

WHERE WAS BERTRAND RUSSELL

(When the Law Lords Really Needed Him?)

The New Palace of Westminster is where the Law Lords do their work. The reader will have in mind all those spires and the Clock Tower ringing the hour.

The bell is Big Ben, of course.

It's spring in England. I am my corpus to the oral argument in *MacDonald v. Ministry of Defense*. Let me background here.

The Lord Chancellor appoints high court judges, and from them, the court of appeals judges. From this bench, he ennobles Law Lords who are appointed to life peerages. That makes them Lords of Appeal in Ordinary. Lords (five-at-a-time) are selected by the Lord Chancellor who is the Prime Minister's appointee; it's like having John Ashcroft pull together an ad hoc Supreme Court. For more see Parliament.uk/about_lords/the_law_lords; there are twelve Law Lords working full time with thirteen in reserve. (As this goes to press, Lord Falconer, Secretary of State for Constitutional Affairs, announced a long anticipated proposal for creation of a British Supreme Court which will move the functions of the Law Lords outside the House of Lords.)

To get to Committee Room No. 1, I passed through security at the public (St. Stephen's) entrance. Westminster Hall is on the left; this is where Charles I was tried in 1647. Within a dozen years the Stuarts had hunted down and murdered most of the men who voted to convict him. When the *MacDonald* case was called for the morning session, the doorkeepers ushered everyone out of the courtroom into the corridor. This passage was decorated in a style that might be called "Royal Windsor High School." We stood at a respectful distance while their Lordships trooped out from a distant doorway. As they approached, their Lordships gave us a polite bow and both teams of barristers returned the favor. The Law Lords got to the courtroom first, settled in and then the doorkeepers admitted counsel and the public. It all made perfect sense to honour the court in this manner. It's just not *our* sense. And the visitor can lose that really good view of the Thames he had snagged by showing up early.

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The lawyer for the Ministry of Defense said that MacDonald wasn't being discriminated against because MOD would have fired a gay servicewoman who was attracted to women; MacDonald said that he was being discriminated against because a straight woman – attracted to men – wouldn't be cashiered. The *MacDonald* case had come back from Strasbourg – seat of the European Court for Human Rights – for further proceedings; the case seemed to be headed back to an industrial tribunal.

Their Lordships were stuck with a devilish issue: In a discrimination case, what gets compared to what? Was Parliament telling judges to measure the gay man's share of distributive justice by a straight woman's situation or was his due to be measured by a gay woman? In one exchange, Lord Hope struggled with this scenario. An officer spies a male hunk poster on the wall of a service member's billet. What has the officer seen? Without knowing the gender of the service member, our earnest officer can't be sure that he has seen evidence of an offense against military morals. The situation seemed to oblige further viewing as to who is living in close quarters with the quite possibly but not necessarily offending gent-on-the-wall. Their Lordships were not amused that Parliament had left them in this pass, for they, quite literally, were obliged to skulk about Camp Ashby-de-la-Zouche or Fort Swinburne-by-the-Sea in search of enlightenment. Or instruct military moralizers to do so.

The problem Parliament tossed at the Lord Chancellor's top court judges had a distinctly British flavour. In fact, it's the problem that troubled Bertrand Russell through a series of works leading up to his 1910 *Principia Mathematica*; try the 1925 edition, Appendix C. Assume the world is divided up into tucky and fluffy; everything is either tucky or fluffy but not both. How does an observer tell if something is tucky or fluffy? It occurred to Russell that an observer would have to resort to rules that discriminate tucky from fluffy or true from false. A dyadic pair (as he called them) would call for an apparatus of rules to sort these things from those things. These sorting or parsing rules would require more rules that would govern the deploying of sorting rules, supply a check of results for errors, train people to work the rules, and so forth. Consequently, the world couldn't be divided into *just* tucky and fluffy.

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A hundred years ago Russell took lodgings in rural Oxfordshire and went to work writing up all of these sorting and parsing rules for classes of this and classes of that. And, of course, those very famous classes of classes. He worked with his tutor, Alfred North Whitehead, who (later) sneered at Americans for not being theoretical enough about their philosophy. *If it works, it works*, he dismissed us. And the Principia has soldiered on through the last century or so, now mostly ignored. But lawyers and judges, the artisans of the law, also have their own heavy lifting to do and no one today even dreams that you could write down all of the rules *we* use to manage ideas. The *MacDonald* case also demonstrates that the work is just as hard for us as it was for these two fellows from Trinity College, Cambridge.

With that, I return the reader to the predicament in Committee Room No. 1. There are two pairs, very exclusive classes indeed. One pair: gay man and that gay woman (MOD's offering). But there is also the gay man and that straight woman, according to MacDonald's counsel. Like I said, you need a regime to help judges sort out this class from that class, and that's more than Parliament had supplied their Lordships.

I toured the building after the hearing was over, the case being taken under advisement. As I crossed the main axis of Westminster I could see into the House of Commons, familiar to us from Prime Minister's question time; Ms. Betty Boothroyd, as Madam Speaker, was presiding from the woolsack. It was time for a division of the House. Without electronic voting equipment, the M.P.s do this the old-fashioned (might I say dyadic?) way; members form two lines under the watchful eyes of the whips, who administer party discipline. But no matter how many times the House divides, it still isn't going to supply all of the answers to go with those neatly recorded yeas and nays. Full employment for lawyers, judges, and, of course, Bertrand Russell, a Lord in his own right. (Adverts for anti-nuclear protests traded on his title, listing him on the speaker's roll as Earl Russell, and thereby lending *noblesse* to the proceedings.)

The last word goes to Chief Justice Lord Holt (1642-1710); he deplored "reports [of judicial decisions], making us appear to posterity for a parcel of blockheads." Fifoot, Lord Mansfield 14. I express my sympathy for those who report judges-at-work, and, of course, the judges themselves. Managing A and not-A turns out to be a monumental problem for both

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legislators and judges, no matter what intellect they bring to the task. But it is judges who must grapple with classes of things, at work in public. And overlooking the Thames on that Thursday afternoon, there were learned counsel arguing the merits of due and discrimination back at the judges, and, in this case, interrupting their Lordships at will. I highly commend a performance at Westminster to judicial tourists.

Apparatus

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