy immunity from legal liability, including for those wrongs the Crown or its servants directed or ordered. Officials would continue to be personally liable for unlawful actions they personally performed – and even now in cases when they were exercising delegated power rather than powers legally reposed in them personally. The effect was that it would be impossible as a matter of law to locate a “unified sovereign will” that intended to commit an unlawful act. Legal responsibility would continue to focus primarily on “real persons” rather than abstract ones.

What of political responsibility? If the partially reformed Parliament was no longer to have a role in executive functions, how was it to scrutinise or influence an administration over which it seemed to have little or no control? If hierarchical controls were to be put in place, what should be the proper connection to Parliament? Perhaps these ways of asking these questions

58He expresses consternation in the second edition of Law and Opinion that under the National Insurance Act 1911, Insurance Commissioners appointed by the Treasury were given wide power to make regulations p xl “This power to make regulations is probably the widest power of subordinate legislation ever conferred by Parliament upon any body of officials, and these officials namely, the Insurance Commissioners, are appointed by the Treasury. “In 1844, for example, the Board of Trade was empowered to make regulations for the form of returns required of Joint Stock Companies. These were to have “like force as if contained in an Act” so long as they applied to “all companies alike”.

59 O MacDonagh, Early Victorian Government 1830-1870 Holmes and Meir NY 1977 eg at 8-9.
make a system of individual Ministerial responsibility to Parliament seem almost inevitable. It was not.

Indeed, when Earl Grey stated the principle of responsible government in 1858 it was very far from the system that uniformly operated in the UK parliament. It is likely that in this instance the UK’s colonial experience informed its domestic constitutional law. In 1839 Lord Durham, for some time Governor-General and Lord High Commissioner of the British North American Colonies during a period of near rebellion, had presented to the UK his Report of the Affairs of British North America.60 In it he urged acceptance of the principle of responsible government for the colony: that is that the administrative as well as the legislative function ought to be entrusted to Ministers who maintain a majority in the Parliament – and that the administrative function ought not to reside in the hands of the Governor acting in accordance with his instructions from the UK. The idea was taken up in 1854 by the new General Assembly of the New Zealand House of Representatives who requested of the acting Governor that he consider the resolution of the House that ministerial responsibility in the conduct of legislative and executive proceedings should be established by the Governor without delay.61 The British Government’s response (from Earl Grey then Secretary of State for the Colonies) was affirmative. Is it entirely surprising then, that it was the same Earl Grey who in 1858 suggested that the situation in the UK Parliament was the following.62

“the powers belonging to the Crown [are] to be exercised through Ministers who are held responsible for the manner in which they are used… and who are entitled to hold their offices only while they possess the confidence of Parliament, and more especially the House of Commons”?

This is an example of imperial government learning public administration from the colonies – or rather transplanting the solution to a colonial problem to a domestic setting. It is significant that the first “English” constitutional law texts to mention responsible government were written in Australia and Canada.63 There was, in fact, no uniform or consistent system of Ministerial responsibility for the bureaucracy in the UK Parliament in 1858 and a mixed

60 He had been assisted in Canada by Charles Buller and Edward Gibbon Wakefield. I am grateful to Dame Alison Quentin-Baxter for calling this to my attention.

61 Extract from the Minutes of the proceedings of the House of Representatives, 6 June 1854. Edwin Gibbon Wakefield coincidentally was the chief force behind the New Zealand Company emigration scheme.

62 Quoted in Chester, above n 13, 81.

pattern would continue until at least the 1880s. Even as the centre was becoming increasingly bureaucratic, a range of new Offices, Boards and Commissions had been created by statute especially during the 1830s and 1840s. They took a hybrid form – having some of the characteristics of independent officials and some of the characteristics of officials in a hierarchy. In many cases, the members of such Commissions or Boards were excluded by statute from holding a seat in the Commons.\footnote{The idea that officers for profit appointed by the King should not be allowed to sit in the House of Commons goes back to the Act of Settlement. Various statutes during the early nineteenth century allowed and disallowed commissioners and board members to sit in the House. The practice appeared to be unsettled at the time.} In other cases one of the Commissioners would be a Minister but power and responsibility would be shared equally between the Commissioners. The Board as a whole may have had an obligation to report to Parliament, but that was all.\footnote{Parliament could and did set up some Commissions of limited tenure and used that as a measure of accountability eg the General Board of Health.} Far from being answerable for the whole, Ministers would sometimes use their Parliamentary position to criticise the actions of fellow commissioners. Indeed, the “mid-century reaction against the Whiggish notion that executive power was best vested in multi-member boards and that there should be a move to ‘single-seatedness’” (Bentham’s expression) was still in progress in 1858.\footnote{S Anderson above n 13, p 359 and citing BB Shaffer, “Idea of a Ministerial Department” 77-8.} Autonomous statutory commissioners would survive into the 1880s and 1890s – though they would be “invisible to the constitution writers”.\footnote{W Bagehot, The English Constitution 1867 London OUP 1928, preface to second edition.} Varying degrees of independence from central control would characterise English administration in contrast with the French.

At the time Walter Bagehot was explaining the centrality of ministerial responsibility to the British Constitution in 1867, he was advancing a justification for an evolving practice, rather than explaining a well-established orthodoxy (as he claimed to be doing).\footnote{Ibid, 194} It was in truth a new idea that was as often observed in the breach. The political failures of the Poor Law Commission, controversies over the inclosures of Crown land, and problems connected with the General Board of Health could all now be accounted for, not because of central-local resistance, but because these boards and commissions were too independent from Parliament: there was no politically responsible Minister. The problem was not too much “centralization”, but rather, not enough. He says of the Poor Law:\footnote{Ibid, 194}
Independent, unsheltered authority has often been tried, and always failed. The most remarkable is that of the Poor Law…[The] whole of its goodness has been preserved by its having an official and party protector in the House of Commons.”

Significantly, Bagehot proclaims that the great success of the English Constitution is “unity” – that in it the sovereign power is single, possible, and good. Centralization of the sovereign will – understood in a political sense – appears to be complete and has been made compatible with parliamentary government. It is now Ministerial responsibility (and collective Ministerial responsibility) that brings “unity”.

**Backlash: A Debate about the State**

These developments – associated at the time mainly with Whig Reformers, and to a lesser extent with utilitarians – met with instant and vehement resistance. The political back-lash was robust and expressed in statist terms. English attempts at centralized administration would be compared to the French state by contemporaries on both sides of the debate. John Walter in *The Times* protested against the utilitarian Edwin Chadwick’s “French centralization” in the organization of the Poor Law Commission. Chadwick himself compared his administrative techniques with those of the French. His Board of Health was described as “going off to Paris” and “UnEnglish”. Trevelyan in a letter to Gladstone in 1854 suggested that one of his own reforms to the Treasury would “bring the office into a more intimate relation, according to the French system”. Mr Podsnap simply said “Centralization. No. Never with my consent. Not English”. Such comments suggest that attempts to aggregate power to the centre were conscious, explicit and born of explicit comparisons with other state models.

Much of the resistance is stated in passionate language. The Birth Deaths and Marriages Registration Bill is described as the “Devil’s parchment”. “Centralization is Despotism” reads another headline in an article that complains that centralization lends “aristocracy to...
functionaries”.77 A satirical song about measures to protect public health describes centralization as an “infection”.78 An 1870 article in the *Examiner* compares centralization to Bonapartism: “if works of public improvement and public health went on tardily, officials, moneyed men, and club politicians told us that London, too, wanted a Haussmann to trample down all resistance, and to put his hand in the pocket of the future”.79

There were very serious arguments at stake. The independence of the local magistracy was being undermined. Patronage now centred almost entirely on central government and this threatened to undermine liberty.80 “Unified will” may be much safer understood in the abstract rather than when it is practically “fetter[ing] John Bull to the chariot wheels of the Minister”.81 More temperately, a letter to the editor of the *British Magazine* in 1832 recognised that centralization “is plainly requisite for the well-being of the state”.82 But the letter goes on to express Quentin Skinner’s concern83: “hitherto the Nation was the principal and the government but an adjunct to it”. The state and the government apparatus are becoming synonymous.

While most lawyers thought of statutes as beneath their notice, some commentators, such as Toulmin-Smith, recognized the centralizing trend as a direct attack on the common law:

> “The fundamental principles of the Common Law … are altogether set at nought by the Public Health Act [1848] … [A] central Board having no possible knowledge of circumstances, presumes to arrogate power to dictate as to all those things which… can only be well understood and ordered by those immediately interested.”84

And in the debate on the Public Health Bill, Urquart suggested that the common law had already solved these issues:85

77 *The Age* Nov 05 1837 p 36.
78 *Fun* 4 “A Song About Centralization” 1863 April 25 p 58.
79 *Examiner* 1870 Sept 10 p578.
80 See eg *The Leader* 2:56 1851 April 19 p 370 commenting on the decay of local influence.
81 *The Age* 1835 July 26.
82 Letter to the *British Magazine* London 1832 6 (1834:Nov) 514.
83 Q Skinner, above n 1.
85 Urquart for Stafford speaking to the public health bill 1848 *Parliamentary Debates* 1848 s 3 98:710713, 711-12.
“Anyone who would take the trouble to refer to Blackstone’s Commentaries would find that the common law provided ample means for putting down all the nuisances to which this Bill referred.”

These critics are not wrong in recognizing the new legislative mechanisms as threatening both common law method and ideology. The common law indeed represented an older rival means by which the unity of the sovereign will could be achieved by tacit acceptance and adoption by the sovereign – and by particularistic decision-making that conformed to the general principles of the ancient constitution. Not only did these new legislative examples eschew common law method and challenge its ideas about interest representation, they often showed little respect for property rights. The legislation made famous by Cooper v Wandsworth Board of Works86 conferred broad powers (without notice) on sewerıng authorities to demolish and remove dwellıngs that posed a risk to health in a time of cholera. The analogy with Baron Haussmann’s sweeping powers to rebuild Paris begins to look apt.

The most robust and coherent intellectual defence of centralization came from the utilitarians. The degree to which the development, albeit incremental, of centralized administration, during this period was a direct consequence of Bentham’s thought and of the efforts of his influential utilitarian admirers 87 has been the subject of much scholarly debate.88 We should be careful not to claim too much for the influence of any single political theory. Bentham’s Constitutional Code was certainly not treated as a blueprint, but equally it cannot be an accident that it was his acolytes who would carry out many of these ideas in the most prominent and controversial legislative examples of the day such as the new poor law, inclosure, factory inspection, public improvement and public health legislation. The legislation would incorporate Benthamite methods of audit, inspection, and statistical inquiry – though it is impossible to prove that these inclusions were the direct consequence of utilitarian philosophy. Key figures in the implementation of such laws, such as Edwin Chadwick, would certainly be motivated by the principle of utility. For Chadwick, the idea that private interests should be forced into alignment with the public interest, formed the

86 (1863) 14 CB (NS) 180.
basis of his version of res publica. One of the biggest contributions Bentham and his followers may have made to these developments is their emphasis on general laws, long before the need for or efficacy of such legislative techniques was recognised by Parliament.

What can at least be said is that Bentham was not only concerned about sovereign entities overreaching or abusing their powers but also about the potential for officials to disobey or fail to fulfil sovereign will. Up until this time, the solutions to these problems had been left almost entirely to the common law and its remedial writs for the performance of duties of office. Such remedies did not operate in any systematic way and were always controls after the event. The utilitarians were interested in other, potentially more reliable, methods of diagnosis and control.

It is John Austin who would deliver the most sustained defence of the reforms to public administration. In a 48 page article entitled “Centralization” which appeared in the Edinburgh Review in 1847, Austin, defended centralization against the charge that it was necessarily synonymous with “over-government.” At the same time he makes clear that utility and not freedom should be the more fundamental norm for the utilitarian:

“some of these maxims (as for example, the celebrated laissez-faire) are plainly false and absurd, since they plainly imply an assumption which would prove the inutility of law and government”.

The article now reads as an introduction to an early twentieth century defence of administrative law. The issue of how the administrative apparatus should be organised, he claims, may be more important to a government than how its constitution is arranged. Civilised societies, he urges, need a centralized administration that makes dispersed authority dependent on the sovereign will – but one that also allows for discretion and delegation. Unsurprisingly given his earlier views about general jurisprudence, for Austin, the details of administrative arrangements making functionaries dependent on the sovereign will, are a part of sovereignty itself. In the 1847 article he defends an ideal version of sovereignty rather than the more abstract and universal notion which appeared in his Province of Jurisprudence Determined in 1832. His “control view” of administration is remarkably similar to what we

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89 The last would re-emerge much later in public choice theory?
90 John Austin also argues for the removal of private legislation as a category.
would now think of as a “classic transmission belt theory” of administrative law. The will of the centre should be accurately and completely conveyed to its agents who execute it. The judges should supervise the faithful transmission of the sovereign will. Austin’s essay, important though it is, is not any part of the received canon of modern administrative law. It tells the now invisible story of state building: how the substitution of a unified political will, for an older reified version of will moderated through common law processes and practices, made the nineteenth century state.

Lawyers, on the whole, would not engage with these discussions. As we shall see in the next chapter, the only aspect of the Benthamite inheritance that would attract broad interest within the legal profession in the nineteenth century would be Bentham’s account of the highly abstracted sovereign aspects of statehood (the ability to command). It is this account, as retold by Austin, that would become the centre-piece of analytical jurisprudence in the later nineteenth and twentieth centuries. Lawyers would know little about statutes and still less about administration. No one would study them. Techniques of “good government” would be eclipsed by government per se. “Good government” as understood by the early utilitarians, would become part of a suppressed tradition (at least in legal circles). Arguments against “Centralization” would, however, continue to feature in the periodicals press at least until the 1870s. Later in the century the target of resistance would shift to ‘officialism’ or ‘red-tapism’.

And Dicey?

Lawyers around the Empire received these new ideas about state apparatus and the practical remaking of the notion of unified will, with what appears to be very little self-consciousness. Of the constitutional text book writers it is only W E Hearn who even recognizes the existence of a civil service. He suggests that: “men trained to the work [of public service] and skilled in its execution” and “with security of tenure” have been “steadily recognized throughout our political history.” The fact that Professor Hearn grew up in Ireland and wrote his book in Melbourne may have contributed to this sense of the inevitable. It appears

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94 Roberts above n 89 p 207.
95 I disagree here with Roberts above n ??? about Austin’s defence of centralisation coming after the fact.
97 2 ed 1886 259-260.
that the administrative apparatus arrived towards the end of the nineteenth century “ready made” at least as far as constitutional law was concerned.

The most famous of the constitutional text book writers, was, of course, A V Dicey. For many of the same reasons as he did not recognise an English administrative law, Dicey did not recognise the civil service or “state building” during this period – the Great Seal was administrative “mechanism” enough for him. In his Lectures Introductory to the Study of the Law of the Constitution (1885) he would emphasise the differences between the UK and the French systems of administrative adjudication (the sections exploring the differences expanding as the work appeared in new editions). For Dicey, droit administratif was about the position and liabilities of state officials relative to the civil rights and liabilities of private individuals. It was not about the powers of officials and neither was it about the distinctive organs of government and their relationships to each other, as Dicey’s French law counterparts would have understood it. While he acknowledged the latter to be a core part of the study of droit administratif for the French lawyer, he deliberately chose not to discuss it. He certainly would not have been prepared to recognise that the British state could have been built on a French state model. We (the UK and US), he claims, derive our civilization from English sources, and hence administrative law is unknown to us. There is no state to be found in England, even understood in the most reductionist, Weberian sense of an administrative apparatus.

The debates about, and developments in, the administrative apparatus are even now better known to historians of the nineteenth century than they are to lawyers. In legal thought, by contrast, the early nineteenth century is almost universally regarded as a period of unrivalled laissez faire. Government would not interfere with the economy; the free market would reign, collectivism would be unknown until after 1870. If we know of “legislation” from that period we think of the repeal of the corn and usury laws, reform of divorce laws, and of free trade. Utilitarianism would mean the political dominance of the view that individuals should be free to pursue his or her own self-interests, not the necessity of subduing “sinister interests” or

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98 1885 1 ed p 330.
100 10 ed p 333.
102 Among the areas regulated were foodstuffs, slaughterhouses, passenger carrying ships, ill treatment of animals, weights and measures, trade quality (wool flax, gold) and licensing.
squaring personal interests with the public interest. So we were told by Dicey in his 1905 Law and Opinion. Dicey simply fails to take account of the most important legislation passed during the earlier part of the century. His narrative has dominated legal thinking ever since.

As the archetypal “administrative law denier” Dicey has been the favourite whipping boy of administrative lawyers for so long that it is difficult now to do him justice. We know that he knew about the changes to the central bureaucracy – not from Law and the Constitution but from the later Law and Opinion. Indeed, in Lecture IX of Law and Opinion there appear three sentences and a footnote that not only acknowledge that the “English administrative machinery was reformed and strengthened” during the period he describes as a “Golden Age” of Benthamite Liberalism, but that “the machinery was thus provided for the practical extension of the activity of the state.” His also credits Bentham with the invention of the “new system of centralisation”, inspection, and central control of local government but laments that:

“The English collectivists have inherited from their utilitarian predecessors, a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited to socialist experiments.”

These points are rather hidden in his larger narrative which tells a story that associates Bentham almost entirely with laissez-faire, and the first half of the century with policies of limited government intervention. And while in these three sentences he acknowledges that the collective state was built on these earlier reforms, he is not always accurate when describing how powers were actually used in earlier, allegedly less interventionist, times. For example, in the 1914 edition of Law and Opinion, he describes the power delegated to the Insurance Commissioners appointed by the Treasury under the National Insurance Act 1911

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103 Idea which are present in both Adam Smith’s and Bentham’s works.
108 Ibid 310.
109 Ibid 306.
as “probably the widest power of subordinate legislation ever conferred by Parliament upon any body of officials”. We know, and presumably he did too, that the Board of Trade had enjoyed equivalent or greater powers as early as the 1840s (see the earlier discussion). On the other hand, he does acknowledge what it has taken many modern administrative lawyers a long time to notice: that the existence of strong centralized state power can be as important during a time of laissez faire or “more market policies” as it is during a time of welfare intervention. Later, lawyers such as Lord Hewart, in his The New Despotism (1929) would almost entirely associate delegated power and bureaucracy with the “new” collectivist welfare state. Nineteenth century experiments in administrative regulation, part of a suppressed tradition of administrative law, would only be partially recovered by Carr, Robson, Jennings, Willis, and Laski, writing in defence of the welfare state and in reaction to Lord Hewart in the twentieth century (as we shall see in chapter 6).

Of a “unified sovereign will” there is, of course, much in Dicey’s Law of the Constitution. As every constitutional law student knows, according to Dicey, Parliament, or technically the Queen in Parliament, (and not the Crown or King) is the full repository of legal sovereignty. Political sovereignty or will, as opposed to legal sovereignty, though, for Dicey, remains in “the people”. He wants public opinion to act as a check on Parliament – at the same time as he acknowledges that law can lead as well as follow public opinion. He is plainly concerned about the dangers of a too unified sovereign will.

Dicey was, of course, not alone among utilitarians in approving the 1832 extension of the franchise “to the middle classes” but recoiling from the later attempts to extend the franchise still further and in deploring the “collectivist” and “socialist” legislation which was promised and followed after 1870. Austin too, opposed any further advancement toward democracy in his pamphlet Reform in 1859. Dicey reads J S Mill’s On Liberty (1859) as placing freedom rather than utility at the heart of utilitarian creed (and thus he directly disagrees with Austin’s 1847 view without ever having to refer to it). There is a sense in Law and Opinion of a Mr Brook “having looked into a thing” and “knowing when to pull up, you know.”

In terms of how the law should protect liberty in the face of this new collectivism, however, Dicey finds himself in a quandary. As a Benthamite lawyer he is thoroughly committed to the

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110 Ibid P lx
111 See Chapter 6.
112 We take no position here about whether this is the “correct” reading.
113 George Eliot Middlemarch 1872.
view that the “doctrine of innate rights “ is “logically unsound”. And yet he looks wistfully to the Declaration of Independence and its “faith that the obligations of contract are sacred” as a limit upon the “despotism of the majority” (again likely influenced by J S Mill). He notes that democratic reform in the US, in contrast to the UK, had been accompanied by rights protections. In the absence of any Declaration of Rights through which to defend rights, the only recourse would be to the common law - meaning now private law. It is the closest thing to a liberal creed of “individualistic common sense” he could find. These common law rights, such as the freedom of contract, are the basis and not the result of the constitution. This is not merely a political preference: for him self reliance and “self-help” are moral imperatives and flow out of his version of utilitarianism. The state harms us if it takes way our personal responsibility to protect our own interests. For an avowed Benthamite, it is ironic, to say the least, that he should discover the utilitarian dogma to be now best expressed in the common law.

What has largely escaped notice is a sentence that only appears in the seventh edition of the *Introduction to the Study of the Law of the Constitution* (1908). There Dicey says that the closest approximation to “the state” or the “Crown” in English thought is the “august dignity of the judges”. The significance of this can only be appreciated if one recognizes the fundamental nature of the project on which Dicey was embarking in *Law and the Constitution* in the first place. He was very much reacting against legal fictions. Hearn’s text, while similar to his own in very many core respects, is still tied to Blackstone: Hearn states that “In our political system the Crown always has been and still is the sun. Whatever be its merits, democracy has no place in English law.” Dicey explicitly joins Bentham’s attack on Blackstone (and by implication on Hearn) for placing the Crown so much at the centre. He also joins Bentham in attacking legal fictions. Their shared project is to “[discern] the facts

114 Above n 108, 309.
115 Ibid, 309.
116 Ibid, 309.
117 W Novak in *The Peoples’ Welfare*, (University N Carolina Press Chapel Hill 1996) suggests that the legal centralization of state power in the US (which came later than in the UK) was not accompanied by “the expected enhancement of salus populi common good rhetoric, but by its repudiation, and an offering in its stead of a heightened regard for individual right and liberty.” At 244.
118 216, 220 1 ed 1885.
119 See Dicey’s example of the Shipping safety certificate *Law and Opinion* p .
120 AV Dicey, *Introduction to the Law of the Constitution* 7 edition 1908, 389. August dignity of the judges is first used here in comparison with droit administratif.
of the law”. He is also reacting against historical accounts of constitutional law – he claims to be telling the constitution as it is today rather than how it was yesterday or how it will be tomorrow.

It is surely noteworthy, then, that in 1908 he reintroduces the notion of the Crown, meaning the state, and suggests that now it is best represented by the “august dignity of judges”. That is a much more accurate account of the legal position as it had been at the beginning of the nineteenth century than it would be at the end. He appears to be seeking refuge in an earlier, more Blackstonian, version of the unified will – in which sovereign will is much more reified and much less centralised. Is Dicey really so far from Hearn who says “the will of the King is that which is displayed in his court not in his chamber”? Dicey, with Hearn, is seeking something to stand apart from the governors and governed, that is not the people, society or the bureaucracy. Elsewhere, Dicey acknowledges the dangers of transforming abstract principles into practical maxims (such as the idea that all property belongs to the nation). Arguably here too, he is expressing an emerging appreciation that realising sovereign will in a unified political will could be dangerous. Judges now are responsible for defending the liberal creed: it is they who must protect the constitution from the worst excesses of democracy – even though, ultimately, they have a duty to obey Parliament.

Likely by 1908 Dicey was also concerned about continental theories of sovereign will that had been making ground in Britain through the later nineteenth century in the work of T H Green and the idealists. These were also reactions against centralization but this time against its more mechanistic aspects. Man, viewed not as an individual, but as the product of a larger social organism that was the state with its own organic will, was, for Dicey, much to be feared. He was worried about sacrificing the individual to all forms of the social or collective.

Finally why did Dicey gloss over the important changes to official liability which at the time were relatively recent? It was Hearn who first suggested that one of the great strengths of the English constitution was that the officers of the civil service should be personally responsible for unlawful acts to ordinary tribunals (though Hearn, unlike Dicey, would also recognize a

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123 Ibid.
124 Ibid.
125 There are earlier indications of this thinking even in the first edition where he suggests: "Moreover, of the powers ascribed to the Crown, some are in reality exercised by the government, whilst others do not in truth belong either to the King or the Ministry”.
126 Cf Dicey ibid p 165.
127 Hearn n 120, 18-19.
128 Law and Opinion 248.
role for criminal law as well as “ordinary” private law). Dicey never even acknowledges the public law controls on officials via the prerogative writs (such as quo warranto, mandamus and prohibition) and the criminal law, which had been so important throughout the century. He insists that it is only the ordinary private law that applies to government officials. He ignores the special immunities from vicarious liability that apply only to the Crown after the 1850s and the inconsistencies and problems created by those changes. All of this avoidance is in the cause of emphasising the importance of ordinary law (in opposition to the French system). The same thing really matters to Dicey and to Hearn, though they express it in different terms. Hearn explains the law in these terms:

“Every official act of the Crown must be done in the manner prescribed by law. Every act so done is lawful. Every act done under colour of royal authority, but not in the proper manner, is not an official act of the Crown.”

Hearn is attempting to capture the “true meaning of the King can do no wrong.” “Since no unlawful act is the act of the Crown, no command to do any such act can be the command of the Crown.” Dicey says almost the same thing, though he states it more directly and scrupulously avoids any mention of the Crown:

“With us every official from the Prime Minister down to a constable or a collector of taxes is under the same responsibility for every act done without legal justification as any other citizen.”

Both are concerned that there should not be a unified will to do wrong. Disaggregating the state for liability purposes, and at the same time denying the existence of a bureaucratic hierarchy and administrative unity, are absolutely central to Dicey’s version of the rule of law.

Dicey is much more subtle than is usually acknowledged. These omissions, evasions and late additions are significant and often destabilise the text in important ways. There is perhaps, even here, another suppressed version of a state tradition. We shall have to return to the

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129 Hearn 101, 109.
130 He does recognise that soldiers and clergymen may be exceptions p 181 3 ed 1889.
131 Hearn p 20.
132 Ibid.
133 Ibid.
134 3 ed 181. He appears to know nor care nothing for quasi-commissions. Cf the very similar passage in Hearn p 109.
135 Dicey’s response to idealist thought will be considered in the next chapter.
question of why the orthodox version of the Diceyan narrative has continued in the legal imagination for so long, and how he was read after World War I, in chapter 6.

In the first part of the chapter we traced the administrative and political changes that turned a highly rarefied notion of unified sovereign will into a much more practical and political notion. We can now see that one of the major differences which divided Blackstone and Bentham was how they imagined sovereign authority should be executed. But as the new administrative apparatus emerged neither of their theories would match the facts: Blackstone because his older notions of authority would be replaced by newer political notions and Bentham because power was becoming more collective and corporate. Having charted this mechanistic and practical realisation of statehood in the first half of the nineteenth century we are now better placed to understand the two major intellectual currents that would follow in the later nineteenth century: one would subsume statehood within notions of sovereignty; the other would react against such mechanistic manifestations of statehood in favour of more organic notions linking individual to society to the state. We shall return to these issues in the next chapter.

Part II The Crown as Personne morale?

We have seen so far that there are plenty of allusions to the state in English legal thought – though those traditions would not reach the consciousness of many twentieth century lawyers. The Treasury attempted at times to define the state as the central administration or permanent bureaucracy (above the political administration),136 Dicey gestured toward the notion of the state as residing in the judges, and sometimes the common law treated the state as synonymous with the public or the law. Whichever version of statehood was at stake, it was the “Crown” which would be invariably used as placeholder. Could the Crown come to represent the common law state – and if so which version? What did the judges make of these administrative changes?

In this part we shall start with the question of whether the Crown, by mid-century, could have come to represent this increasingly unified administrative apparatus as the legal personification of the state and with a distinct moral personality. Could this complex apparatus have been imagined as a collective corporate person? After all, Blackstone’s

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136 In comparison with the US federal administration which changes 6 layers of administration with each change of government, apart from a handful of “political advisors” (a phenomenon of the Blair years) the advisors do not change when the UK government changes.
Commentaries, which had imagined the Crown as a kind of corporation, had by now achieved a certain authority. The idea had had public circulation within government circles since the beginning of the century. The Treasury had long been using the Crown as a place holder for the state. Torrance remarks: “pre-reform Tory monarchism could dignify an insane, then a profligate, King only by invoking an increasingly abstract idealization of the Crown – exalting ministers and the bureaucracy at the expense of Parliament.” The “Crown” rather than “Her Majesty” came into more frequent usage after the 1860s. By mid-century there was emerging a more comprehensive and efficient corporate fund that represented the public purse. Much more state activity was becoming subject to appropriation rather than fee taking. The civil service was becoming more hierarchical and corporate. By 1857 the Crown Suits (Scotland) Act would list the “public departments” which could be petitioned through the Advocate General.

Despite these measures, the common law judges did not respond in a way that conceived the Crown as representative of the whole administrative apparatus. Neither would the Crown come to represent a set of distinctive public norms. The common law would instead muddle through and try to adjust on a case by case basis to the major changes taking place in political, economic, and administrative life. Indeed, and perhaps surprisingly, in normative terms the common law scope of the public realm fragmented during the 1860s. In this part of the chapter, we shall chart this path and attempt to explain why the common law took this particular turn.

**Monarch: the person and the political**

In the first part of this chapter we chronicled how personal office and power became subject to obligations of public trust, and came to be placed within a hierarchical and bureaucratic structure during the nineteenth century. If the early Victorians had difficulty in separating personal from official power in relation to *ordinary* office-holders how much more difficult it would be for them to treat as separate the natural person of the Queen from the office of the *monarch* – imbued as she was with notions of royal dignity and prerogative power. Such a conceptual separation is a prerequisite before the Crown would be able to represent the state for many purposes.

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137 Torrance above n 6, at 86.
138 Cap 44. office or employment in public service is there defined as “every office remunerated out of the consolidated fund, or monies provided by Parliament, or fees authorised by parliament.”
The important case of *Viscount Canterbury v AG*,\textsuperscript{139} decided in 1843, represents some of the difficulties the common law judges encountered in making this distinction. The case was brought by way of a petition of right to Queen Victoria but concerned events relating to the reign of William IV. The petition alleged that servants of the Commissioners of Woods and Forests had negligently caused a fire that destroyed and damaged the Speaker’s possessions in his lodgings in the Palace of Westminster (Parliament Buildings) and asked that the Crown accept vicarious liability for the damage. Among other things, the case invited the judges to consider the practical legal consequences of the proposition that the King never dies and is a perpetual legal person. It invited them to distinguish between the natural person and the office of the King: the King’s two bodies.\textsuperscript{140} The former is a natural person who dies but the latter is an abstraction which continues.

The Court acknowledged the proposition that the monarch was a legal person with distinct qualities but was unwilling to find that Queen Victoria should inherit the liabilities of her predecessor when an ordinary person would not. This outcome is not surprising. Maitland has made famous the extent to which the Crown’s existence as a perpetual legal person had never been fully taken to heart by nineteenth century lawyers.\textsuperscript{141} On the passing of office from William to Victoria it was thought necessary to enact legislation continuing military and other commissions signed by her predecessor,\textsuperscript{142} authorising Victoria to carry into effect treaties for the suppression of slavery entered by William IV,\textsuperscript{143} and to transfer obligations to pay pensions out of the civil list.\textsuperscript{144} Even if this legislative practice can be explained by a concern to sure up the succession and personal loyalty to the new monarch, or as signifying the sense that some powers were temporary and some obligations voluntarily undertaken, it seems clear that, at that time, legal powers and obligations were still associated with the “person” of the monarch and not with the office itself.

\textsuperscript{139} (1843) 1 Ph 305; 41 ER 648.
\textsuperscript{140} For a discussion of this concept see chapter two.
\textsuperscript{141} F M Maitland,
\textsuperscript{142}(1 Vict 31 (1837)) It was not until 1862 that the Queen’s personal signature for the renewal of military commissions was dispensed with 25 and 26 Vict cap 4.
\textsuperscript{143} 1 Vict cap LXII 1837.
\textsuperscript{144} Adjustments to civil list support for HM household 1 & 2 Vict to 2 & Vict cap 11. There are many other examples eg: 7 Gul IV and I Vict cap xxxi (continuing commissions for royal marines) 7 Gul IV and I Vict cap 58 (heirs and successors of King have full authority to make grants), 1 Vict 31 1837 cap LX (corrects to our lady Victoria) 1 & 2 Vict cap 1 (patents and grants issued by her predecessor continue) 1 & 2 Vict cap 2 (commissions of peace continue).
The Court also had difficulty distinguishing between the King’s private money and the Crown’s “public” money. Before it could found liability, it said, there had to be a fund against which judgment against the Crown could be satisfied. It could not find one. Again this is not surprising given common understandings of the time. According to the Court, the monarch voluntarily relinquished his or her hereditary revenues at the beginning of each reign in exchange for the vote of the civil list out of the Consolidated Fund. There was no provision in the civil list for a fund against which damages could be imposed.

To the modern lawyer the answer seems obvious – judgement could be satisfied out of the consolidated fund. There were three problems with that answer at the time – and the fact that the Court does not even consider it as a possibility is telling. The first, and most devastating, is that according to the seventeenth century constitutional settlement only the Queen in Parliament could spend money out of the consolidated fund. The second is that there were no settled understandings of what the civil list should include. The separation of the public and private revenues of the monarch was still in a state of flux.145 Progress on determining which matters should fall within the civil list was still ongoing during William IV’s reign146 when a Select Committee made the telling (and to us obvious) distinction that “the Civil List should be applied only to such expenses as affect the dignity and state of the crown, and the proper maintenance of their Majesties’ Household”.147 The proper division between public and private revenue, then, was still unsettled at the very time of the events in dispute.148

The final complicating factor was that the land and buildings of the Palace of Westminster where the fire occurred, while vested in the Commissioners of Woods, were held in trust for the Queen.149 This ambiguity was apparently exploited by William IV himself when he and his family moved into the Speaker’s rooms in the Palace at Westminster for a period shortly before the fire. Importantly, while the revenues from that land were not held by the Queen (they were among the revenues voluntarily relinquished by her), neither were these revenues necessarily to be found in the consolidated fund. They too were vested in the Commissioners

145 George III had had to go to Parliament so that he was able to hold any property as any natural man.39 & 40 Geo III c 88.
146 J Jacob, The Republican Crown p 13 Civil List 1837
147 Chester, above n 13, 188.
148 So, for example, building new stables at Windsor 2 & 3 Vict Cap XX did not fall as an expense under the civil list but instead fell within the jurisdiction of the Commissioners of Woods Forests and Buildings who were responsible for the crown lands that had been surrendered to the public.
149 Ownership of land is described in the statute book variously as “held on behalf of Her Majesty by Commissioners”, as belonging to “the Crown” or “Her Majesty”, as held by “trustees for the Crown on behalf of the public” and all manner of variants.
of Woods personally in order to pay their fees and expenses.\textsuperscript{150} It is perhaps not a coincidence that in the year in which the petition was brought, legislation was passed appointing new Commissioners (this time by the Treasury), and requiring that the surplus revenues held by them personally be paid forthwith into the exchequer.

The rationalisation of public money and organisation clearly had some way to go before it would be relatively unproblematic to distinguish between the monarch’s person and her public manifestations. Many of these difficulties would be clarified by administrative reforms throughout the century. Indeed, only a decade after the Viscount Canterbury case was heard it would be much easier to make these distinctions.

These administrative matters, though technically difficult, did not rank anywhere near the political difficulties in distinguishing between the monarch’s person and office. Holdsworth’s view was that:\textsuperscript{151}

“If the Stuart Kings and the prerogative lawyers had had their way King and State would have been identified. The result of Parliament’s victory was that the Crown, though it remained a corporation sole with many extraordinary qualities, did not become co-extensive with the state.”

It is certainly true that lawyers and politicians would have been wary of any attempt to aggrandise the royal person as the personification of statehood at any time during the nineteenth century. The law was blind to whether the Queen actually exercised the legal powers conferred on her, and it was by no means clear how much real political power she was capable of exercising. As Cannadine catalogues, in just seven years William IV thrice dismissed a ministry, twice dissolved Parliament before its time, thrice proposed a coalition between opponents, and once used his influence in a controversial vote in the Lords.\textsuperscript{152} Victoria artificially prolonged the life of Melbourne’s government in 1839, and all but sacked Palmerston from the Foreign Office in 1851.\textsuperscript{153} If these were the public manifestations of royal influence, one could only have guessed at their private manifestations. We now know that Victoria very reluctantly signed an Order in Council in 1870 creating a sub-commander in chief in the Secretary of State for War and that Prince Albert used his influence in the

\begin{itemize}
  \item \textsuperscript{150} The lands in question would be vested in the Commissioners of Woods personally by 3 & 4 Vict 1840 cap civ.
  \item \textsuperscript{151} Quoted by Chester above n 13, 95.
  \item \textsuperscript{153} Ibid, 109.
\end{itemize}
appointment of the controversial figure Edwin Chadwick to the (equally controversial) Public Health Commission.\textsuperscript{154}

As late as 1879, the Commons debated that “the influence of the Crown has increased, is increasing and ought to be diminished”.\textsuperscript{155} Bagehot’s 1867 claim that “the monarchy has increased its strength”, by becoming representative of the “dignified” rather than the active “efficient” parts of the Constitution, was not a description of the current mode of office but rather advice as to the course the monarchy should take. Cannadine concludes that at the time Bagehot was writing, monarchy was “neither impartial or above politics, nor Olympian and above society, as it was later to become, but was actively part of both.”\textsuperscript{156} It would take the whole of Victoria’s reign before she would accept that the sovereign could no longer take any part in party politics. Royal power was too personal, too unpopular and too interfering for lawyers to vest in the royal person grandiose ideas of statehood. This was particularly so at a time when Britain was one of the few non-absolutist monarchies in Europe.

\textbf{Immunity, Vicarious Liability and Control}

For the common lawyer, the issue of whether the Crown was a legal representation of the state rarely presented itself as a purely abstract question as it tends to do for political theorists. The question of whom and what was represented by the Crown always depended very much on the legal context. So, for example, the Crown was quite capable of appearing as both a private and an abstract person when the Attorney General brought an action to enjoin encroachments and obstructions on public ways.\textsuperscript{157} The fiction that operated in such cases (to some good effect) was that an obstruction on a public highway was both against the private rights of the King as property holder, and also against the public rights of travel and passage. Both the private and public rights could be protected by the Attorney-General in the name of the Crown. In other words, the common law made the Crown the ultimate protector of public rights and public ways. We have also seen that the Crown’s role in criminal law was often conceived as representing the public. The Crown is harmed along with the public when an official acts fraudulently or in abuse of office – regardless of whether that official was appointed by the Crown.\textsuperscript{158} The concept that the “King can do no wrong” understood in one

\textsuperscript{154} Finer
\textsuperscript{155} ibid
\textsuperscript{156} 110.
\textsuperscript{157} AG v Richards 2 Anstr 603 (Eng) 1795.
\textsuperscript{158} R v Bembridge discussed at text accompanying fn and also see Henly v Mayor of Lyme (1828) 5 Bing 92; 130 ER 995, 107-9.
of its oldest common law senses, is not merely a license for executive fiat, or at least, it is not only that. In some of its manifestations, it means that the King or Crown will act as the moral exemplar ensuring that right be done by her subjects. In these cases the Crown represents the “public” and the “law”. The common law Crown was certainly able, in particular contexts, to represent the impersonal state.

Where the common lawyers ran into the most difficulty in separating the personal from the public aspects of the Crown, was in the cases concerning aspects of Crown liability. How could this abstract representation of the public and the law be simultaneously held to law? How could this legal paragon will to do wrong? The idea that the Crown represents the law and the public seems to be incompatible with the idea that the Crown could also represent the state apparatus for responsibility purposes when some part of it had done wrong. While it would be important for politicians and administrators to design a state apparatus that unified political will for control purposes, common lawyers would be much more reluctant to conceive of a “unified will” to do wrong or to act unlawfully. That smacked of despotism.

The problems associated with holding the Crown liable for the torts of officials, then, were manifold. The Crown was privileged as a matter of legal process – and actions could only be brought by petition of right. The Crown was meant to be the moral exemplar. It did not have a fund against which to satisfy judgement. And, extremely important for the Victorians for whom personal responsibility was a touchstone, whether conceived as a person or as an abstraction, neither the King or Crown had actually willed anything unlawful in the cases brought to trial.

*Viscount Canterbury* itself was decided in the context of a claim about whether the Crown should be held vicariously liable for the negligent actions of workers in the Palace of Westminster. Returning to these facts, for a moment, helps to illustrate some of the further complexities surrounding the ways in which the emerging state apparatus engaged with legal issues of responsibility. It was not servants of the Crown who were allegedly negligent there, but rather the servants of the Commissioners of Woods Forests and Buildings. At the time there was no direct administrative or financial link between the Commissioners’ servants and the Crown, Ministers, or Parliament. The Commissioners’ servants were appointed, and supervised by, the Commissioners. The Commissioners themselves were appointed by order in council, (nominally by the Crown) and made up a small office which was nominally part of the Board of Trade. Both Commissioners and servants were paid out of the revenues of the
lands vested in them rather than out of appropriations voted by Parliament. At the time of the alleged negligence, Commissioners were not required to report to Parliament, individual Commissioners were prohibited by law from sitting in the Commons and there appeared to be no regular mechanism by which to pay into the exchequer the surplus revenues they received. While the Court did not go into all of these ways in which the Crown, Ministers, and Parliament had no direct control over these servants, the general absence of control must have weighed heavily on their reasoning.

Of course control mechanisms significantly evolved over the course of the century and one might speculate whether the decision would have been made differently had similar facts arisen later. By 1844 the Commissioners would themselves be incorporated and required to report annually to Parliament. As their functions and powers significantly increased, they would be required to obtain prior parliamentary approval for certain purposes.\(^{159}\) By 1851 the salaries of their subordinates would be paid out of appropriation and the Commissioner for the Treasury would assign distinct duties to each Commissioner. By 1857 the Commissioners of Her Majesty’s Woods would be listed as a public department for the purposes of the Crown Suits (Scotland) Act 1857.\(^{160}\)

While some of the issues of connection and control would be slowly remedied as the century progressed, there was still, however, another significant obstacle to holding the Crown vicariously liable in this particular case. According to the common law at the time, the Commissioners were not \textit{themselves} vicariously liable for the acts of their servants except for matters directly within their direction and control.\(^{161}\) That was an important indicator of “public office”: the superior should not be vicariously liable for the acts of his servants. The strain of Victorian morality which emphasised personal and individual responsibility was combined with a concern that good people should not be deterred from public office by the risk of liability. Subordinates would have been required to pay a surety in the event of administrative failures for which they were personally responsible. So if Commissioners, being public officers, were not liable for matters which were not within their direction and

\(^{159}\) They went from building new stables at Windsor to performing important central scrutinising functions.

\(^{160}\) In fact the Commissioners would retain elements of independence, see S A ‘Public Law’ above n 13 at fn 186.

\(^{161}\) \textit{Whitfield v Lord Le Despencer} (1778) Cowp. 754, 766: “Whoever holds an office which renders him responsible for any act done in it, ought to have the entire management and control of it. If responsible for the acts of his servants he alone ought to have the privilege of appointing them, upon his own terms and at his own discretion, and with absolute power over them in every respect, as he has over the servants of his own house.”
control how could “the Crown” at one step removed be liable? Equally, if the Commissioners were themselves to become a corporation with their own corporate fund form which to satify judgement, why should the Crown and not the Commissioners be liable?\textsuperscript{162}

None of these issues are of themselves insurmountable. It would be possible to construct a corporate will or intent and attribute it to the Crown. Alternatively, it would be possible to attribute the actions of the wrongdoer to the Crown as corporation without attributing the will to do wrong. But there was no theoretical framework in English law from which to work through these questions. What was missing at the time \textit{Viscount Canterbury} was decided, and for much of the century, was any modern \textit{theory} of corporation, corporate will and action, or corporate personality. Even Dicey would lament that Bentham and his followers never addressed the key tensions between corporate power (whether public or private) and personal responsibility.\textsuperscript{163} He suggests that “Collectivism, in so far as it may be considered a doctrine, has never, in England at least, been formulated by any thinker with anything like the commanding ability or authority of Bentham.”\textsuperscript{164} Neither would it be considered deliberately or consciously in relation to law.\textsuperscript{165} It would be Maitland who, through his translation of the work of Gierke, would introduce such a theory into English legal thought, but not until the very end of the century. Maitland’s suggestions that the Crown was capable of representing the state as a legal person, simply came too late to inform a common law normative conception of the public realm and to influence these legal developments. When these theories did emerge, they would not focus so much on the public and private distinction directly, but rather on the distinction between the individual and the collective. In the absence of a theory of any kind about collective power and responsibility until the very end of the nineteenth century, the Victorians simply muddled through. The common law struggled to adjust to the new bureaucracy and to adapt its old forms. We turn now to what actually happened.

\textsuperscript{162} Above n 148.
\textsuperscript{163} Dicey himself recognises this in \textit{Law and Opinion} p 158. It may be that this points to deeper ambiguities in Bentham’s thought as a whole – whether it is a primarily a system of public morality as opposed to a system of private morality and how the two aspects relate to each other. From the late 1790s Bentham had begun to be interested in the benefits of collective \textit{private} as opposed to collective public enterprise. Although at times he advocated for departments conceived along functional lines, on the whole he disliked public bureaucracy: he preferred private contractors and used the East India Company as a joint stock model for his “National Charity Company”. All the while he also emphasised personal responsibility (as did almost all Victorian moralists).
\textsuperscript{164} Law and Opinion 67.
\textsuperscript{165} This view is adapted by MacDonagh, \textit{Early Victorian Government 1830-1870} Holmes and Meir NY 1977 at p 11.
The Crown becomes both smaller and bigger

Despite the fact that strictly speaking the case did not consider the question, *Viscount Canterbury* is universally treated as standing for the legal proposition that the Crown is not vicariously liable for the acts of its servants. The lowly servant who committed the negligent act remained personally liable under the private law – the government as an institution would be neither directly (institutionally) liable nor indirectly (vicariously) liable. As the state apparatus changed, Parliament progressively empowered the localities to undertake more functions, local boards of health were established, and docks, parks and drains were undertaken to be built by local authorities. Would the Crown come to represent all of these officials for liability purposes?

That did not happen. The Crown would not come to represent the whole of the state apparatus, but only a part of it. The common law, which could have generated unifying normative principles, to apply to the whole of the public sphere, did not do so. Separate sometimes overlapping normative regimes would develop for different parts of the public realm. As a general rule the local and the “new” bureaucracy would be subject to greater public and private law controls The Crown itself would be characterised by immunity. The judges would act as overseers of the “new” state apparatus, and determine what constituted the Crown and its “emanations”. The functional and normative principles which had formerly defined public office across the public realm – would be replaced by formalistic tests of whether immunities applied, or not.

Stuart Anderson has shed considerable new light in this area in his recent work. We cannot do his detailed study proper justice here nor replicate the plethora of exceptions, contradictions and statutory variations that he so carefully identifies. We can only outline what happened in broad terms.

There were a number of indicia of “publicness” that had been manifested in the common law up until the 1850s. These included the ideas of public trust discussed earlier, and the various immunities from rating, vicarious tortious liability and contractual liability of public officers performing public services. Anderson suggests that these could have formed unifying principles of public law and public service for which the Crown could have become the legal representative – principles which might have formed the basis of a “nascent public law”.

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What actually happened in the 1850s and 1860s was that potentially unifying common law principles of “publicness” came to be more selectively and formalistically applied.

As Anderson carefully and compellingly argues, in England the categories of officials enjoying immunities from rating and vicarious liability became restricted largely to central government. Charitable trustees, commissioners, quasi corporate statutory bodies and local government would no longer be included in these unifying principles of “publicness”. The justifications for such immunities would move from functional and normative ones – involving ideas of public benefit, public purpose and public trust, and a concern about the incentives for attracting the best people to public office – to newly formalistic ones.

Formerly, whether public officers would be liable to local rating had depended on a functional test of whether their occupation was for the public benefit or for private profit. This meant that even servants appointed directly by the Crown could be liable for rating if they were making a profit from such occupation. The new rationale became that the “Crown was only bound by express statutory provision”, a formalistic test that operated as a gloss on the statute. The leading case removed the immunity from rates earlier enjoyed by municipal docks. This was particularly surprising given that quite recent case law had recognised an exemption from rating for municipal property on the basis that the Municipal Corporations Act 1835 treated municipal property as “public funds appropriated for purposes of a public nature” and no longer as private property. If formerly “public bodies” would no longer be covered by the immunity, newly created bodies would not count as “public” either for the purpose of the immunity. The new local health boards for example would not be found to confer benefits on the public but only on a “section of the public”. The result was to strip the immunity from rating of its normative justification. The Crown’s immunity from rating would become a hollow formalistic concept which would be inconsistently applied.

At about the same time, the judges began to restrict the general immunity from vicarious liability, previously enjoyed by all public officers, to the Crown and its servants. This was so even when vicarious liability was claimed against officials who clearly met the pre-existing common law criteria of “publicness”. In the leading case of Mersey Docks and

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167 Lord Bute v Grindall (1Tr 338; 2H Bl 265).
168 Mersey Docks v Cameron [1864-1865] XI H L C 471 cf Mayor of Liverpool v Overseers of West Derby (1856) 6 E & B 704.
169 R v Mayor and Alderman of Liverpool 9 Ad & El 435).
170 R v Hull Justices (1854) 4 E & B 29. See SA 372.
171
Harbour Board v Gibbs172 the officials who were denied immunity were unpaid, did not make a personal profit, and acted as trustees for the public benefit. The rationale for the immunity again shifted from a normative to a formalistic one. It was not because officials held “public offices” that they attracted immunity. The only basis of immunity from vicarious liability would be that “the King could do no wrong” (understood now in a formalistic sense that did not do any normative work). Bodies such as Mersey Docks Trustees would not be treated as part of the Crown but as separate corporate or quasi-corporate bodies. And lest officials who were Crown servants be held liable for directing their subordinates to do wrong or from profiting from such wrong doing, as the law of public office had earlier required, a new doctrine emerged that removed from them any potential liability.173 They were no longer to be treated as superiors or masters. Whatever their place in the bureaucratic hierarchy, they would be treated in law as merely fellow servants of the Crown. If Dicey would deny the existence of an administrative hierarchy, it would be the common law judges who did it first. Thus the immunities from liability were effectively expanded for those in managerial positions in the bureaucratic hierarchy of central government and removed for those on the periphery.

The consequences of these new liability rules for the project of conceiving of the Crown as a personne morale representing the state, should be obvious. Formalistic versions of Crown immunity left little by way of a normative framework on which to build “a personne morale”. The fragmentation of what had formerly been united by legal notions of “the public” would create different normative “public” spheres.

What possible explanations can be offered for this formalistic turn? Anderson offers a quite practical reason born out of constitutional principle. He suggests that it was precisely because the judges could not find any departmental funds against which to satisfy judgment that they were unwilling to find government departments liable for rates or for vicariously liability. By contrast, local authorities, charity commissioners and independent quasi corporations did hold distinct funds and at least some of these could always raise rates to meet a financial shortfall.

The Mersey Docks cases hint at other reasons too.174 Many local government improvements, such as the building of docks, piers and harbours and so on, involved cooperation between public and private enterprise. Improvements were funded by private or public capital and

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172 (1865-66) 11 HLC 686.
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174 As Anderson acknowledges.
often a mixture of both. It was common for an improvement to be initiated by a private venture and taken over on completion by the municipal authority.\textsuperscript{175} Suspicion of mixed public and commercial ventures had been a legacy of Adam Smith and of the experience of the East India Company. Monopolies and exclusions harmed the public, and this was especially so when combined with sovereign powers. It had been argued in the Mersey Docks cases that Mersey docks were in the same position as docks elsewhere which were subject to rating and vicarious liability. The Docks on the River Thames were all in private hands. Those private companies were certainly liable for rating and other tortious and contractual liabilities. Why should the trustees of Mersey Docks, engaged in the same functions, be legally privileged? It cannot only have been that functional tests were being abandoned, but also that they were becoming harder to apply as public purposes expanded.

Is it also a possibility that this was the contest between the centre and the locality transacted in a new way? Some parts of government would be allowed to share in the traditional immunities enjoyed by the Crown, but by no means all. The judges may have been concerned not to undermine the fiscally conservative moves for cheaper more efficient central government. The unhappy fiscal consequences of the Crown being held liable in damages for the negligent acts of the navy at sea were contemplated in the Viscount Canterbury case. Perhaps the Judges had taken upon themselves the fiscal conservative justification for centralization and were less sympathetic to Whiggish reforms? Certainly when statutes granted new powers of improvement, they did not grant such powers to the Queen or Crown. It would have been difficult for the Victorian Englishman to associate the Crown prerogative and royal dignity with drains, water supply, sewerage and the moving of dust heaps.\textsuperscript{176} These were “new” functions of government and not the functions traditionally associated with the centre or the Treasury. It may even be that the judges were anti improvement – or at least that they wanted to ensure that any such social experiments in the localities would be fully paid for by those who would benefit from them (especially in advance of the Second Reform Act extending the franchise further which was anticipated to result in more social legislation).

\textsuperscript{175} See eg Local Government Act 1858 cap 98 which allowed private persons to bear the first expense of building bridges viaducts etc which could be purchased on completion by municipal government and maintained and repaired at public expense. See also D Fraser (ed), Municipal Reform and the Industrial City Leicester University Press 1982 St Martin’s Press NY. For an in-depth analysis of the US practices see H Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law 1730-1870 (Chapel Hill UNC Press 1983).

\textsuperscript{176} This is an argument also made by Anderson.
Another possibility is that Treasury reforms had been too successful. The Treasury reforms treated central government and its officers differently from those at the localities. It was only the former who were subject to entrance exams, and only they were entitled to the new statutory civil service pensions. The new professionalized centralised civil service rose in status over this period, and became more aristocratic. They might share in the Crown’s prerogatives while others should not. There is no evidence in the case law that the judges took any account of this. Neither is there any evidence that the central bureaucracy’s own claims to represent the common or public good gained any legal traction. It would be precisely such claims as these which would give rise to an openly hostile reaction from the judges in the twentieth century.

The turn of the case law, which extended the Crown’s immunity so far but not to all public officers, may simply be explained as an impulse on the part of the judges to keep the immunity within bounds – an idea for which Dicey would supply the powerful rule of law justification after the fact.

There was nothing inevitable about this. In some parts of the Empire where there was a shortage of private capital, and public improvements were almost entirely publicly funded, the Crown or state as a whole was able to be sued for vicarious or even direct institutional liability. But these differences were in the nineteenth century the result of legislation rather than of common law strategies to conceive of the Crown as corporation for liability purposes. The Secretary of State for India, for example, could by legislation be sued on matters for which private commercial actors would also be liable, (though not for those actions “only the sovereign” could perform). The legislation reflected the common law as it had previously been applied to the East India Company – a creature of Charter. It would become, in turn, the model for French government liability177 (an example of the British state lending a model to the French). In Australia and New Zealand too, where, because of a shortage of private capital, the construction of railways, canals and other infrastructure was almost entirely undertaken by government or local government and not by private enterprise, Government could be held institutionally liable in tort. That remains the case in Australia (except for the state of Victoria). Scotland and New Zealand became “re-colonized” in different ways via the UK Crown Proceedings Act 1947 and its New Zealand copy, which reverted to a broader, 177. S Anderson, ‘Public law’ above n 13 at 380-381 citing D Fairgrieve, State Liability in Tort (Oxford, 2004) 12-13, 20-3. The Secretary of State for India was able to sue and be sued as a body corporate and the liabilities were met from the general revenue.
English, understanding of Crown immunity in the twentieth century. The Crown was always less associated with the royal dignity and the natural person of the monarch in the nineteenth century colonies. The royal person did not visit.

What is clear is that these developments had the effect of restricting the development of unified normative principles that could be applied to the public realm. This would become very significant for public law and the way it would develop. The key moral characteristic of the Crown (and its servants) would commonly be represented in the case law as the enjoyment of immunity – especially from tort liability. Tests of “publicness” would continue in the case law. “Public” actors would be subject to the ordinary private law for some purposes and to the prerogative writs of mandamus and prohibition for others. Mandamus writs relied on a test of whether an actor was sufficiently “public”. While it was not available against the Crown, in certain cases it could be available against Crown servants. Writs of prohibition were conceived in terms of the Crown representing the state and the public in ensuring that the courts were kept within the bounds of their jurisdiction. This was viewed as a matter “within the care of the Crown”. All of the remedies attached to real persons and officers. They reflected the disaggregated, dispersed state as had existed when the common law developed them. The common law did not generate a single set of public norms that would reside in or would be represented by the Crown as the personification of the state.

If the state, crown and public would not be coextensive, “the public” as a normative idea would continue to have a life in common law and statute. Ideas about the common weal, the common good, public good, salus populi and res publica, had existed for centuries, taking different meanings during different periods. The common law would continue to apply such background norms on their own and as a gloss on the statute law. Statutes would adopt common law concepts such as “common carrier” doctrine. The statute book itself would be replete with references to the “public”, and, remarkably in this age of “laissez-

179 R v The Lords Commissioners of the Treasury 4 A & E 286. See also Anderson p 346.
182 An interesting question which we cannot answer here is whether common law notions of the “public” would decline in the UK as Nowak suggests happened after democratization and constitutionalization in the US see Nowak, The Peoples Welfare p 245.
183 Ed 1845 Cap 28 : Railways companies would not be liable to any greater extent than common carriers for tolls. Canal Company tolls would be charged equally to all persons.
faire”, the concept would invariably be left virtually undefined. It is almost as though there were perfectly clear shared notions about what is intended by the notion of “public”.

It is not, however, the case that what was considered “public” would remain static during this time. For example “undertakings of a public nature” which in the 1840s seemed to include roads, pavings and drains, by the 1860s also included recreational parks, seating and playgrounds. It appears that statute, or, more accurately, statutory process would become important in determining the boundaries between public and private at least for a time. Different rules of incorporation, capitalization rules constraining when a profit could be paid, and rules about the acquisition of land (making it easier for people under a legal disability to sell and providing special processes for resolving disputes), would apply to such undertakings. Conflict of interest rules would apply in particular sectors (though apart from this constraint the “public” classification would apply independently of who performed the undertaking). Parliament did not make the classification by strict legal definition: what counted as an “undertaking of a public nature” was never positively defined in the statute. What determined “publicness” was that undertakings of “public works” had to be authorized by “special acts”. The bill process itself was intended as a contest that would test whether powers being conferred on corporations would be used for the public good. This potential political source of public norms would also be “lost” to legal memory as companies began to be governed by more general rules of incorporation.

The “public” would not disappear. It would maintain a life of its own in different guises and in different areas of the law. But the state, crown and public would not be coextensive. It

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184 Eg 1847 cap 112 (power to grant land for public purposes) 1852 cap 52 (power to take “any heriditaments necessary for the public service) 21 and 22 Vict (sales of art “for the benefit of the public”), Railways Act 1844 “for public advantage” the Board can be restrained from using its powers.

185 See eg 1844 Cap CX (Registration Incorporation and Regulation of Joint Stock Companies Act ) which defines the activities to which it does not extend.

186 1847 cap 15 Gas Works Supplying Towns Act, bodies of commissioners would not be allowed property holding or contractual conflicts but would be allowed to hold shares in a joint stock company. Compliance with conflict of interest rules, however, were sometimes made a condition of being involved, and became more common in the statute book as the century progresses, eg 5 & 6 Vict cap CIV 1842 made it unlawful for a member of a municipal corporation to vote in matters involving a pecuniary interest, 1844 Factories Act Cap XIV only allowed factory surgeons to be appointed by a JP “not being the occupier of a factory, and not being the father, son, or brother of the occupier of a factory” (s x). 1845 cap 41 those involved in making or repairing highways were not allowed pecuniary interest even in the form of shareholding.

188 1845 Cap XVI

189 Railway Companies obtained a general authorisation in 1845.
would take more than a century before some of these normative conditions of “publicness” would begin to be articulated again as unifying principles. We begin to see the degree to which the Crown might represent the closest approximation to the state in British legal thought and at the same time be the greatest obstacle to the development of such a conception.

Conclusion

The Blackstonian version of unified sovereign will regarded the King as the centre from which all authority flowed. At the time he was writing there was in practice no unified sovereign will understood in a political or organizational sense. Instead the state was characterised by dispersed power, particularised rules and common law processes of decision making. Unified political will was undoubtedly manifest in certain limited areas, but for much of the conduct of government and law, the concept of the sovereign served a symbolic function. The democratic and bureaucratic reforms of the nineteenth century had the practical effect of unifying sovereign will in a much more real sense. Centralised bureaucratic power effectively placed the unified sovereign will in ministers answerable to Parliament. Would the Crown as placeholder for the sovereign now come to represent Ministers and their bureaucracy? The answer is yes and no. Only some parts of the administrative apparatus would be treated as the Crown and only for certain purposes. Parts of the centralised impersonal bureaucracy would in practice share in the monarch’s privileges and immunities. Whether or not a particular part of the administrative apparatus would be treated as the Crown for liability purposes would now depend on new formalistic judicial tests rather than older functional concepts. Other older ideas about the Crown as representative of the public and the law would linger in criminal law and in the prerogative writs. And functional ideas of “publicness” (now detached from ideas of the Crown) would continue to do work in the common law and in statute.

The Crown would take a variety of different forms. It would sometimes be conceived as synonymous with the central government of the day – including both the political and bureaucratic apparatus. It would sometimes be conceived as distinct from governors and governed as a symbol of law and of “the public good”. It would sometimes be conceived as mechanism for counterbalancing the potential excesses of a newly enfranchised democracy in the form of the “permanent civil service” (standing between the government of the day and the public) and in the “august dignity of the judges” (representing common law rule of law
values). Almost all of this story would be lost to lawyers in the twentieth century. Looking back they would not see anything that resembled “the state”.

There is another particular characterisation of the Crown that we have not yet examined. That is the Crown as possessor of the prerogative, as above the law and the source of all law, and of ultimate coercive power. It is how that version of the Crown or sovereign came to be represented in Austinian jurisprudence, and the reaction of those who would seek to imbue such a sovereign with particular moral qualities, to which we now turn.