

ECONOMIC LIBERTY AND THE OFFICIAL LAW BOOKS IN COLONIAL MASSACHUSETTS

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Hernando de Soto's *The Mystery of Capital* traces the essential developments of land registration and titling in 19th century U.S. history. But his chronology omits implementation of mid-17th century English legal reform initiatives in colonial Massachusetts concerning land registration, creditor-debtor law, and market regulations. Massachusetts's legislators were pursuing a reform agenda in an agrarian, semi-literate, and pre-contract society, conditions that are similar to many developing countries today. This article expands on de Soto's work by examining the vehicle that colonial Massachusetts utilized to communicate its ordinances and regulations: the official law books printed and distributed to colonists.

The Historical Mystery of Capital

In his celebrated work, *The Mystery of Capital* Hernando de Soto (2000) recounts his campaign to assist impoverished communities around the world to register and title their undocumented property holdings, and secure for themselves vast reservoirs of their own ready-made capital. To assist his endeavor de Soto surveyed experts in several disciplines to review the history of property titling and registration in Western industrialized countries, only to realize that in most aspects such a history is not only unwritten but seldom contemplated. How could there be such an omission in the historical record? Perhaps, he reasoned, these legal processes are so part of the daily routine of Western countries that they have not been attractive topics for

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study, or maybe their evolution has been so complex and occurred over such an extended period of time that their secrets are barely perceptible. Whatever the case, in the absence of an established and thorough history of property titling and registration de Soto realized that developing countries had no extant model to follow. So he undertook his own survey in order to “reopen the exploration of the source of capital and thus explain how to correct the economic failures of poor countries” (de Soto 2000: 1–10, 105–8).

In de Soto’s model, based on secondary sources and interviews of experts in the fields of economics, history, and international development, the critical historical omission appeared to occur during the 19th century U.S. westward migration. As he explained in his chapter “The Missing Lessons of U.S. History”:

I found many examples that reminded me of developing and former communist countries today: massive migrations, explosions of extralegal activity, political unrest, and general discontent with an antiquated legal system that refused to acknowledge that its doctrines and formulas had little relevance to the real world. I also found how U.S. law gradually integrated extralegal arrangements to bring about a peaceful order— . . . the law must be compatible with how people actually arrange their lives. The way law stays alive is by keeping in touch with social contracts pieced together among real people on the ground [de Soto 2000: 108].

De Soto (2000: 158–88) returns repeatedly to the idea of social contracts that, by his definition, are local agreements legitimizing informal property ownership not already certified by official state documentation. The identification of informal agreements certifying such ownership is vital to gaining official recognition of informal property holdings and transactions. At the same time, an equitable transmission of informal to formal ownership encourages informal property holders to accept official titling processes and leave the shadows of illegal regimes like black markets. But when de Soto (2000: 188–206) discusses the necessity of political implementation of any transformation of informal property arrangements to those officially recognized by the state, he acknowledges that many features of a modern state’s machinery stand ready to frustrate an equitable and comprehensive settlement: political parties, state bureaucracies, and legal professions tend to uphold a status quo. But if social contracts that regulate informal property holding remain a patchwork of local agreements, known and followed only by the inhabitants of a neighborhood or precinct, access to national markets will remain largely out of reach and impoverished communities will remain plagued by a continuing legal quarantine and cycle of poverty. What is lacking in

developing property registration and titling regimes that, if present, could facilitate equitable solutions to informal property holding and facilitate its official titling?

The answer provided by 17th century Massachusetts, both in its issuance of law books that contained regulations passed by its legislature and the English law reform ideals that served as a catalyst for these publications, is that the provision of legislative enactments to the public is key to an equitable and efficient administration of property registration, credit regimes, and market regulations. *The Mystery of Capital* gives short shrift to the American Colonies in favor of the development of U.S. property law in the 19th century. De Soto's treatment is thus consistent with the widely held judgment that the colonial period is the "dark ages of American law" (Friedman 1985: 33–104).

Yet, a crucial development in legal administration occurred during the first decades of settlement of the Massachusetts Bay Colony that reflected one of the leading demands made by English law reformers of the mid-17th century: the printing and distribution of official editions of legislative enactments. As a pamphleteer petitioned Parliament in 1641, "a book of husbandry [would] maintain double the number of people, and in more plenty and prosperity than now they enjoy." The mechanism of such a miraculous development was printing, because it could "spread knowledge" to the "common people" who, "knowing their own rights and liberties, will not be governed by way of oppression, and little by little all kingdoms" would become like utopia (Hartlib 1641: 9–14). Massachusetts printed its first official law book in 1648 (Dunn 1998).

This article is not a criticism of de Soto's choice of colonial Massachusetts to illustrate the primitive beginnings of property ownership in North America. *The Mystery of Capital* simply reflects existing scholarship. The legal history of the early national period has traditionally focused on the emergence of federal and state judiciaries, and their respective case law. In order for judges to render opinions a professional legal class must exist to argue cases and interpret the law. So, one primary quest of early American legal history has been to identify the emergence of a legal profession. Because English common law is accurately summarized as "judge-made law" via legal opinion, and based upon the English heritage of the majority of early settlers, English common law is an obvious source and explanation for early American law. But several innovations that the English legal profession and Parliament were, at best, slow to act upon were demands for the "Englishing" of common law from "Law-French" pleading in courts, which occurred in the early 1730s (Mathew 1938:

358–69), and the official distribution of statutory law as enacted by Parliament, which began with the publication of the *Statutes of the Realm* beginning in 1810 (Grossman 1994: 126–27). Essentially, English legal knowledge was monopolized by lawyers presenting arguments in a foreign language, and by Parliament’s failure to issue officially and free of charge its own statutes that governed the nation.

Meanwhile, the hallmarks of early U.S. national law are the public texts of the Declaration of Independence, the U.S. Constitution, and the Bill of Rights that contain the fundamental principles and laws that are the primary social contract between the people and their government. Once these documents were distributed a citizen could protest, “You cannot do this to me, I have rights of free speech and due process.” Under these fundamental contracts lay state and federal statutory law, and the earliest predecessor of these statutes was the multi-volume set of public laws of the Massachusetts Colony. That publication detailed a property law regime including property registration, creditor-debtor transactions, and the colony’s official regulations concerning markets themselves. Massachusetts’s law books not only comprised a practical manual on how to protect one’s property, they also allowed market activity to expand by making laws more transparent.

English Law Reform and Massachusetts Laws and Liberties

In the 1640s and 1650s pamphlets published in London regularly demanded that Parliament compile and distribute an official publication of existing statutory law. At the time the official collection of Parliamentary acts was kept in the Tower of London, and it was left to private printers to issue printed editions of English law. In 1647, a pamphlet entitled *The Lawyers Bane* urged members of Parliament to summarize and publish the mass of statutory law enacted over the centuries because men should “understand those laws and ordinances by which their rights, privileges, interests, and estates are secured.” To achieve an official law book a convention should “consult and take into serious consideration the whole body of the present laws,” with a goal of enacting “new, good, equal, just, and necessary laws, plain, easy, and free from all dilemmas and ambiguities.” The remainder of the law “together with all old names and distinctions as of Common, Civil, and Statute Laws” should then be “repealed and taken away for ever” (Nicholson 1647: 1–7).

During this era English courtroom proceedings were conducted in

an antiquated version of French utilized since William the Conqueror, and legal documents were penned in Latin and French. Richard Overton demanded that “all laws of the land locked up from common capacities in the Latin or French tongues” must be “translated into the English tongue.” Also “all records, orders, processes, writs, and other proceedings” should be “issued forth in the English tongue . . . without all or any Latin or French phrases or terms.” Then, the “meanest English commoner that can but read written hand in his own tongue may fully understand his own proceedings in the Law” (Overton 1647: 75–76). Albertus Warren warned fellow lawyers not to object to the law’s translation into English, because not until every Englishman could “read his duty in English and look into that which must regulate his deportment and interest civil” would the “reason of law be cleared” (Warren 1650: 35–41). Or as William Walwyn ([1645] 1934: vol. 3, 317) proclaimed, the “greatest safety will be found in open and universal justice, who relieth on any other will be deceived.”

The most popular statute book of the day, produced by the private printer Ferdinando Pulton, ran over 1,400 pages long, making it neither affordable nor portable. It was intended for students at the Inns of Court, merchants, the gentry, but not for commoners. Its introduction explained that “very many discreet men . . . desired that the statutes which be now in life, force, and general use, might be selected and set forth in one book.” The editors agreed that “knowledge of our laws, customs, and statutes of the realm is a means to direct every subject, the better to govern himself,” but a gentleman most required such knowledge to “keep, save, and defend his heritage and possessions in tranquility” (Pulton 1632). Near the end of his Protectorship in 1657 Oliver Cromwell’s appointee to reform English Law, William Sheppard, still pleaded for “one plain, complete, and methodical treatise or abridgment of the whole Common and Statute Law,” in order to “make those things that are now obscure and uncertain, clear and certain” (Matthews 1984: 172–74).

While mid-17th century English law reform was short lived and awaited the 19th century for its fruition, only a year after the Massachusetts Bay Colony had issued its first *Book of the General Laws and Liberties of 1648* colonial legislators acknowledged the “great benefit” of “putting the laws in print” (Shurtleff 1853: vol. 3, 173). They promptly appointed a new law committee to prepare supplementary editions. Upon royal notification that the colonial charter had been revoked divesting the colony’s legislature of its authority in 1685, two subsequent editions of the *Laws and Liberties* had been issued in 1660 and 1672, including annual pamphlets from the early

1660s to 1686 (Whitmore 1889: 71–138). Upon England's grant of a second charter to the colony in 1691 the annual printing of laws became standard practice until the American Revolution. By that time the Bay Colony had been printing and distributing its official law books for almost a century and a half. The *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay (1692–1780)* comprised 21 volumes in its 19th through early 20th century reprinting (Cushing 1984: 6–29).

New law books had to be issued periodically to revise and update those laws that had either expired, or were amended in due course. With the provision of official laws and regulations colonists alerted their representatives of necessary revisions to existing laws, and subsequent amendments were thereby realized. The law books operated in the public interest simply because the public had access to their contents. Without such access citizens would have to rely exclusively on magistrates to determine issues as individual cases arose, and new legislative initiatives would be deprived of the input from the very people who would be bound by subsequent enactments. Most importantly, the printing and distribution of official law books allowed colonists to be proactive agents in relation to the law, instead of being only subject to those who enacted, interpreted, and enforced it. On the other side of the Atlantic John Warr termed English law's complexity as "the badge of our oppression," because "so many" were the "references, orders, and appeals that it were better for us to sit down by the loss, than to seek relief." The nation had become "lost in the law" (Warr [1649] 1810: vol. 6, 220).

With the distribution of Massachusetts official law books colonists were able to verify a law's existence or meaning with far greater certainty than without the *Laws and Liberties*. Only 50 percent of Massachusetts's male colonists were literate enough to sign their names, and laws were proclaimed in town squares periodically. Without the law books colonists would have depended mainly on judicial decisions. Knowledge of these decisions would necessarily be restricted to a small percentage of the population. Gerrard Winstanley described such a process in England: "Much misery [had resulted because the] mind of the law, the judgment of the Parliament, and the government of the land is resolved into the breast of the judges." Predictably, knowledge of the law had become so "intricate" that "few know which way the course of the law goes, because the sentence lies many times in the breast of a judge, and not in the letter of the law." This practice had "occasioned much complaining of injustice in judges, in courts of justice, in lawyers, and in the course of the law itself" (Winstanley [1652] 1973: 336).

Land Registration

On October 7, 1640 the Massachusetts colonial legislature, the General Court, enacted a law requiring land registration and its implementation became an integral part of the colony's economic regulations:

For avoiding all fraudulent conveyances, and that every man may know what estate or interest other men may have in any houses, lands, or other hereditaments they are to deal in, it is therefore ordered, that after the end of this month no mortgage, bargain, sale, or grant hereafter to be made of any house, lands, rents, or other hereditaments, shall be of force against any other person except the grantor and his heirs, unless the same be recorded, as is hereafter expressed [Shurtleff 1853: vol. 1, 306–7].

While de Soto's primary focus in the *Mystery of Capital* concerns securing title (and capital) for informal property owners, Massachusetts legislators' main intent was to void "fraudulent conveyances" via the registration of property.

English reformers testified to the circumstance that in an era before easily available credit, or paper currency, debtors regularly evaded creditors by conveying real property holdings to family members or business associates. William Leach (1651: 2–10) insisted that a property registration system be established to prevent men from avoiding creditors by "fraudulently and secretly" conveying their "estates to their allies." John Shephard (1652: 4) thought that with the establishment of land registers "creditors should be sure of their debts." Henry Robinson (1651) proposed a "county register of conveyances . . . together with another register of bonds and bills of debt" to prevent unnecessary lawsuits, and "facilitate and enlarge trade and navigation." With a shortage of hard currency during most of the colonial period, and the absence of modern contract law until the 19th century, the conveyance of property to guarantee and satisfy debts was the lifeblood of early Massachusetts's economic life. Property registration was one conduit of a multi-conduit system of economic transactions, but it could only transform real property into capital if that real property was also integrated into a market system to effectively guarantee repayment of debts.

English common law's primary purpose was to make real property as secure as possible from any type of intrusion or summary confiscation. Although English law's mission was its titling process for real property, an anonymous pamphlet entitled *Reasons against the Bill Entitled: An Act for County Registers* (1653) complained that if Englishmen "must register all their deeds for the time past, then many

thousands will be . . . undoing themselves” by the consequent discovery of “flaws” in the “title of their estates.” In Massachusetts there were no such worries, because its registration of property was unencumbered by any previous formal titles and sustained by an apparently limitless amount of land. But in other polities where guarantees of representation are nominal, and a consensus on real property’s systemic integration into a market economy does not exist, titling or registering property may discourage owners from leaving unofficial property regimes because those very processes alert government to new sources of revenue through taxation or confiscation.

In Massachusetts, where a majority of the male inhabitants elected their own representatives to the colony’s legislature, townsmen could readily agree with the necessity for property registration that would protect both their homesteads and their incomes. The colony had been plunged into economic depression when the numbers of English immigrants dropped off dramatically in 1640, and their importation of desperately needed hard currency of gold and silver bullion was reduced proportionately. With a seemingly inexhaustible supply of land, colonial legislators decided to require registration of real property and incorporate it into its exchange economy (Dunn 1996: 328). No aristocracy controlled land ownership in the colony, as it rested with the towns, and no legal profession existed to safeguard such an interest.

During the same era English common law protected real property from attachment for debts, but debtors were imprisoned routinely until they remunerated their creditors. While the English statutory definition of bankruptcy remained a convoluted one for centuries, it was consistently dependant on whether a debtor was a merchant or a member of the landed gentry. By exempting the gentry from the statutory definition of bankruptcy Parliament successfully protected estates from execution for debts until the 19th century. Until then, by common law process only half of any real estate was available to creditors. Even when landowners used estates as collateral, arrangements strictly enforceable at common law, courts of equity provided debtors opportunity for relief and evasion of creditors (Duffy 1980: 284–305). Essentially, the wealth of England was land and the foundation of its social order was hierarchy. To allow tradesmen and merchants an efficient means to attach real property for repayment of debts would ultimately undermine the existing social order by placing land, commodities, and specie in a system of fluid exchange. Instead, as John Shephard (1652: 7) lamented, under the current regime English law was “too mild and remiss against the estates of debtors, and against their persons . . . much too rigid and severe.”

With a more than ample supply of land, coupled with a shortage of hard currency, Massachusetts followed a very different course. By 1644 the General Court established a process for the seizure of both personal and real property for debts: for “attachments of goods and chattels, or of lands and herditaments, legal notice shall be given to ye party or left in writing at his house or place of usual abode, otherwise ye suit shall not proceed” (Shurtleff 1853: vol. 2, 80). Under the regulation titled “Arrests,” the *Laws and Liberties of 1648* repeated an earlier guarantee that “no man’s person shall be kept in prison for debt but when there appears some estate which he will not produce.” The regulation titled “Attachments” stipulated that a defendant must be notified of such a suit by warrant delivered to his home, but if he did not appear judgment would be entered against him (Dunn 1998: 2–3). Thereafter, an execution for the defendant’s property, real or personal, would issue to a marshal or constable for execution (Haskins 1960: 216–21). Since the colony’s wealth was constituted overwhelmingly by real property, legislators employed it as collateral to prevent its fledgling economy from being asphyxiated by a lack of a viable currency.

Creditor-Debtor Reform in England and Massachusetts

G. B. Warden (1978: 681) recognized that the “most pervasive object” of 17th century English law reformers was the twin dilemma of “indebtedness and property.” In England and its American Colonies debtors were imprisoned until repayment of creditors in an era devoid of credit agencies, instant credit checks, or fine print on bills of sales. Contract law was a 19th century development, and since its arrival successive generations assume that everyday economic transactions have usually occurred without litigation. Before the era of contract such ordinary events were anything but ordinary, as each transaction raised the real possibility of a lawsuit and even imprisonment (Mann 2002).

During the Middle Ages, England’s manorial system saw a small number of managers, or stewards, administrate the creditor-debtor relations of most of the kingdom. Landlords held their own courts to enable tenants to transact business, and local markets operated with the lord’s steward in attendance. Instead of specie, labor and crops were exchanged between the tenants themselves, and in homage to their lord. Eventually, manorial common fields that allowed communal farming were demarcated and fenced off in a process known as

“enclosure.” This led to the decline of the manorial system during a centuries’ long devolution, and manor courts lost their authority over time as their tenants (and suitors) moved on in a desperate attempt to find other livelihoods. Ultimately, the national courts in Westminster Hall took up the burden of market transactions, and debtor law became an essential part of their business with dramatic increases in market activity (Brooks 1986: 70–79, 93–96). But contemporaries complained that the royal courts became overwhelmed by creditor-debtor cases: “How can the judges at Westminster confine and contract all the Law of England in and to Westminster . . . to be only determined by them?” (Jones 1653: 17).

The process of collecting debts was dilatory and uncertain. A purchase of expensive official documents was necessary to initiate a suit, and a debtor could even invoke a plea to “wage his law” whereby an ancient custom allowed him to summon oath-takers who, by reciting a customary pledge, could clear him from the debt. This was not a system designed for an environment in which ever-greater numbers of transactions were being made. To handle the increase in debtor actions English judges concocted a summary procedure for the arrest of a debtor initiated only upon the filed charge of his creditor (Blatcher 1978: 111–66). John Cooke (1646: 7) explained that many people who sought repayment of “just debts” had been unable to “pay officers fees to recover them,” so that a “poor man cannot sue for his wages” but “for a matter of 20 shillings . . . will cost him forty in the getting of it.” But the new summary process was driven by fees paid to everyone from the judges who issued warrants for debtors’ arrests to their jailers. Abuses like manufactured lawsuits inevitably arose (Veall 1970: 74–104, 143–47).

The sum of the English property regime provoked repeated petitions to Parliament. *A Declaration and Appeal* (1645) invoked Magna Charta to condemn imprisonment for debt, “being a freeborn people and no villeins and slaves” an English freeman could not be “outlawed” without “lawful judgment of his peers or by the law of the land.” Furthermore, debtors’ incarceration “tendeth to none other end then to the enrichment of lawyers, attorneys, solicitors and jailers, and to the utter ruin of thousands of us your oppressed brethren, and of our wives and children.” *A Pittiful Remonstrance* (1648) craved “deliverance from this unjust, inhumane slavery of imprisonment for debt, illegally fastened as on us, so, on this whole nation and their posterity, contrary to the law of God, and the fundamental great Charter of England’s liberty.” *The Womens Petition* (1651) decried the “Norman yoke of bondage and oppression . . . still continued upon this nation, by the impious, oppressive, dilatory, and most

chargeable practice of the law, and destructive imprisonment of men and women for debt, in the several prisons . . . and dungeons of cruelty in this land.” In 1647, another petition to Parliament demanded that its members

settle a just, speedy, plain and unburdensome way for deciding of controversies, . . . and publish them in the English tongue, and that all process and proceedings therein may be . . . also in English, . . . that each one who can read may the better understand their own affairs, and that the duties of all judges, officers, and practicers in the Law, and of all magistrates and officers in the common-wealth, may be prescribed, their fees limited under strict penalties, and published in print, to the knowledge and view of all men by which just and equitable means this Nation shall be for ever freed of an oppression, more burdensome and troublesome then all the oppressions hitherto by this Parliament removed [Aylmer 1975: 79–80].

After the execution of Charles I in 1649, Parliament passed a series of laws aiming to reform creditor-debtor relations. In the same year its members enacted the initial reform popularly known as the *Five Pound Act* (Firth and Rait 1911: vol. 2, 240–41). Prisoners were to be discharged upon an oath that their total possessions did not exceed £5, an amount not to include “necessary wearing apparel and bedding for himself, his wife, and children, and tools necessary for his trade or occupation.” A subsequent ordinance enacted in 1653, *An Act for the Relief of Creditors and Poor Prisoners*, established county courts to hear creditor-debtor litigation; the necessity of county courts, or accessible justice, was one of the most common demands of reformers. The 1653 Act also authorized judges to expeditiously determine the estate of imprisoned debtors, and if a prisoner had property the court could use it to satisfy his creditors. Most important, real estate could now be seized to satisfy debts. Previously only merchants could be declared bankrupts, and as such, subject to a confiscation of their “lands and tenements” to satisfy creditors. Therefore the 1653 Act fundamentally altered creditor-debtor relations in England. Real property at large was subject to confiscation in order to satisfy debts, and debtors would be incarcerated only if they willfully refused restitution (Firth and Rait 1911: vol. 2, 753–64). However, upon the restoration of Charles II all acts and ordinances passed by the Interregnum Parliaments were abolished in 1660.

Massachusetts’s incorporation of real property into its market economy was prompted by a severe economic crisis caused by the decline in new colonists and hard currency that they brought with them from England, which in turn initiated a deflationary cycle. The

General Court described this dilemma in an act passed on October 7, 1640, the same day that it established the colony's land registration system:

Many men in the plantation are in debt, and there is not money sufficient to discharge the same, though their cattle and goods should be sold for half their worth, as experience hath showed upon some late executions, whereby a great part of the people in the country may be undone, and yet their debts not satisfied, though they have sufficient upon an equal valuation to pay all, and live comfortably upon the rest. It is therefore ordered, that upon every execution for debts past, the officer shall take land, houses, corn, cattle, fish, or other commodities, and deliver the same in full satisfaction to the creditor [Shurtleff 1853: vol. 1, 306–7].

In 1641 the colony had foregone the arrest of any colonist for debt if the “law can find competent means of satisfaction otherwise from his estate,” if not then an arrest should be made (Whitmore 1889: 41). In 1647, Massachusetts forbade the seizure of a debtor’s “necessary bedding, apparel, tools, arms, or other implements of household which are for the necessary upholding of his life,” just as Parliament would do two years later in its own *Five Pound Act* (Shurtleff 1853: vol. 2, 204). Finally, under continuing deflationary pressures the General Court authorized marshals to forcibly seize a debtor’s land or person six years before Parliament allowed county court justices to seize real estate to satisfy creditors (Shurtleff 1854: vol. 4, part 1, 197).

English Market Regulations

During the 16th and 17th centuries Parliament enacted a series of economic regulations known as “penal laws,” covering everything from the manufacture of woolen cloth to the brewing of beer. To aggravate matters, centuries before professional police forces were in place the Crown and the Parliament placed their faith in private informers to enforce these laws in English markets. The use of private agents of enforcement did not enjoy even an iota of market efficiency because the state had, in effect, empowered individuals to enforce its regulations for personal gain by reaping profits from their neighbors’ industry. A contemporary account termed it “lamentable” that many “poor men are daily abused and utterly undone by sundry varlets that go about the country as promoters, or brokers between the pettifoggers of the law and the common people, only to kindle and espy coals of contention whereby the one side may reap commodity” (Harrison 1994: 175–76).

The original intent of King and Parliament appears to have been

beneficent. In 1549, a large-scale uprising known as Kett's Rebellion began when commoners began to overturn fences erected by local magnates, ones that they protested unjustly curtailed their use of common fields. Ultimately, nobles from the surrounding countryside were forced to pay homage to Robert Kett and his followers at their camp where they held "court" under a large oak tree. Under the authority of their uprising the rebels conducted mock sessions of the king's courts, which in turn ordered the seizure of supplies for the camp from everyone but "any honest or poor man." Kett and his followers then petitioned the crown to disallow any future enclosures of common fields, for the reduction of land rents, and demanded that only they should enjoy common field profits rather than their landlords. The final article of the petition requested that Edward VI compel local justices of the peace to enforce existing Parliamentary statutes that regulated enclosures, "We pray your grace . . . give license and authority . . . to such commissioners as your poor commons hath chosen . . . to redress and reform all such good laws, statutes, proclamations, and all . . . proceedings which hath been hidden by your justices of your peace . . . from your poor commons" (Russell 1859: 47–62).

The alarm raised by Kett's Rebellion reinvigorated earlier efforts to enforce parliamentary penal laws. Hugh Latimer urged the young king's councilors to enforce these laws by authorizing informers to prosecute "rent-raisers, oppressors of the poor, extortioners, bribers, [and] usurers" (Davies 1956: 30). A 1551 royal proclamation declared that the "superfluous and tedious statutes" should be "made more plain and short to the intent that men might better understand them, which I think shall much help to advance the profit of the commonwealth." At the same time the proclamation called on noblemen and justices of the peace, or those same men who were enclosing lands, to enforce penal laws (Jordan 1966: 166–67).

To fortify the penal law regime a 1558 statute provided that if an informer was frustrated in filing suits on penal statutes in local courts, whose juries had proven resistant to informers enforcing them in local markets, he could appeal to the national courts in Westminster Hall. In 1566, however, Elizabeth I was forced to issue a proclamation *Protecting Informers* after riots saw "great" crowds harass and attack them in a "very evil" manner. Rioters resented the new process because it had removed the regulation and prosecution of market offenses via penal statutes from local jurisdictions to the national level. From the 16th through the 17th centuries parliamentary economic regulations digressed from an ostensible intent of protecting commoners' rights, to mechanisms of revenue for crown, court official,

lawyer, and informant (Davies 1956: 17–74). In Edward Coke's ([1644] 1681: 191–94) judgment, "Many penal laws obsolete, and in time grown apparently impossible or inconvenient to be performed, remained as snares whereupon the relator, informer, or promoter did vex and entangle the subject."

Eventually, for-profit syndicates were formed to lobby Parliament to enact statutory penalties, and their members' reward was monopoly rights for those regulations' enforcement. Once secured, these same syndicates employed individual informers who often reached pretrial settlements with the subjects of their suits, known as "compositions," before formally initiating a prosecution to enjoy the entire penalty rather than splitting it with the crown. From enforcement authority through composition the original mission of penal statutes to benefit the common welfare was set on its head (Beresford 1957–58: 221–37). Coke ([1644] 1681: 191–94) diagnosed the fatal flaw of the scheme, "Under the reverend mantle of law and justice instituted for protection of the innocent and the good of the commonwealth," informers "vex and depauperize the subject and commonly the poorer sort, for malice or private ends, and never the love of justice."

During the Parliaments of 1621 and 1624 Coke spearheaded an array of reform initiatives including the reduction of the number of penal statutes, and an attempt to reign in the methods of their enforcement. His favorite example of abuse was seizures made upon a statutory penalty enacted in 1364 to regulate poultry prices. Since prices were invariably higher in markets of 16th and 17th century England, every poultry merchant in the kingdom was in violation of this statute. Despite the many attempts to organize and reduce the number of penal laws during this era Parliament's singular achievement came in 1624 with the repeal of 60 statutes, of which 50 were economic regulations. One member of the committee, William Hakewill, reported, "We found in the heap of them 250 fit to be repealed which remain only as so many snares to entrap men" (White 1979: 27–141; Beresford 1957–58: 236).

In place of informers Charles I empowered royal commissions to travel throughout the kingdom and prosecute violators of his laws and proclamations. But soon follow-up reform commissions had to be dispatched to ameliorate the original commissions' abuses. G. E. Aylmer (1957: 230–32) noted that by the late 1630s even the reform commissions were "getting a bad name" because the "same men were often on reforming commissions and on the less reputable ones . . . simultaneously." Aylmer recognized that some of the "worst abuses" resulted from "payment of officers . . . by fees, . . . rather than by salary, and the treatment of offices under the crown as pieces of

semi-private property with little notion of the public service about them or their holders.” The efforts of Coke and fellow members of Parliament accomplished another important reform with the passage of *An Act for the Ease of the Subject Concerning the Informations upon Penal Statute (1624)*, which required penal law suits to be filed initially in local courts. Subsequently, the only national court that heard such cases was the Star Chamber, but their great number had become so unmanageable that informers began to be turned away only a decade later (White 1979: 65–76).

While the raft of injustices concerning informers and markets would seem solvable by the cessation of Parliament’s interference in local markets and employment of informers, there were reports in local markets themselves that officials used penal laws to show favoritism based on provincial loyalties. Commoners complained that many local magistrates were “loath to displease their neighbors” and regularly ignored the enforcement of parliamentary statutes. But when a “country baker” attempted to enter a larger city’s market with “bread of better quantity,” local bakers who frequented that market regularly pressured magistrates to find “fault by and by with one thing or another in his stuff, whereby the honest poor man . . . is driven away” (Harrison 1994: 246–47). While parliamentary penal laws’ fee-based system of official enforcement was bound to encourage extortion and corruption, it also provided the means for government officials to skewer the operations of markets by injecting their preferences based on favoritism. Meanwhile, King and Parliament were befuddled that “subjects be daily unjustly vexed and disquieted by divers common informers upon penal statutes, notwithstanding any former statutes” (*Statutes of the Realm* 1993: vol. 4, part 2, 801–2).

The anonymously authored *An Experimental Essay* (1648: 1–5) acknowledged that the “Common Law in England consisteth of many ancient customs, and to rectify inconveniences in those customs, as grievances have arisen, statutes have been made from time to time in Parliaments, which hath caused a multiplying of laws . . . to the puzzling of all people who are not lawyers.” The author believed that a compilation of the law of the “particular customs of some towns and cities” was therefore necessary to establish “one way alike throughout the kingdom,” so that “every understanding man would be as well able to judge of right, as any judge of the law now is, or can be.” If Parliament would replace the “vast body of the law” with a “few plain brief laws like a new Magna Charta,” then “all the laws might be printed in a table or little book for every one that can read to make use of.”

In 1652 the Massachusetts General Court had found it necessary to

revise the regulation titled “Bakers” to remedy complaints that customers were being cheated at market by the provision of underweight baked goods:

Whereas it appears to this Court that there is much deceit used by some bakers and others, who, when the clerks of the markets comes to weigh their bread pretend they have none but for their own use, and yet afterwards put their bread to sale which, upon trial, hath been found too light; for prevention of such abuses for time to come, it is ordered by this Court and the authority thereof, that all persons within this jurisdiction who shall usually sell bread, within doors or without, shall at all times hereafter have all their bread that they . . . put to sale . . . [weighed] and marked and yielded to trial of the aforesaid clerks, as is directed for bread, by order of this Court, in the printed book, page 3, title Bakers, and under the penalties therein expressed [Shurtleff 1853: vol. 3, 266].

Colonists periodically bought and sold goods on market day, when merchants, craftsmen, and farmers brought their wares for sale. When bakers came to market their goods were weighed and certified by colonial officials. The General Court’s amendment directed that bakers must mark each loaf of bread for sale, and a table of weights and measures was provided in the legislation. The bakers’ regulation directed officials to “weigh the said bread as oft as they see cause, and to seize all such as they find defective.” The 1652 amendment of “Bakers” proceeded to authorize seizure of goods and penalty of forfeiture just as English penal statutes had done for centuries.

But in Massachusetts with the issuance of official law books colonists could be their own agents of enforcement in markets, and were no longer exclusively reliant upon state appointed officials, or subject to private enforcers seeking to collect a fine or seize their property. Daniel Coquillette (1994: 200–1) explained that because the law books’ format was based on alphabetically arranged titles, one had only to flip a few pages to the “B” section of the *Laws and Liberties* to find its regulations concerning bakers. And because learning ABCs was studied before penmanship, colonists with the most rudimentary education could access the law.

Conclusion

One of our most venerable legal maxims is “Ignorance of the law is no excuse.” It originated from a 14th century judicial ruling upon an English bishop’s plea that, because he was unaware of the particular statute on which his prosecution was based, how could he have violated the law (Holdsworth 1925: 55)? While the court disagreed, its

judges could never have imagined the longevity and unquestioned authority of their ruling. Five centuries later Justice Joseph Story (1884: 64) added the caveat, “The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them.”

In the interim, John Locke (Laslett 1988: 323–25) had written in his *Second Treatise* that a “political or civil society” was formed only when “any number of men” authorized the “legislative thereof to make laws . . . as the public good of the society shall require.” Only this act could transport men “out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries, that may happen to any member of the commonwealth.” The obvious consequence of such a theory of governance is twofold: legislators must provide the members of such a political compact the corpus of enacted law for examination and reference, and just as importantly, without a timely dissemination of the statutory contracts binding the members of a political compact it exists only as a theoretical exercise rather than an operating social contract.

With the dissemination of laws, citizens gain insight, and power, into the halls of their legislature and courts, so that they can judge for themselves whether legislators and judges are wielding authority properly, and for the public good, instead of private gain. With the provision of market information, from the mundane to the complex, both private persons and public officials who seek to exploit a market system illegally for personal gain come under the surveillance of the multitude of market participants. Concomitantly, the distribution of market regulations exposes those same regulations to public critique and subsequent amendment. Today we know reflexively that any market decision or investment is poorly made if not based upon the most recent and accurate information available. Access to both market regulations themselves, including processes and forms securing property ownership, must be made available in order for the development of markets to occur. Without such regulations and their dissemination to market participants more sophisticated investment activities would be impossible. Not only does Adam Smith’s “invisible hand” have material foundations, paradoxically, in order for markets to be free and open their participants need to have access to regulations that apply to both their property and their marketplace competitors. Only a fully informed participant can judge commercial risks in relation to the maximization of chances for profit (Hayek 1978: 220–33; Friedman 2002: 25–27; de Soto 2000: 39–48).

No matter how sophisticated the design of statistical or analytic

study of markets, if market participants in developing countries are deprived of the knowledge of public regulations by which they might pursue their self-interest, who can possibly diagnose the cure of their malady or their economic potential past or present? As Toby Mendel (2005: 18) wisely observed, “One of the reasons routine publication is so important is that individuals are often unaware of basic information relating to government. . . . Put another way, people do not know what it is they do not know.” Because capitalism, as it has evolved through the centuries, has become predicated on the ability of individuals to best judge their own interests and act accordingly, how is this in any way consistent with our unquestioned maxim that “ignorance of the law is no excuse”? In this most fundamental matter of citizenship, does any government have an excuse if it fails to disseminate the “public laws” purportedly enacted in the name of civil society? Any such provision of information should not be thought of as a privilege, because it is every citizen’s business and right to know. As John Warr concluded ([1649] 1810: vol. 6, 214), “So that here is the proper foundation of good and righteous laws, a spirit of understanding big with freedom, and having a single respect to people’s rights; judgment goes before to create a capacity, and freedom follows after to fill it up. And thus law comes to be the bank of freedom, which is not said to straighten, but to conduct the stream.”

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