The Illusion of Free Markets: Punishment and the Myth of Natural Order  by Bernard E. Harcourt
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to those made by legislative bodies. In seventeenth-century England and early America, judicial institutions were very much involved in political crises.

The most important link Pole sees between legal and "mainstream" political histories connects the common law of contract as it emerged in seventeenth-century England and the contract theory of government embodied in America's founding documents, for both were based on the principle "that individual wills must . . . give their consent voluntarily, free from coercion or deceit" (p. 4). In the seventeenth century, Englishmen began to apply the notion of contract, which heretofore involved transactions between individuals, to the establishment of the state. Thomas Hobbes and John Locke developed contract theories of government. But while Hobbes held that the people voluntarily conferred all authority to a ruler, Locke maintained that each adult male retained sovereignty over himself and that "government existed by virtue of a contract of which the people remained the judges" (p. 53). It was this individualist Lockean concept that strongly influenced eighteenth-century Americans and found its way into the Declaration of Independence and the Constitution.

The jury was another important institution of representation and consent. In early modern England, in an age before popular elections and when a distant and inaccessible Parliament met irregularly, juries (both grand and trial), more than any other institutions, linked people with government. The political role of the jury was closely related to the long controversy over whether juries have the right to judge law as well as fact. In the earliest centuries of the jury's existence in England, the distinction was not clear. But with developments in the concept of proofs, the notion that juries should confine themselves to finding the facts, leaving it to judges to determine their legal meaning, had grown up. In the seventeenth century, English radicals, and the Whig jurist Sir John Hawle, claimed that juries retained the right to determine law as well as fact. This applied especially to political cases, above all in trials for treason and seditious libel. The doctrine of jury law-finding was related to the notion of the jury as protector of the people's liberties. Here, the "people" signified those who were out of power and therefore vulnerable to repression by government.

Extremely interesting is Pole's discussion of how in the United States the authority to define law passed from the jury to the judiciary. Eighteenth-century American juries were "robust" in asserting their power to find law (p. 129). But in the 1790s, judges both more professionally trained and self-confident than those of the colonial period began to rein in juries and assert that law-finding was the business of judges. In the case of Marbury v. Madison (1803), John Marshall declared that it was "emphatically the office of the judiciary to say what law was" (p. 79), although in Pole's opinion this did not logically exclude juries from the same role.

Later portions of Pole's book deal with a variety of issues related to contract and consent. These include how the American Revolution and the struggle over the Constitution compelled Americans to question just where sovereignty lay, the development of bicameralism, and other issues of representation and self-government.

One question is left unanswered. Pole expresses astonishment that the U.S. Supreme Court has applied the principle of judicial review to "encroach steadily and deeply into law-making territory" (p. 131). This deviated sharply from the intentions of the Founding Fathers. One is left wondering why the Court's assumption of a "quasi-legislative role" (p. 194) was not met with more protest.

This is, however, the only significant criticism that can be made of Pole's well-researched and illuminating volume. The book makes a major contribution toward integrating histories of law and politics and is a must read for anyone interested in the recently burgeoning scholarship of the jury and its representative functions in England, France, and America and in the English roots of American law and constitutionalism.

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This long, complicated, and strikingly unusual book traces modern American attitudes to the marketplace and jailhouse back to the birth of conjoined twins in the eighteenth century: belief in the free exchange of commodities, and ever-increasing rates of incarceration to protect it. Bernard E. Harcourt dislikes both phenomena and has written a tract for our times contained, though in no sense hidden, within a joint history of economic and penal thought. He seeks to unify the two by tracing them to a both novel and lasting trust in a seemingly natural order. He first presents detailed accounts of early French market regulation and somewhat less detailed discussions of the Chicago wheat pit (which was, however, just as tightly controlled in ways obscured by the rhetoric of free markets). The French case is amusing enough, since it went to such extremes as forbidding public dancing on market days and merely chatting about possible price rises. Yet on the surface this appeal to the ancien régime is odd, because as the late Jonathan R. T. Hughes compellingly showed, it was from England that colonial America drew its array of petty restrictions.

For all the detail on market regulations, Harcourt chooses to emphasize France because it enables him to start with the Physiocratic system-builder François Quesnay (as well as Cesare Beccaria). These are unusual reference points given that anglophone histories of economic thought typically start with Adam Smith. But Quesnay and Smith knew one another well, and Harcourt works from them through their intellectual heirs, giving prominence to the Chicago school of economics. He endeavors throughout to trace a twinned
genealogy of the schizoid view in which commerce is self-regulating and criminality is not.

Wrapped within this dense who-begat-whom history of thought is the author’s desire to abolish the rhetoric of free markets and related tough-on-crime appeals. Such talk, he says, serves only to elect politicians while camouflaging grotesque inequalities of income and encouraging acquiescence with the United States’ almost uniquely punitive legal system. In short, Harcourt has more than rhetorical purpose; he wants to overturn the actual distribution of income and shrink the prison population in America.

Five questions are worth raising about the author’s analysis, since they should make the character of the argument plain. First, how safe is it to write history when one is already sure not merely of how it will transpire but how it ought to have turned out? A more dispassionate attempt by the author to compensate for his own views might have been preferable. It must be acknowledged, however, that Harcourt conceals neither motive nor message and rests his case on well-built descriptive foundations in the sagas of ancien régime regulation and the writings of economic theorists. Second, it may be asked how much of modern opinion truly rests on deep intellectual foundations; how genuinely wide is the influence of the Chicago school? Third, how is it that in recent decades the rich have come to acquire such preternaturally excessive multiples of the income accruing to people at the bottom of the heap? How far can the widening gap of the past three or four decades seriously be attributed to a mode of thought stretching back to Quesnay and the like?

Fourth, how is it that other countries that share this tradition of thought about commerce and crime have not replicated America’s noisy anti-government talk, nor jailed so high a proportion of their own citizens? Throughout much of the text, I thought this question located the Achilles’s heel of the book’s argument, but not so: the author is far too subtle to fall into this trap. Harcourt minimizes the intercountry differences by taking into consideration the phenomenon of incarceration in mental institutions. The rate of incarceration on a percentage basis looks much more similar across several countries than might be expected. He also points out that the time-trends of jailing people are moving in comparable directions. These are ingenious though not fully persuasive arguments. They cannot, to my mind, wholly plane away the exceptional roughness of the penal system in the United States.

Finally, the question remains: what is to be done, at least if one shares the author’s distaste for extreme differences in income and abnormal levels of incarceration? Here Harcourt does not follow through. He may wish to see the income distribution narrowed, but how this is to be managed and what Gini coefficient would be appropriate he does not say. Yet there is abundant food for thought here. This book is outstandingly original, impressively learned, clearly expressed, and cogent in debate.


This impressive book—the author’s first monograph—offers a convincing interpretation of the socio-economic and maritime history of Britain’s oldest and smallest colony. Local studies have previously illuminated aspects of Bermuda’s internal history, and in recent years there have been several academic studies of slavery on the island. But research on Bermuda’s history has had relatively little impact on wider historical themes. To date, no historian has demonstrated the importance of Bermuda to the history of the Atlantic world. Books dealing with British overseas expansion often mention Bermuda briefly as a mere footnote. In books on colonial British America, Bermuda is invariably treated to a few asides in discussions of the thirteen colonies or ignored altogether because it is neither on the American mainland nor in the Caribbean.

Michael J. Jarvis is the first historian to overcome these difficulties by writing a genuinely Atlantic maritime social history in which Bermuda’s historical significance emerges not just in relation to the island but in connection with the networks forged with maritime communities in colonial British America. Bermuda lay at the cusp of the Atlantic wind and weather systems, able to take advantage of westerly winds blowing sailing vessels towards Europe and northeasterlies steering voyages toward North America and the Caribbean. Bermuda’s sloops, which were far more numerous than topsail vessels on the island, were frequent visitors to North American harbors, notably in the Chesapeake Bay. This book offers detailed commentary on the mercantile networks, family connections, and maritime slave labor that sustained trade links with diverse Atlantic markets.

Jarvis emphasizes the ability of individuals and families to forge a maritime economy that capitalized on Bermuda’s access to flows of knowledge and commodities along shipping routes that stretched for a thousand miles to the west and southwest of the island. He traces a maritime world constantly in motion, one that changed and adapted to the growth of trade. To cite a specific example, he argues that the rise of black maritime seafarers in Bermuda occurred slowly at first, as it took time to adapt slaves to seafaring activities, but that such sailors were used increasingly by the 1720s as white owners found ways of minimizing desertion. The book also deals with maritime activities that were significant even though they were hidden from full view: smuggling with the foreign Caribbean, ships plying their