A discussion of modernity is a vast undertaking. This essay begins the work of categorising the various phases of English legal history as they relate to the development of a period of time which we could define as being "modern".

The historical movement to modernity

This book takes an approach which is divided into historical corridors, seeking to identify the development of welfare provision in England and Wales and particularly the inter-action of that welfare with law. There are four basic divisions then: *medieval* (in particular the early forms of the poor law); *pre-modern* (in which social and self-help initiatives such as friendly societies provided some welfare provision[1]); *modern* (in which state-provided welfare was pioneered in the United Kingdom); and *late modern* (in which the welfare state began to come under pressure, beginning with the oil crisis[2]). At the time of writing it is necessary to recognise a form of politics and of social theory dubbed *institutional reflexivity* [3] which suggests (both descriptively and prescriptively by turns) an emergent form of social organisation.

All of these categorisations are open to some discussion and analysis. Not least the final categorisation of "late modern" which appears to fall into the problem of attaching the prefix "post-" to every societal development.[4] In setting out each category there is the problem of overlap, at least chronologically, with other categories.

In particular the transition from medieval to pre-modern intends to encapsulate a shift in emphasis from the exclusion of the poor from civil rights[5] (by sequestering the poor away in poor houses) to an understanding of the need to provide for the poor in extremis. In this book there will be different emphases between the utilitarianism of Bismarck (seeking the prevent working class revolt by removing their fear and insecurity by wage replacement insurance) and the British socialists motivated more by philanthropy than cynical social engineering.[6] However, as we shall see, there are under-currents of the

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[1] Hudson, *The Law on Investment Entities* (London, Sweet & Maxwell, 2000).

[2] A timeframe asserted as the underlying thesis in Glennerster and Hills, ed., *The State of Welfare* (Oxford University Press, 1998), and adopted in this text.

[3] Giddens, "… response" in Beck, Giddens and Lash, *Reflexive Modernity* (Cambridge, Polity, 1994?). As compared to Beck's "risk society" and "reflexive modernity", the latter being adopted by Lash. Giddens prefers his terminology because "reflexive modernity" suggests that the modernity involved is somehow complete, whereas his focus on reflexivity within the control of institutions better reflects the control which social institutions have and the effect which their self-generated vocabularies, ranges of expertise and risks.

[4] Beck, *The Risk Society* (Sage, 1992).

[5] In the sense meant by Marshall (1950).

[6] Briggs (1969).

medieval mixed in with the common law while social policy was developing the pre-modern welfare system.

The role of the common law is highly significant in developing the pre-modern: or more accurately, in having held back the pre-modern phase for so long. The pre-modern phase includes the recognition that ordinary human beings were capable of forming contracts of employment with their masters which elevated from the serfdom associated with the feudal period. At common law there were said to be three relationships which could never give rise to enforceable legal relationships: that between father and child, between husband and wife, and between master and servant. The Enlightenment recognition of human beings as moral agents outwith the direct control of the Judeo-Christian deity took some time to extend into a recognition of the rights of individual human beings.[7]

The expression "late modern" is an elision of a number of social theoretical concepts

Is modernity complete: have we moved into postmodernity?

This discussion is taken from *The Law on Investment Entities*, Ch 1.

The old myths of our society have been destabilised by the modernist project.[8] One of the most important examples of this destabilisation process has been the dissolution of traditional "communities" where individuals and families lived around the workplace, shared communal facilities, communal values and communal aspirations. In seeking to erect a programme built on the concept of the community, the problem presents itself that such concepts no longer retain their traditional meaning nor does everyone understand them to mean the same thing.

This project still rumbles on. Habermas takes the postmodernists to task for suggesting that the modernist project has been completed. It is more accurate to suggest that different aspects of the modernist project are in different stages of development and perhaps that the deconstruction school has arrived to pull down those ideas which are either redundant because they belong to another time or which are redundant because they never had a valid claim to truth. In *The Philosophical Discourse of Modernity*,[9] Habermas begins with the claims of the French post-structuralists that they have moved beyond philosophical subject and the concomitant need to return to reason understood as communicative action. This notion of the individual's role being replaced by communication bears a number of straightforward, definitional political complications when placed alongside agenda which seek to "empower the citizen".[10]

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[7] See perhaps the significance of books like Paine, *The Rights of Man* , originally published in 1791.

[8] See generally Beck, Giddens and Lash, *Reflexive Modernity* (Polity, 1994) as a description of some of those social changes.

[9] Habermas, *The Philosophical Discourse of Modernity* (Polity,).

[10] Not least is the proximacy of communicative action to the systems theories proposed by Talcott Parsons, and pursued by Niklas Luhmann, while being reviled by luminaries of the new left like Anthony Giddens. Discussing these issues in a new political language is essential if the centring of "discourse" as part of the

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This discussion is summarised most neatly in Giddens's *Beyond Left and Right*[11], a discussion which he pursues in *The Third Way*. His assertions as to the changing nature of the world seem unassailable - although his conclusions are more open to question. In Giddens's world, the welfare state stands in an equivocal position. Rather than focus on the generation of enormous poverty in the United Kingdom specifically (regardless of the poverty in other regions of the world like sub-Saharan Africa), the social change is presented primarily as one of challenge in which increased social risk offers as many chances for improvement as for loss. For the right is seen a need to temper and regulate the worst excesses of the market, for the left there is a need to accept the presence of global markets which need to be socialised.

The unfortunate side effect of this socialisation of global capital, as expressed by Chomsky,[12] precisely that while power and wealth are concentrated in the hands (and pockets) of the few in the global casino, the costs of market capitalism are borne by the many.[13] The effect of the capitalist principle creating corporations behind which the investors themselves can hide has the result that ordinary people are distanced from the capitalists. Chomsky refers back to Adam Smith's own critique of joint stock companies as being "a conspiracy against the public" through which capitalists could hide their individual responsibility of the activities of those companies beyond "government interference", meaning control by the public.[14]

The arena for contest here is therefore between those who celebrate the opportunities offered by global capitalism and those who identify in the nature of global capitalism itself the seeds of increased global poverty and the death knell of sustainable welfare provision by the nation state.[15] This debate is at the heart of the discussion in this book.

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debate is not to be mistaken for a displacement of the unfashionable "individual" from populist political discussion.

[11] Giddens, .

[12] Chomsky, *Profit over People* (New York, Seven Stories Press, 1999).

[13] Chomsky's particular concern is in relation to the enforcement of debt repayment obligations against developing nations: 'The simplest answer to the argument that countries who borrowed from the World Bank and/or the IMF have no right to ask for debt forgiveness is that the presupposition is false, so the argument is vacuous. E.g., the "country" of Indonesia didn't borrow; it's US-backed rulers did. The debt, which is huge, is held by about 200 people (probably less), the dictator's family and their cronies. So those people have no right to ask for debt forgiveness -- and in fact, don't have to. Their wealth (much of it in Western banks) probably suffices to cover the debt, and more. … Of course, that principle is unacceptable to the rich and powerful, who prefer the operative "capitalist" principle of socialising risk and cost. So the risk is shifted to northern taxpayers (via the IMF) and the costs are transferred to poor peasants in Indonesia, who never borrowed the money.' Taken from the reports delivered on Z-net (www.z.org) - sentiments reproduced in Chomsky (1999), *op cit.*.

[14] Chomsky, *Profit over People* (New York, Seven Stories Press, 1999), 148.

[15] Within that latter category is a deeper ideological divide between those who reject the wage-relationship of capitalism wholeheartedly (many readings of Marx, Reclaim the Streets, Paul Foot); those who accept the continued existence of capitalism but seek to temper its effects with universal welfare benefits sustaining citizens from cradle to grave (Titmuss, Van Parijs); those who accept the continued existence of capitalism but seek to temper its effects with means-tested welfare benefits provided to relieve the poverty

While much of the text will consider the detail of the legal rules, behind the context of pension funds and community-based investment entities is precisely this debate about the ability of the market to support welfare-providing services[16] (like pensions) or the need (whether economic, political or even spiritual) for these services to be provided by or with the state. Chomsky points out the socialisation of sovereign debt which stands in counterpoint to the reduction in the socialisation of services in the welfare states of many of the same developed nations arguing for market economies elsewhere: investment contracts for pensions, wealth generation and welfare protection are thus coming to replace social provision of security.[17]

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of the worst off in our society (…); and those who accept the social market in many circumstances while still using the rhetoric of equality of opportunity (Gordon Brown).

[16] In this discussion I preserve the strict division established by many between *state welfare* (that is, welfare services provided by the state out of central funds) and *social welfare* (that is, welfare services provided by communities and not the state, or provided by the citizen privately). See the taxonomy of the various structures in Epsing-Anderson, *The Three Worlds of Welfare Capitalism* (Cambridge, Polity, 1990); and Pierson, *Beyond the Welfare State?*, 2nd edn., (Cambridge, Polity, 1998), 173.

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Samuel Beckett: nihilism and modernity – an end of optimism

Waiting for Godot

The spirit of modernism contains a regularly nihilistic streak. In the sense that modernism constitutes a shift from established certainties into new social orders bound up with technological progress and the attempt to substitute one set of certainties with another, there should be little surprise that this shift carries with it a tremendous fear as to the effect of that change. One writer who gives effect to this tendency most clearly is Samuel Beckett, in particular with *Waiting for Godot*. …

The Cure
Nietszche