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Taking a Stand: Politics, Prisons, and Football

When I was a 14- or 15-year-old schoolboy, we studied the English Reformation in history class. Our teacher explained to us what were considered to be the accepted reasons for that pivotal event in English history and politics. He told us that one of its leading causes was the desire to challenge and reject the authority of the pope and the corrupting influence of the Catholic Church generally. Always being one quick to challenge the teacher's authority, I asked him whether they taught the English Reformation in the same way that we were taught it at the Catholic school down the road from my non-religious (but squarely Protestant) school. He smiled at this and contented himself with the reply that this was a good question, but one that we need not deal with at that time. As I now appreciate, my question had much deeper ramifications than I even glimpsed; it was a lucky strike by a mouthy teenager. It raised the whole issue of the nature of historical inquiry and scholarly objectivity. Shortly after that, the same teacher gave me a small book and recommended that I should give it a read. It was *What Is History?* by Edward Hallet Carr and published in 1961. Looking back, although I might not have appreciated it at the time, this book (which I still have) was the start of my career as a general and serious sceptic; it put me on the path to being the kind of critical theorist that I became and now am.

Carr's lauded monograph is less about history and more about what it means to be in the business of history-writing. Although Carr did not see himself as particularly radical in his approach and insights, he opened up a way of seeing and being in the world that was entirely subversive. He was rebelling against the prevailing scholarly orthodoxy that passed off the historian's role as akin to that of a factory store-person – keeping

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track of what went in and out, making sure that it was catalogued appropriately, and assigning it to its proper place in the grander scheme of artefactual things. Carr was having none of this. He saw the historian as having a more active role; there was a continuing interaction between both the historian and the facts he generated and between the present and the past. In an arresting phrase (which I vigorously underlined), he wrote that the historian adopted 'an angle of vision over the past'.¹ This challenged ideas that there was a fixed or objective reality, but a constantly shifting ground that eluded a final or impartial accounting. Of course, events occurred at different times and places and their basic reporting could be right or wrong, but determining their larger significance and meaning was a much more ambitious and fluid affair.

At his most provocative, Carr was suggesting that there was a moral or political dimension to history-writing that could be fudged or hidden, but never completely done away with. Reality was not the unadorned certainty that most imagined or craved. As he put it, "the facts speak only when the historian calls on them: it is he who decides which facts to give the floor, and in what order or context".² If historians were store-persons, they wielded enormous power; their role and authority was more akin to that of an architect as opposed to a lowly gatekeeper. According to Carr, therefore, historians or scholars generally not only created or, at least, relied upon the organizational scheme that was most in line with or supportive of their own sense of importance and significance, but also allocated the inventory to its allotted place in a scheme very much to their own liking. What Carr said about history always seems to me to be pertinent to any mode of inquiry or theorizing, especially when it is done in the name of truth and objectivity.

Carr's influence upon me has been enormous. The line going back more than 50 years now seems to go directly to that occasion of reading *What Is History?* I have spent much of my professorial life asking the question "where are you standing when you speak?" I have pushed that question not only about the work and writings of others, but also about my own writing. Carr hit upon an insight that far exceeds the discipline of history-writing. For me, it has been a general invitation to challenge any and all efforts to speak in the accent of Truth and Objectivity. I reject any claim that it is possible or even desirable to achieve the 'view from nowhere'. In taking this line, I do not intend to suggest that all views are subjective and that one view is no better than another – on the

¹ E. H. CARR, *WHAT IS HISTORY?* 86 (1961). ² *Id.* at 11.

contrary. I take a pragmatic line that defends the idea that there is no Method of methods and no Context of contexts.³ There are only those arguments and reasons that have passed social muster in an open and intelligent exchange. Along with this comes the relentless insistence that there are no bright-line or 'stand-less' boundaries between theory and practice, natural and social science, facts and values, philosophy and conversation, and, of course, law and politics. It is not that these categorical distinctions collapse in on each other and have no relevant differences at all, but that such differences are contingent and social because they always arise from and within, directly or indirectly, their sustaining historical and political context.

So where do I stand when I think about and write about law? Who is this 'I' that raises the issue about where one stands? What is my 'angle of vision'? My answers to these questions are, of course, themselves beholden to some context and sense of context that will itself be unfixed and, in some ways, be unfixable. By this, I mean that not only can I be unsure about whether I have accurately identified the place from which I stand, but also that this place will itself be shifting and changing. It is somehow folly to think that I have always stood in the same place and that, as I change, the place on which I stand has also not changed (see Chapter 2). Indeed, I may be entirely the wrong person to make any convincing or compelling observations about the place on which I stand. There may be others who can get a clearer or more revealing picture of where I stand from where they stand; I might be too close or too immersed in that place to get any distance from it. Nevertheless, with that caution in mind, it seems appropriate that I should take a general stab at trying to explain where I think that I am standing or what is my 'angle of vision' when I write about law.

A Backstreet Boy?

As much as I have spent my life trying to deny or downplay it, my parents have had the most influence on my intellectual career as much as on my life generally. I grew up in north Manchester as the only child of my working-class parents. My dad was a bus mechanic and my mother,

³ See ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* (2009). The strongest modern influence on me has been the philosophical pragmatism of the late Richard Rorty. See, for example, RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* (1999).

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unusually for those days, was a comptometer clerk at the local co-operative society. They were both from large families and made some sort of decision that their only child would not be deprived of some of the opportunities they had missed as part of a large family. I was also the oldest grandchild on my mother's side, but the youngest on my father's side. We were not well-off, but we were not poor. I never experienced wanting for much or being worried about whether I could do the things I wanted. Of course, what I wanted was conditioned by what I thought we might be able to afford; my horizons were limited by the terraced street on which we lived and the people who lived there. As a post-war baby, born in 1951, I was part of a boomer generation and, therefore, blessed that I would not be exclusively defined geographically, socially, or professionally by the place of my birth or upbringing.

My mother (who is still alive at 91) was the driving force of my family. As the eldest daughter of her family, she had already put in time as a caregiver and assumed responsibility for her siblings. They were a close, if fractious family who lived in public housing in the inner suburb of Newton Heath. My grandmother stayed at home and, when my mother went to work, took care of me. My granddad was an archetypical, flat-capped northerner who worked in a steel factory near Trafford Park and was as loving to me as he was gruff to others. The only time I really saw him get emotional was on that tragic day in February 1958 when the Manchester United football team was killed on the snowy runway at Munich Airport. Like many such men, he seemed more comfortable shedding a tear for those heroic strangers than for those closer to home. But my granddad had a great influence on me in one of the connecting themes of my life – supporting Manchester United. My granddad and my father did not get on too well, in part because my dad was not a Red, but a Blue who supported Manchester City.

On looking back, two particular incidents involving my mother stand out as having a very significant effect on me and my life's trajectory; both involved education. When she was about 11, she took a school exam and did so well that she was offered a place at the Manchester Grammar School instead of the local secondary school. However, she was unable to go to the grammar school as my grandfather decided that spending the money on a school uniform would not be the best use of the family's meagre resources in light of the increasing size of the family. This was a huge blow to my mother and no doubt had an enormous influence on how her life would play out. Resentful of being deprived of her chance at educational and personal success, she was determined that such a fate

would not sabotage the potential of her children once she had them. I was the future beneficiary of that defeat and her determination. I did win a local scholarship to Oldham Hulme Grammar School and, at the insistence of my mother over my own resistance to the idea, I was able to accept it.

For all my railing against the traditionalism of the institution and its curriculum, I owe much to the school and its teachers: it taught me structure and discipline in refining my ideas. After all, I tended (and still do to some extent) to define myself by what I was against, not what I was for. I left the school under something of a cloud. Caught between the old hierarchical order and the promise of a newer, freer one at the end of the 1960s, I went off the academic rails for a while. I had enough of doing what everyone wanted me to do or to be, so I had a delayed teenage tantrum. I did not take my final exams seriously and was duly rewarded with miserable grades. This was a cause of deep regret to my parents and deep anger from my teachers. I managed to get back on the rails over the next few years, but my educational trajectory was far from conventional. However, without being too Panglossian, it all turned out for the best. I carried a large academic chip on my shoulders which has served me well, at least most of the time – I do not take success for granted, know the worth of hard work, pull for the underdog, and recognize that timing is everything. I still own my old school tie which acts as a reminder to me of both the better and worse aspects of my school days.

The second incident involved me directly. On our first day at junior school as five-year-olds, my classmates and I were asked who could write and spell their name. Being something of a show-off, I immediately put up my hand and spelled out my name 'A-L-L-A-N'. The teacher in gracious, but no uncertain terms told me "that was almost right – it is spelled 'A-L-A-N'". I went home that afternoon and told my mother that she had been spelling my name incorrectly and that henceforth I would spell it properly. The next day my mother went to the school and told the teacher that I did not spell my name 'Alan', but that it was 'Allan' and she should remember that. Even at my young age, the significance of this encounter was not lost on me, although I did not grasp its full importance until much later. It took a lot of courage for my mother to go to the school and take on the teacher. While she was polite, she was not prepared to bow to the assumed authority of the teacher. She knew right and wrong and was prepared to take a stand. Tellingly, it showed me that the teacher was not always right and that authority should not always be confused

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with correctness: you should show respect to people, but that was not the same as kowtowing to them simply because they had some power over you. My days as a critical theorist can be traced back to that incident.

My father and my relationship with him were more complicated than my mother and my relationship with her. However, if my mother gave me a strong sense of myself and who I could be in the world, my father provided some of the content and substance. I spent much of my time banging heads with him. He was uneducated in any customary sense, but he was no fool. Unlike me, he was also a good listener. He would hear me out, but almost never changed the view he had begun with. He was as stubborn as he was supportive of me. When I was younger, I saw only the stubbornness, but later I appreciated the supportiveness. He set an example of what it meant to work hard (and for that to be its own reward) and to give your best effort at all you do. But two particular aspects of his life had the most impact on me – politics and football (Chapter 3).

My dad was a trade unionist. He worked at the main bus depot in Manchester and, apart from fitting engines, he was the works shop-steward. He was proudly pro-worker in his few words and many deeds. He took the view that the working man (and occasionally, but less importantly, woman, unfortunately) was deserving of greater respect and remuneration than he received. Unlearned in any treatises on socialism, he was an instinctive and unrelenting champion of the proletariat. If he was to be labelled, it would be as a Fabian in the tradition of the Webbs and George Bernard Shaw; he was for a safe and steady march to a better life for all, not a man of revolutions and grand gestures. Although I used to be unwilling to attribute my own sense of politics to him, I now appreciate that his 'democratic socialism' is exactly what I subscribe to (see Chapter 4). I spent a period as a young man dabbling in the celebrated and daunting texts of the political left, but I never really subscribed to their revolutionary fervour and apocalyptic scenarios. I liked to rock the boat (and took great pleasure in doing so), but, perhaps with my mother's more guarded sensibility, was never really prepared to scuttle the boat entirely. After all, it is hard to be any kind of revolutionary while being a professor at a prestigious and established law school.

My dad and I did not talk much about law. He was very proud that I had become a professor, although he was wont to say as much to me. Early on in my career, I went back to Manchester before I went on to give a lecture at Cambridge as part of a series for Canadian lawyers and judges. He asked me what I was going to talk about. I told him that I

was going to take what was considered a radical stand by demonstrating how judges tend to advance and benefit established interests and conservative values under the guise of doing law and being objective (see Chapter 5). He laughed at this. His basic response was – what else would anyone expect them to do? He thought it simply trite and silly to have to point out that judges would act that way. He was not offended by this and certainly not surprised by it: it would be obvious and apparent to most working-class folks that this was the case. If he were a judge, he would also follow his own political views and values. But he was pleased that I was taking such a stand and even more delighted that I could make a well-paid career out of doing this kind of common-sense criticism.

My politics have remained reasonably in the democratic socialist camp (see Chapter 6). I have tried (and, no doubt, failed on many occasions) to live up to the challenge this commitment brings. Thanks to the ideas of people like Duncan Kennedy and Roberto Unger, I have resisted the temptation to subscribe to structural and monolithic accounts of social hierarchy and deprivation. Instead, I have been more drawn to the idea that, for all the insights of such uncompromising texts, the world and its informing ideas are a much messier place than some would like to insist or pretend; they tend to defy explanation in terms of ‘The-One-Big-Idea’. Instead, I have opted to draw on all manner of influences and ideas and cobble them together in an equally untidy way. The resulting approach – as I firmly reject the whole notion of ‘grand theory’ – has been vulnerable to claims of inconsistency and lack of rigour. But at least it has enabled me to capture and retain something of the unpredictability and serendipity of life itself. Of course, in applying this mish-mash of ideas to law and my own legal career in its many manifestations, I have taken many detours and gone down my share of blind alleys (see Chapter 7). But, with the vast and ameliorating benefit of hindsight, I think that I have managed to hew a fairly similar course over the years about how law works as a medium for both oppressing people and offering them the opportunities to improve their lives.

Kicking the Habit

The other gift my father gave me was ‘football’. He had been a promising young player until he was injured playing for Stockport County around age 25. From then on, he threw all his efforts into becoming the best referee he could be. He worked his way up the ladder and refereed in the then Football League and even got in a couple of games at the

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international level. He was deservedly proud of his achievements. After he retired from the big leagues, he remained fully involved in both the refereeing of local leagues and their organization; he championed referees and the central importance to the game. Indeed, he was still refereeing in his 80s and received a prized medal and certificate from the Football Association for his 60 years of involvement in the game. But, for me personally, it was his enthusiasm for the game in all its forms and failings that ignited my life-long passion for the game. If somewhat overstated, being a professor is what I do, but being a football fan is what I am.

Football has been part of my life (and, therefore, a part of me) since before I can remember. In so many ways, football has been one of the defining threads and formative experiences of my life – playing, watching, talking about, arguing over, thrilling over, and simply living football takes up a large amount of my waking and, occasionally, sleeping hours. I was one of those kids who was rarely seen without a football at my feet or under my arm; my shoes were always scuffed from kicking a ball around on concrete pavements or schoolyards. For some, this might be taken as a sad confession, something that I am embarrassed by or I ought to be resigned to rather than enthusiastically embrace. But the truth is much to the contrary. I love football. And I hope that it loves me. Football has been good to me. I played at a fairly high level and was even paid for my efforts. But, along with a series of injuries and other opportunities, I likely plateaued in my late teens.

As regards my professional life, in case my claims are seen as a sentimental overstatement, I should note that, when I was first considered for a teaching job at Osgoode Hall Law School in 1978, it was said that “Allan is probably more at home on the football field than he is in the classroom or library, but we should take a chance on him.” I took – and still take – that as a compliment; it suggests that law and teaching is what I work at, but playing and watching football is what I do. While I hope that, over the years, I have become more at home in the classroom and library, I still bring with me onto those educational and scholarly fields a deep sense of life as a game and as a reflection of a footballing sensibility.

In both law and football, I recognize that I love to contest; it is the fuel that keeps my engine turning over. Whether it was for the ball or over some point of law, I was always in the thick of the action. As some of my colleagues and students can attest, I am occasionally too combative for my own good. But, over the years, I appreciate more and more that it really is the case that it is the playing as much as the winning that counts: you need to be a good winner as much as a good loser. Indeed, these days,

it is the watching more than the playing that dominates my involvement; the couch has replaced the pitch in my not-so-sporting life. Nonetheless, I still thrill to the possibilities and magic of football's field of dreams, especially if it involves Manchester United.

With the considerable benefit of hindsight and more than 25 years in law, I can now not only see the man in the boy and the boy in the man, but I can also detect the critical legal theorist in the ebullient football player – authority was to be challenged, rules were to be disputed, conventions were to be broken, facts and context were vital, neutrality was a pious pretence and 'right' and 'wrong' were always situational (see Chapter 8). Although it has taken me more than a couple of decades to grasp the connection, I realize now that there is much more of a link between my professorial life and my footballing passions; each was not an alternative and separate pursuit to the other. I take very seriously the idea of using games as a metaphor to understand social life and activity. I now see that I could have been learning as much about philosophy on the football pitch and as much about football in the library if I had been a bit quicker and sharper.

Through my father (who died a couple of years ago at 93), my political values and my footballing passion were brought together. In short, football has helped me to understand and develop a political approach to life. My involvement as player, official, organizer, and fan has been as valuable as any grand theoretical proposal drawn from the shelves of the great philosophers and critics. The thing about football is that it demonstrates time and time again that the best-laid plans can fail, not through lack of planning or for want of more rigorous analysis, but because of the unpredictable and always-moving quality of life – chance and necessity travel together, defying any fixed or enduring idea or practice of what it means to *play the game* (see Chapter 10). The best moves in the game, whether it is football or life, are those that contribute to the advancement of a more flexible and less oppressive structure; something that is less hostage to itself and more open to transformation. Liberated from the need to get it right, people can begin to confirm a democratic belief in themselves by adopting a simple and playful ethic – “act for the best, hope for the best, and take what comes”.⁴ In a society that attempts to embrace the contingency and playfulness of life, there is likely no better way.

In his wonderful book 4–2, an affecting chronicle of a young kid's life through the prism of the 1966 World Cup Final, David Thomson

⁴ J. F. STEPHENS, *LIBERTY, EQUALITY, FRATERNITY* 270 and 271 (2nd ed. 1874).

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manages to capture something of the magic and possibility the game of football holds. With lyrical ease, he captures both the lightness and profundity of being the game of football is capable of encompassing:

A game, a piece of sport, is valuable because it is unnecessary, unimportant, not just trivial but weightless. And because a game is all of those things, it can reach a profundity that the solemn events will never claim. A game can always be read as a metaphor for deeper conflicts, antagonisms, and violence – a game is a prelude to war, in that sense. But a game, or play, is also a way of passing time when time is all we have; it is an urge toward movement, action and maybe even grace as opposed to being stagnant and inert. And winning doesn't matter, because victory is always an illusion.⁵

My own particular education in life through football is probably best captured by my early involvement in local street games. I lived on Lord Lane in Failsworth on what were then the outskirts of Manchester. When we first moved there, the lane was wide and unpaved. There was a decrepit air-raid shelter outside my aunt and uncle's house that was a couple of doors away from ours. The beauty of this arrangement – an odd description for such an unpretty part of the world – was that there were few cars and we could play football in the lane to our heart's content or, at least, until it rained too hard, the woman across the street confiscated our ball, or our mothers called us in for bed. Often, there would only be a handful of us: attack-and-defence was the order of the day. But, on occasion, when the older kids would let us join, there would be enough for pick-up teams.

These impromptu games were grand affairs that, at least in my mind's eye, lasted for hours. Apart from observing some basic rules about kicking the ball and seeking to score goals, the structure and organization of the game was very fluid – players came and went (and some came again after they had gone home for their tea); the goals grew or contracted in height or width depending on the size and ability of the goalkeeper; people rotated in position and sometimes between teams; the pitch was of fairly flexible and changing dimensions; the score seemed to go up and down and usually stayed sufficiently close that the match was ended by a 'next goal wins' resolution; fouls and infractions were called in relation to the identity of the perpetrator and the victim (i.e., little kids got to do more with their elbows and have less done to them by bigger kids);

⁵ D. THOMSON, 4–2 171 (1996).