



# Nineteenth-century registers: constituting the market, professions and individuals

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## ABSTRACT

The nineteenth century saw the introduction of at least 20 registers into English statutory law. These were used as techniques of governance, in a Foucauldian sense, and they reflect the shifts in the changing relationship between individuals and the state at the time. The registers include the better-known systems for voters, births, companies and some professions. Less well-known registers were introduced for industrial property, coalwhippers and for deserters from ships. Deploying the idea of governmentality allows the registers to be seen in terms of the externalisation of aspects of governance, the facilitation of the internalisation of specific practices by those who sought registration and, to a lesser extent, by the competitors of those who sought registration. As such, their introduction represents a move away from the pre-existing juridical mode of governance.

**Keywords:** legal history; Foucault; registers; nineteenth century; governance.

## INTRODUCTION

In the late twentieth century, Foucault was quoted as saying that the 'law is not what is important'.<sup>1</sup> What has not been made clear in the literature are the conditions of possibility, within the law itself, for the current state of affairs. The examination of past statutory systems allows for an assessment of how changes in legislative frameworks have reflected changes in the processes of governance. The widespread adoption of registration systems in nineteenth-century England provides a useful opportunity to undertake such analysis. Of course, *individual* registers have, in recent times, been the subject of significant

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1 Alan Hunt, 'Foucault's expulsion of law: toward a retrieval' (1992) 17 *Law and Social Inquiry* 1–38, 7.

analysis;<sup>2</sup> however, this research considers all of the nineteenth-century registers. One of the first was the register of Births, Deaths and Marriages;<sup>3</sup> other examples include the registers under the Joint Stock Companies Act 1844, the Patent Law Amendment Act 1852, the Merchant Shipping Act 1854 and the Medical Act 1858. Less well-known examples were for ‘coalwhippers’ under the Coalwhippers Act 1843 and for deserters under the Merchant Shipping Act 1894. By the end of the century, at least 20 registers had been legislated.<sup>4</sup> There were, of course, a number of pre-existing registers – including the parish registers,<sup>5</sup> the registers of ships<sup>6</sup> and the Stationers’ Company register<sup>7</sup> – though these were not centralised. As such, the Parliaments took a known, and accepted, technique, expanded it, and applied it more broadly for the new problems that they were facing.

This fits with Foucault’s assessment of practices of governance: ‘techniques themselves change and are perfected, or anyway become more complicated’.<sup>8</sup> The registers will be considered through a Foucauldian lens;<sup>9</sup> not to provide a totalising narrative, but to explore key aspects of governance embedded within them. ‘Foucauldian-inspired’ critiques of registers have been highlighted;<sup>10</sup> however, Smith’s analysis considered only ‘civil registration’.<sup>11</sup> This article

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2 See, for example, Jess Smith, *Law, Registration and the State* (Routledge 2023); Sarah Keenan, ‘Making land liquid: on time and title registration’ in Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2018); and Marc Trabsky, ‘Normalising death in the time of a pandemic’ (2022) 12 *Oñati Socio-Legal Series* 540.

3 Births and Deaths Registration Act 1836.

4 By 1900, a version of all remained on the books – save for the repealed register for coalwhippers.

5 Cromwell ordered, in 1538, that all ‘baptisms, marriages and burials’ be recorded: John Cox, *The Parish Registers of England* (EP Publishing 1974) 2.

6 The Navigation Act 1660 limited access to certain trade routes to ships registered as English. Following that, in the eighteenth century, the Register Society, later Lloyd’s Register of Shipping, established its own registration system.

7 Permission to print a book in England was then subject to the entering of the book into the Stationers’ Company register. See, further, Cyprian Blagden, *The Stationers’ Company: A History 1403–1959* (Harvard University Press 1960).

8 Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978* (Palgrave Macmillan 2007) 8.

9 A simple connection is his notion of ‘biopolitics’, the ‘endeavour, begun in the eighteenth century, to rationalise the problems presented to governmental practice by the phenomena characteristic of a ... population: health, sanitation, birth-rate, longevity, race’: Michel Foucault, ‘Birth of biopolitics’ in Paul Rabinow (ed), *Ethics: Subjectivity and Truth* (New Press 1997) 73. Obviously, this applies to the registers of births, deaths and marriages, but also to ‘common lodging houses’ under the Public Health Act 1875, s 76.

10 Jess Smith (n 2 above) 115.

11 *Ibid* 2.

engages with the manner in which the detail of the legislation evidences both the early stages of ‘governmentality’<sup>12</sup> and the shifts in how this form of governance impacted on the constitution of individuals in society. With respect to the former, this research will show how registers facilitated the operation of the market and the professions as modes of governance – though such ‘externalisation’ was incomplete. With respect to the latter, the registers facilitated the ‘conduct of conduct’<sup>13</sup> for registrants, in line with the expansion of governmentality. As such, the deployment of registers accords with Foucault’s assertion that the ‘juridical mode of governance ... is increasingly replaced by ... a power that exerts a more positive influence on life, undertaking to administer it, multiply it, and impose upon it a system of regulations and precise inspection’.<sup>14</sup> One specific aspect of the regulated conduct of the parties to be considered is that of morality. That said, the registers had a limited reach. Much of the population was not directly disciplined by them. This analysis of the detail of the statutory systems, then, reflects a focus on the ‘material operations’ of the law that constitute ‘apparatuses of knowledge’<sup>15</sup> and allows for greater insight into the processes of change away from juridical governance.

## EXTERNALISATION OF GOVERNANCE

With respect to the role of registers in the externalisation of governance, Miller and Rose characterise this mode as the manner in which the ‘state limited itself by designating zones exterior to it ... that had their own density and autonomy’ such that the ‘political apparatus depended on the activities of multiple governing agents external to it’.<sup>16</sup> The authors refer explicitly to ‘the market ... churches, philanthropic organizations, trade unions and friendly societies’,<sup>17</sup> however, the focus here will be on the registers that classify the market and delimit the professions. That is, the state retained a role in both areas, with that role focused on knowledge within, and without, the bureaucracy.

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12 See, generally, Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991).

13 Michel Foucault, ‘The subject and power’ in James Faubion (ed), *Michel Foucault: Power, the Essential Works Volume 3* (Allen Lane 2000) 341.

14 François Ewald, ‘Norms, discipline, and the law’ (1990) 30 *Representations* 138–161, 138.

15 Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975–1976* (Allen Lane 2003) 34.

16 Peter Miller and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Polity 2008) 17.

17 *Ibid.* Friendly societies were subject to registration, first under the Friendly Societies Act 1850, charities were not.

## Market

The use of registers to organise the market aligns with the rise of the ideas of political economy.<sup>18</sup> Political economy's relevance to the use of registers is threefold: (1) the simple organisation of the market in terms of authorised companies and associations for workers; (2) the attribution of value; and (3) the importance of information to the market. As such, registers are 'constitutive' of the financial individual and 'collective legal identities'.<sup>19</sup> More broadly, though, the technique of governance operated to categorise, to order, to impose 'spatio-temporal' limits,<sup>20</sup> on that which is registered – whether the target be tangible, intangible or human.

The clearest way in which the market evidenced the externalisation of governance was the registration of companies. The market was ordered both through the existence of companies and through the knowledge the state had about them – with knowledge being a key locus of regulation. The registration process allowed competitors, and customers, to know whether a specific firm was in compliance with the law, with respect to registration, and to know the names and addresses of the directors and auditors<sup>21</sup> in case of litigation. While the companies had the imprimatur of the crown, by virtue of registration,<sup>22</sup> the company's compliance with the standards of conduct, and their liabilities, were the responsibilities of those constituted by the (governance) practices of the market. The state could not effectively regulate behaviour and so it was left (externalised) to those who operated in the market to seek

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18 For Foucault (n 9 above) 76, following Pierre Rosanvallon, the market 'played' a particular role in the spread of the liberal form of governance, it was 'a 'test', a locus of privileged experience where one can identify the effects of excessive governmentality'. Registers also accord with Adam Smith's ideas in that they are 'public institutions, which ... can never be for the interest of any individual, or small number of individuals to erect and maintain': *The Wealth of Nations* vol 2 (Penguin 1999) 274. Foucault, of course, discusses Smith in one of his lectures published in *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979* (Palgrave Macmillan 2008) 267–289.

19 Jess Smith (n 2 above) 115.

20 Ibid 7.

21 Joint Stock Companies Act 1844, s 7.

22 The company as technique of governance, of course, has a more extensive history. The argument here is that registration allowed for governance at a greater distance than was possible in the early modern period. For a discussion of the way in which governance was more 'personal' in the seventeenth century, see Chris Dent, 'Because I said so? Revisiting the "letters" in early modern letters patent' (2022) 12 *Queen Mary Journal of Intellectual Property* 47–67.

sanctions for behaviour that was contrary to the law – though, the state, of course, provided the courts as a forum for dispute resolution.<sup>23</sup>

Turning to both tangible and intangible property, the registers included specific limits of protection that allowed others to be (relatively) clear about what was outside that protection.<sup>24</sup> The Land Registry Act 1862, for example, required that ‘an exact description’ of the land to be registered be provided to the registrar<sup>25</sup> – enabling the registrants’ neighbours to know the limits of what was being claimed (it also allowed future purchasers to know the limits of what was being sold). As another example, the requirement to provide a ‘specification’ of the invention to be patented<sup>26</sup> meant that competitors knew what devices they could not use without potentially being sued for infringement. It has been argued that, with respect to industrial property rights, registration ‘determined’ the ‘boundaries of the property ... shifting the focus of attention ... away from the essence of the property towards the surface of the document’.<sup>27</sup> These registers, then, set out the limits of the property so that they could more easily be subject to market forces.

Unsurprisingly, one particular link between the discourse of political economy and registers is the notion of ‘value in exchange’,<sup>28</sup> given that the registers facilitated the exchange of interests.<sup>29</sup> John Stuart Mill considered that the ‘institution of property ... consists in the recognition, in each person, of a right to the exclusive disposal of what he or she’ owns.<sup>30</sup> More specifically, ‘exchange value requires to be distinguished from price’;<sup>31</sup> perhaps unsurprisingly, then, none of the centralised registers recorded the money paid for an exchanged

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23 A related example is the recording by registrars of bankrupts in ‘docket books’: Bankruptcy Act 1842, s 73. The books were under the jurisdiction of the court and cannot be characterised as a register for the purposes of the present analysis.

24 The qualifier of ‘relatively’ was included on the basis that trade marks that were ‘identical’ to an already registered trade mark could not be registered and marks that ‘so nearly resembled’ a registered mark so ‘as to be calculated to deceive’ also could not be registered: Trade Mark Registration Act 1875, s 6.

25 Land Registry Act 1862, s 7.

26 Patent Law Amendment Act 1852, s 20.

27 Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press 1999) 185.

28 Adam Smith (n 18 above) vol 1, 131, differentiated ‘value in use’ from ‘value in exchange’.

29 For Hearn, ‘some writers have regarded [exchange] as the sole subject of the economic science’: William Hearn, *Plutology* (George Robertson & Son nd) 235.

30 John Stuart Mill, *Principles of Political Economy* (Prometheus 2004) 224.

31 Ibid 417. For Foucault, the ‘importance of the theory of the price–value relationship is due precisely to the fact that it enables economic theory to pick out something that will become fundamental: that the market must be that which reveals something like a truth’: (n 18 above) 31–32.

registrable good.<sup>32</sup> That is, those things to be registered under the commercial registers – designs, companies, patents, land, ships – can be seen to have an innate value, by virtue of their registration, that was unchanging.<sup>33</sup> This value was based, in part, on knowledge. The inclusion of information in the commercial registers facilitated the exchange of goods of value. With respect to land,<sup>34</sup> registration gave a ‘certainty of title’.<sup>35</sup> The Register of Patents also recorded the change in ownership of the grants and provided information that assisted prospective purchasers of a patent<sup>36</sup> – with ‘knowledge’, for Mill, being ‘a cause of the state of the production and distribution of wealth’.<sup>37</sup> Finally, for Ricardo, one ‘source’ of the value of a good is its ‘scarcity’.<sup>38</sup> Registration, and the use of the unique identifying features of the registrable interests, if nothing else, reinforces the scarcity of that which is registered.

Finally, mention may be made of two other registrable entities. These were the friendly societies and, from 1871, the capacity for the registration of unions.<sup>39</sup> Each of these forms of organisation allowed for the partial protection of workers within the market dominated by companies.<sup>40</sup> One of the possible purposes of the societies was the

insuring or making good any Loss or Damage of live or dead Stock, Goods or Stock in Trade, Implements and Tools, sustained by any Member by Fire, Flood, Shipwreck, or any Contingency of which the Probability may be calculated by way of Average.<sup>41</sup>

These, of course, allow workers who have lost the ability to participate in the market to return to work. The societies also offered a degree

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32 Though the Register of Shareholders did record the price at which each shareholder purchased their shares: Joint Stock Companies Act 1844, s 49.

33 In Mill’s terms (n 30 above) 419: ‘All commodities may rise in their money price. But there cannot be a general rise of values. It is a contradiction in terms.’

34 Land Registry Act 1862.

35 HL Deb 17 February 1862, vol 165, col 351, Lord Chancellor.

36 The patent register included the specification, the description, of the invention. With that, a potential purchaser would have some idea of the value, or use, of the invention in the market.

37 Joseph Schumpeter, *History of Economic Analysis* (Oxford University Press 1994) 543.

38 David Ricardo, *The Principles of Political Economy and Taxation* (JM Dent & Sons 1911) 5.

39 Under the Trade Union Act 1871, s 6, registration was voluntary.

40 The relationship between friendly societies and trade unions is emphasised by the provisions that held that, with the passing of the Trade Union Act 1871, any registration of a union under Friendly Societies Acts was rendered void (s 5), and that registrars of friendly societies were registrars for trade unions (s 17).

41 Friendly Societies Act 1850, s 2(3).

of disciplining of workers with respect to their finances.<sup>42</sup> That said, charities, set up under the Friendly Societies Act 1875, also included those for the ‘relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters’; ‘societies for any benevolent or charitable purposes’; and ‘societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement and rational recreation’.<sup>43</sup> The breadth of the included purposes, then, reflects their wide-ranging role in governance.<sup>44</sup>

Unsurprisingly, the justification for the application of the technique of governance to workers was not altruistic. For example, the registration of unions was deemed necessary because ‘many of [their] rules and byelaws ... are framed in defiance of the well-established principles of economical science and tend to restrict the free action of those principles on which depend the well-being and progress of society’.<sup>45</sup> Unions, therefore, needed to be constrained in order to protect the market.<sup>46</sup> Prior to their registration, unions were outside proper governance,<sup>47</sup> bringing them into the regulatory sphere allowed the (partial) disciplining of their members.<sup>48</sup>

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42 Scrope highlighted the value of the ‘working classes ... club[bing] their small savings towards the wholesome and beneficial objects of assuring to themselves and each other a provision against destitution, sickness, and death or other calamity’: George Poulett Scrope, ‘Remarks and Suggestions on the Report of the Commissioners on Friendly Societies’ (William Ridgway 1874) 5; and the ‘virtues of thrift’ on the part of workers (ibid 9). Such an assessment may have been the product of his time as a Member of Parliament and his work as a political economist, focusing on ‘welfare economics’: Redvers Opie, ‘A neglected English economist: George Poulett Scrope’ (1929) 44 *Quarterly Journal of Economics* 101–137, 107.

43 Friendly Societies Act 1850, s 8.

44 It may be noted, further, that the legislative acceptance of the unions and societies accords with Foucault’s acknowledgment of the ‘domain of collective and politic units constituted by social relations and bonds between individuals that go beyond the pure economic bond’ (n 18 above) 307–308.

45 *Eleventh and Final Report of the Royal Commissioners appointed to Enquire into the Organisation and Rules of Trades Unions and other Associations* (1869) 24.

46 For example, the report listed a number of ‘objects’ of a union that should prevent them from being registered. These included objects ‘to prevent the introduction or to limit the use of machinery’ and ‘to authorise interference, in the way of support from the funds of the union ... with the workmen of any other union when out on strike’: ibid.

47 Banning them fitted with the assessment that ‘clear definitions [in] law’ were seen to ‘protect the wealth’ of the ‘urban and industrial middle class’: Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* 3rd edn (Cambridge University Press 2014) 25.

48 The requirement that registered trade unions provide copies of their rules (s 14) means that the state, in theory, had the capacity to monitor organised labour, again potentially furthering the interests of the capitalists.

## Professions

The rise of professions in the nineteenth century also shows the externalisation of governance. The registration of some – including pharmacists,<sup>49</sup> seamen<sup>50</sup> and veterinary surgeons<sup>51</sup> – but not all professions shows the extent to which externally validated knowledge was used in the regulation of the society. Registration was required in order to practise, however, the purpose of the register was also about delimiting the profession and reflected Foucault's assessment of the 'disciplinarianisation of knowledges'.<sup>52</sup> Expressed differently, registers reflected the 'symbiosis of professionalisation and state formation'.<sup>53</sup> The discussion, however, will note the fact that not all Victorian professions were subject to the technique.

As an example of the state designating an exterior governing agent, all the professional registers 'out-sourced' the proof of qualification – a set of minimum standards – to another entity. Unsurprisingly, this is further evidence of discipline: the 'processes of progressive training and permanent control ... establish[ing] the division between those considered unsuitable or incapable and the others'.<sup>54</sup> Under the Solicitors Act 1843, in order to practice, solicitors either had to have been an articled clerk for five years<sup>55</sup> or had to have completed a degree and a clerkship of three years.<sup>56</sup> Further, notwithstanding these requirements, judges could appoint examiners, and set rules of examination, to assess the 'fitness and capacity' of individuals to practise as an attorney.<sup>57</sup> In other words, the interests of the dominant players – the courts and the firms that employ clerks – were maintained.<sup>58</sup> With respect to degrees, only qualifications from specified educational institutions were acknowledged, but even their graduates had to serve significant time as a clerk. Likewise, for medical

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49 Pharmacy Act 1852.

50 While sailors are not, necessarily, seen as professionals now, merchant seamen were, perhaps surprisingly, subject to the most statutory schemes in the nineteenth century – there was a register for them in, *inter alia*, the Merchant Seamen Acts of 1835 and 1844 and the Mercantile Marine Act 1850.

51 Veterinary Surgeons Act 1881.

52 Foucault (n 15 above) 182. 'Disciplinarianisation', here, relates to the controls within the bodies of knowledge and to the way in which individuals are disciplined by the knowledges.

53 Terry Johnson, 'Expertise and the state' in Mike Gane and Terry Johnson (eds), *Foucault's New Domains* (Routledge 1993) 151.

54 Foucault (n 8 above) 57.

55 Solicitors Act 1843, s 3.

56 *Ibid* s 7.

57 *Ibid* s 16.

58 Notably, the Act regulated solicitors and not barristers – with the latter remaining under the purview of the Inns of Court.

practitioners, the institutional power of the medical colleges,<sup>59</sup> and of certain universities,<sup>60</sup> was maintained in the Medical Act 1858 through their representation on the ‘General Council of Medical Education and Registration of the United Kingdom’.<sup>61</sup> The extent to which registration furthered the position of these external entities is evident in the explicit justifications that the passage of the Pharmacy Act 1852 was to ‘increase the powers’ and ‘influence’ of the Pharmaceutical Society.<sup>62</sup>

The externalisation meant that the state had no role in sanctioning behaviour that was contrary to the proper conduct for the profession. There were only penalties for incorrect use of the titles; and there were penalties for falsifying the register<sup>63</sup> and procuring false certificates.<sup>64</sup> The Acts did, however, confirm the charters of pre-existing professional bodies;<sup>65</sup> though such bodies may not have had a significant regulatory role.<sup>66</sup> That said, the learnings of the profession were still acknowledged in law. Even in the eighteenth century, there were cases that referred to the ‘usage and law of the surgeons’<sup>67</sup> and the ‘situation [of a surgeon] implies skill in surgery’.<sup>68</sup> In the nineteenth century, there were cases

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59 Nine institutions were included, such as the Royal College of Surgeons of England, the Faculty of Physicians and Surgeons of Glasgow and the Apothecaries Hall of Ireland.

60 Ten institutions were included, such as the Universities of Cambridge, Durham, Edinburgh, Saint Andrews and Dublin.

61 Medical Act 1858, s 4. In terms of qualifications, a Fellowship, Licentiate or Extra Licentiate of the colleges listed above was sufficient for registration, as was a degree in medicine or surgery from any university: sch A, read in conjunction with s 15. Anomalously, a ‘Doctorate of Medicine by Doctorate granted prior to passing of this Act by the Archbishop of Canterbury’ was also sufficient for registration: *ibid*. For an overview of the background to the Act, see Marie-Andrée Jacob and Priyasha Saksena, ‘The changing nature of the Medical Register: doctors, precarity and crisis’ (2023) 32 *Social and Legal Studies* 714.

62 HC Deb 17 March 1852, vol 119, col 1219, Jacob Bell. It may also be highlighted that the ‘disorganised state of the medical profession’ was said, by a pamphleteer, to show a ‘public necessity for ... an immediate registration of that important body of professional men’: ‘Emeritus’, ‘A Letter to Right Hon, Sir George Grey ... on Medical Registration’ (Jackson and Mann 1852) 3.

63 For example, Pharmacy Act 1852, s 15.

64 For example, *ibid* s 16.

65 For example, the Veterinary Surgeons Act 1881 confirmed the charter of the Royal College of Veterinary Surgeons: s 14.

66 The original charter of the Royal College of Veterinary Surgeons did not make provision for the disciplining of members – the text of the charter is available from the Royal College of Veterinary Surgeons, [Royal Charter 1844](#). That said, the judges, under the Solicitors Act 1843 maintained a role in the regulation of lawyers that they had fulfilled from medieval times. It was until the 1870s that the ‘Supreme Court remained responsible for disciplining solicitors’: Richard L Abel, *The Legal Profession in England and Wales* (Basil Blackwell 1988) 249.

67 *Slater v Baker* (1767) 2 Wils KB 359, 362.

68 *Shiells v Blackburne* (1789) 1 H Bl 158, 161.

that considered whether there was a ‘want of skill and diligence in his profession as an attorney’,<sup>69</sup> and more generally, there was a reference to ‘actions against surgeons, attorneys and other professional men, for want of competent skill or proper care in the service they undertake’.<sup>70</sup> So, while the registers themselves did not allow for the sanctioning of registrants, the law already considered their professional knowledge as a standard against which their conduct could be measured. Again, this is an indicator of the law not setting the limits of behaviour in society.

The processes of registration may also be linked with the labour theory of value – the source of value being the ‘quantity of labour required to obtain’ the commodity in question.<sup>71</sup> *Contra* Smith, the value of a good was ‘not ... the wages paid to labour’,<sup>72</sup> though Ricardo did not disagree with the assessment that labour included the ‘skill, hardship and ingenuity’ that went into production.<sup>73</sup> It is arguable that the protection of titles for doctors, solicitors and pharmacists is, in part, an acknowledgment of the ‘skill, hardship and ingenuity’ that went into the qualification. This, most obviously, applies to those who went through years of study or learning in order to become a doctor, solicitor or pharmacist.<sup>74</sup> Expressed differently, a purpose of the Medical Act 1858 was to protect against those ‘who were not members of the medical profession, but who wished to be supposed to belong to it’,<sup>75</sup> those who had not earned a qualification. It also had the effect of delimiting the profession (those with the qualification) and justifying public trust in it (the qualification indicates the knowledge that the recipient had).<sup>76</sup> The labour theory can also be applied to the institutions that trained them – Oxford University, for example, had expended skill and ingenuity in the development of reputable courses and, therefore, there is value to be recognised in their offerings and

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69 *Godefroy v Dalton* (1830) 6 Bing 460, 467.

70 *Boorman v Brown* (1842) 3 QB 511, 525.

71 Ricardo (n 38 above) 5.

72 Harry Landreth and David Colander, *History of Economic Theory* 2nd edn (Houghton Mifflin 1989) 100.

73 *Ibid.* The value of a ship, then, is the value of the work that went into creating it – and not the profit to be made by the shipyard, nor the profit to be made by the shipping company that uses the vessel to transport goods.

74 There is further evidence of this in some of the commercial registers. The Designs Act 1839 was established, in part, to afford ‘protection to those deserving and ingenious persons who were engaged in inventing designs’: HL Deb 29 April 1859, vol 47, col 625, Brougham.

75 HC Deb 2 June 1858, vol 150, col 1406, Cowper. This reason was also given for the registration of solicitors: HL Deb 13 February 1843, vol 66, col 414, Langdale.

76 Larson has noted that professionalisation is an ‘attempt to translate one order of scarce resources – special knowledge and skills – into another – social and economic rewards’: Magali Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press 1977) xvii.

the different medical colleges had also built up their own expertise and reputations.

The role of the registration of ships and sailors, however, may be seen to perform another function within the market. That the maritime insurance industry was one of those highlighted by Lobban as having grown significantly from the eighteenth century<sup>77</sup> suggests that ships had moved from being objects of trade in the early modern period to being objects of investment in the nineteenth century – when the risks to the owners could be spread. The details, required under the Merchant Shipping Act 1854, of the registered ships, their owners<sup>78</sup> and the name of their masters are all relevant to the decisions of insurers and charterers. Further, it is the owners and masters who benefit from the Register of Pilot's Licences, in that the safety of the ship, its cargo and its crew is enhanced if only qualified pilots guide the ship in and out of port. For the sailors specifically, it was less about the training and more about their responsibilities with respect to their workplace. Even the register of deserters<sup>79</sup> allowed ships' masters to reduce the possibility of sailors with a problematic history serving on their vessel. In sum, the capital that was tied up in the vessels may have meant that knowledge of who was to work on them was seen to be necessary.<sup>80</sup> When away from port, the owners had no capacity to oversee the operation of the ships, therefore the multiple registers operated to ameliorate the risks faced by the capitalists.<sup>81</sup>

Finally, the use of registration was not total. Engineers, despite being part of a key profession for the industrial capitalists, were not required to be registered – notwithstanding the fact that parts of

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77 Michael Lobban, 'Commercial law' in *Oxford History of the Laws of England: vol XII 1820–1914, Private Law* (Oxford University Press 2010) 674. With respect to the deployment of specialist knowledge, it is notable that it was in the nineteenth century that the courts began to discuss the importance of knowledge for insurers: 'If he conceals anything that he knows to be material, it is fraud ... if he conceals anything that may influence the rate of premium which the underwriter may require ... such concealment entirely vitiates the policy': *Dalglish v Jarvie* (1850) 2 Mac & G 231, 243.

78 Including the limitations on the number of owners, the fact that owners had to be joint owners and that owners had to be 'qualified' to be an owner of a British ship: Merchant Shipping Act 1854, ss 37–38. Only 'natural-born British subjects', 'persons made denizens by Letters of Denization' and United Kingdom bodies corporate (or those from 'some British Possession') could be owners: s 18.

79 Merchant Shipping Act 1894.

80 The 'qualities' of the sailors were included in the register: Merchant Shipping Act 1854, s 273.

81 Of course, to consider 'risk' in the nineteenth century, from a Foucauldian standpoint, is not new. See, for example, Robert Castel, 'From dangerousness to risk' in Gordon and Miller (n 12 above).

the profession self-organised in the first half of the century.<sup>82</sup> One argument could be that there was an ‘extreme diversity [in] their jobs and realizations’<sup>83</sup> – unlike doctors who only have the human body upon which to practise, engineers had a range of technologies, materials and constructions that could be mastered. Importantly, too, the ‘profession appeared to maintain itself without the conventional requirements of educational qualifications ... [e]ntry to the profession remained severely practical’.<sup>84</sup> At one level, this lack of authoritative educational institutions meant that there was no need to privilege certain universities, and it also meant that the professions themselves facilitated the dispersion of new knowledge.<sup>85</sup>

From a governmentalist perspective, however, engineers performed a different function in society than the registered professions. Doctors, veterinary surgeons, pharmacists and solicitors were, to use more modern parlance, ‘public-facing’. They, then, deployed their knowledge to guide the behaviour of the general public – inculcating norms that the members of the community should internalise. With respect to medical knowledge, in the nineteenth century, the ‘domestic environment ... was constituted as a site subjected to scrutiny and administration’.<sup>86</sup> Lawyers were there to organise their clients’ legal affairs, specifically with respect to the conduct of litigation.<sup>87</sup> Engineers, on the other hand, did not have a disciplinary role – there

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82 For example, the ‘Institution of Civil Engineers’ received a Royal Charter in 1828: Garth Watson, *The Civils: The Story of the Institution of Civil Engineers* (Thomas Telford 1988) 20. This, then, was before the granting of the Royal Charter to the College of Veterinary Surgeons.

83 Antoine Picon, ‘Engineers and engineering history: problems and perspectives’ (2004) 20 *History and Technology* 421–436, 422. Picon lists the divisions of ‘civil, mechanical [and] electrical engineering’ as being relevant, even in the nineteenth century: *ibid.*

84 R A Buchanan, ‘Institutional proliferation in the British engineering profession, 1847–1914’ (1985) 38 *Economic History Review* 42–60, 43. That is, entry into the engineering profession was not in the form of examination; instead, it was based on their ‘working experience confirmed by the senior engineers in charge’ of their work: *ibid.* 46. For engineers, then, the personal assessment of individuals, rather than a centralised system, was what was important

85 According to Berg, professional organisations, such as the Smeatonian Society, were to ‘provide a forum for reading practical papers and for assigning professional status’: Maxine Berg, *The Machinery Question and the Making of Political Economy 1815–1848* (Cambridge University Press 1980) 154.

86 Nikolas Rose, ‘Medicine, history and the present’ in Colin Jones and Roy Porter (eds), *Reassessing Foucault: Power, Medicine and the Body* (Routledge 1994) 63. See generally, Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Vintage 1975).

87 Chancery, when considering evidence of any ‘undue exercise of influence’, looked at whether ‘independent advice was taken’: *Kempson v Ashbee* (1874) 10 Ch D 15, 21.

was no governance of individuals *through* them.<sup>88</sup> Registers, then, were a tool to spread valorised knowledge through the community to those who were not directly subject to education in the field. That is, registered professionals would circulate their knowledge to those whom they dealt with – they would conserve the health of workers,<sup>89</sup> the capital bound up in livestock and minimise the risks to ships.

### Externalisation as incomplete

The deployment of registers shows that the externalisation of governance was not total. There still was a role for the state. That role required that certain state workers were constituted in a certain way.<sup>90</sup> First, though, it is obvious that the state had an interest in knowledge – this supported the centralisation of data collection. For Bentham,

[A]ll [legislators] need is to be possessed fully of the facts; to be informed of the local situation, the climate, the bodily constitution, the manners, the legal customs, the religion, of those with whom they have to deal. These are the data they require.<sup>91</sup>

As a specific example, there was its interest in the registration of voters (in part, to ensure that only those with a sufficient property interest could vote).<sup>92</sup> The centralisation of the information in the registers gave the state a degree of oversight of the economy and of the professions.<sup>93</sup> The registers did not give them *control* over the registrants (that is, they did not allow direct regulation); instead, the state retained a role

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88 With respect to any notion of ‘public safety’, engineers on canals, roadways and large buildings were part of a team (with some engineers increasingly taking on ‘managerial functions’: Picon (n 83 above) 426), meaning that any mistake from an underqualified engineer may be rectified prior to it causing harm; and, of course, any architects involved also held a degree of responsibility. Doctors, on the other hand, were more likely to be sole practitioners in the community.

89 As was noted by a later political economist, the ‘energy [of a labourer] depends upon the health of the workman, and upon the motives that induce his exertion’: Hearn (n 29 above) 37.

90 The organisation of the state machinery in the nineteenth century changed with the establishment of the Civil Service Commission in 1855. See generally, Richard Chapman, *Civil Service Commission 1855–1991: A Bureau Biography* (Routledge 2004).

91 *Influence of Time and Place in the Matters of Legislation*, excerpted in John Hill Burton (ed), *Benthamiana: or Select Extracts from the Works of Jeremy Bentham* (William Tait 1844) 117–118.

92 Noting, too, that there was significant parliamentary discussion about the practicalities of the 10*l* minimum property value for the purposes of s 27 of the Representation of the People Act 1832. See, for example, HC Deb 3 February 1832, vol 9, cols 1234–1268.

93 Miller and Rose note the ‘expanded role of state bureaucracy’ in the first family of governmentality (n 16 above) 17.

for validating the information – which required a certain expertise within it.<sup>94</sup>

This quest for information can be linked with the work of Malthus. Malthus is best known for his theory on population.<sup>95</sup> Of relevance here is that ‘Malthus’s main concern was with the supply of labour’.<sup>96</sup> That there were, in the early decades of the nineteenth century, two techniques put in place to measure the population suggests a link between his thought and understandings of the market (though not about its externalised role in governance) – with those techniques being the Register of Births, Deaths and Marriages<sup>97</sup> and the Census. In terms of the latter, the first few censuses only took ‘account’ of the number of people in each household.<sup>98</sup> It was under the Census Act 1860 that data, such as the occupation or profession of the householders, began to be recorded.<sup>99</sup> Over the course of the century, then, increasingly complex systems were put in place to better ‘know’ the population and its place in the economy.

With respect to knowledge generally, a register is a technique of governance that records facts.<sup>100</sup> The Register of Births, Deaths and Marriages, for example, records the facts that babies were born, people died (along with the cause of death)<sup>101</sup> and that others were married.<sup>102</sup> Specific procedures were also put in place to correct any errors in registers.<sup>103</sup> The registers also operated as a part of classification

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94 Trabsky also has noted the rise of ‘new experts’ in the context of death registration: (n 2 above) 544.

95 Thomas Robert Malthus, *An Essay on Population* (first published in 1798).

96 Annie Vinokur, ‘Malthusian ideology and the crises of the welfare state’ in Michael Turner (ed), *Malthus and his Time* (St Martin’s Press 1986) 171.

97 One pamphlet made the connection explicit: ‘The political economist, anxious to correct his theory of the existence of human life, as well as to ascertain the physical condition of the people, would be content if every birth, and marriage, and burial, were registered.’: William Hale, ‘Some remarks on the probable consequences of establishing a general registry of births, and legalizing the registration of dissenters’ Baptisms’ (np 1834) 2.

98 The first census was authorised by the Census Act 1800.

99 Census Act 1860, s 4.

100 Robert Torrens, in a paper to the Congress of the Social Science Association, said ‘title by registration is a tangible ascertained fact. The entry in the record is conclusive.’: ‘Transfer of land by registration of title’ (1872) 3.

101 Births and Deaths Registration Act 1836, sch B. Trabsky notes the link between the registration of death and the rise of the use of mortality statistics: Marc Trabsky, ‘Counting the dead during a pandemic’ in Carl Stychin (ed), *Law, Humanities and the Covid Crisis* (University of London Press 2023) 60.

102 It has been said that a ‘general registry of deaths was needed for ... statistical information’: M J Cullen, ‘The making of the Civil Registration Act of 1836’ (1974) 25 *Journal of Ecclesiastical History* 39–59, 45.

103 Trade Marks Registration Act 1875, s 5.

systems. That the Register of Designs<sup>104</sup> was separate to the Register of Patents<sup>105</sup> reinforces the pre-existing division in what was known as 'industrial property'. The register for another category of this form of property, trade marks, introduced a new classification system into law – that of the class of goods to which the marks will be affixed.<sup>106</sup> The register entries, then, delimited that which was protected, particularly for the market and professional registers; the legal framework, as a result, giving 'greater definition to things that are prohibited'.<sup>107</sup>

Further, in many instances, the facts were not just taken at face value.<sup>108</sup> The role of patent examiners, for example, operated as a form of validation of the entered information.<sup>109</sup> As noted by Pottage, to register land requires a 'code of translation',<sup>110</sup> a process undertaken by the registrar. With respect to the professional registers, the verification of the expertise of the registrants was not carried out centrally; nonetheless, the listed universities and courts ensure that those who are registered have the requisite knowledge. Even for the Register of Deserters, a 'superintendent' could only enter a name if the seaman in question had 'to the best of [the superintendent's] knowledge and belief' deserted<sup>111</sup> – implying an obligation to not simply register a person on the basis of hearsay.

In other words, the operation of the nineteenth-century registers themselves required the development of expertise within the government as part of these processes of verification.<sup>112</sup> The use of clerks to 'examine' patent applications meant that a specific set of skills was developed (though until the twentieth century, they only examined

104 Designs Act 1839.

105 Patent Law Amendment Act 1852. There was also a Register of Proprietors instituted under the Act (s 35).

106 Trade Marks Registration Act 1875, s 2.

107 Foucault (n 8 above) 46.

108 But, once an entry was made, the register could be assessed as reflecting 'accurately and completely and beyond all argument the current facts that are material' to the object of registration: Theodore Ruoff, *An Englishman Looks at the Torrens System* (Law Book 1957) 8, citing *Registrar (Victoria) v Paterson* [1876] 2 AC 110, a case under the colonial land registration system.

109 Patent Law Amendment Act 1852, s 5.

110 Alain Pottage, 'The measure of land' (1994) 57 *Modern Law Review* 361–384, 363.

111 Merchant Shipping Act 1894, s 230.

112 For a discussion of the developing role and expertise of the General Register Office in the production of statistics, see Edward Higgs, *Life, Death and Statistics: A Local Population Studies Supplement* (University of Hertfordshire 2004). For a discussion of the relationship between the Office and the growing role of statistics, see Lawrence Goldman, 'Statistics and the science of society in early Victorian Britain: an intellectual context for the General Register Office' (1991) 4 *Social History of Medicine* 415.

for procedural matters, rather than the novelty of the invention).<sup>113</sup> With respect to the registration of ships, the Merchant Shipping Act 1854 made provision for the appointment of persons to ‘superintend the survey and admeasurement of ships ... [and] to make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed’.<sup>114</sup> As a final example, the registration of trade marks also required the establishment of a specialist office for the examination of applications.<sup>115</sup> While not all registers required the development of specific expertise, these examples may be linked with the acknowledgment of the importance of expertise for the professions such as solicitors, medical practitioners and pharmacists. They also can be differentiated from the lack of expertise required for the sixteenth-century parish registers or that of the Stationers’ Company.<sup>116</sup>

The recording of certain transactions in the registers enabled a form of their accounting – requiring an implicit relationship between the state and registrants.<sup>117</sup> The Register of Proprietors under the Patent Law Amendment Act 1852, for example, recorded all assignments (but not their price) and changes in interests in patents.<sup>118</sup> The earlier designs system also enabled the registering of changes in ownership of designs.<sup>119</sup> As a final example, the Land Registry Act 1862 required that parties to a transaction of registered land should ‘attend at the Registry Office to complete the transaction’<sup>120</sup> – that is, for the changes in interests in the land to be recorded. This is not to say that the government of the time conducted analyses of the transactions in

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113 Those who headed up the registers also developed specific expertise – Taylor notes the role that Francis Whitmarsh, the Joint-Stock Companies Registrar, had in proposing reforms to the legislation: James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800–1870* (Boydell 2014) 147.

114 Merchant Shipping Act 1854, s 29.

115 Trade Marks Registration Act 1875, s 7.

116 There was a degree of secularisation alongside the professionalisation – with the early modern registration of baptisms shifting to the nineteenth-century registration of births. This change, however, may simply have been the result of there being no other sixteenth-century institution that could have counted the newborns of the time – and the parishes were only interested if the child was brought into their pastoral care.

117 The process of registration also showed that the registrants were, at least, comfortable with the idea of the state being aware of their economic and/or professional activities. While this is not problematic for most now, it would not have been in the minds of those in the early modern period. This knowledge of sectors of society goes to the assessment of nineteenth-century ‘authority arising out of a claim of knowledge’: Miller and Rose (n 16 above) 201.

118 Patent Law Amendment Act 1852, 35.

119 Designs Act 1839, s 2.

120 Land Registry Act 1862, s 64.

order to improve policy; however, the mere fact of the recording of exchanges contributed to the ‘quantification of everyday life’.<sup>121</sup> The transactions had become something that the state was interested in – the ‘science of political economy’.<sup>122</sup> This attention to the minutiae of the economy is in contrast to the early modern systems and mirrors the focus on population inherent in the Register of Births, Deaths and Marriages.<sup>123</sup>

In sum, then, the centralised use of registers reflects an understanding of the state that is distinct from that which existed earlier.<sup>124</sup> In the sixteenth and seventeenth centuries, the parishes and the Stationers’ Company were not part of the state but were linked with it.<sup>125</sup> The head of the Church of England was the head of the state and the Stationers’ Company was based on a grant of the Crown.<sup>126</sup> The nineteenth-century registers were, on the other hand, centralised and their maintenance by officers was paid for out of consolidated revenue.<sup>127</sup> The content of the later registers was validated by the state. The range of nineteenth-century registers reflects the changing role the state had in governance; it externalised the regulation of the market, it externalised the regulation of professions and, through them, it disciplined members of the wider population.

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121 Stephen Gaukroger, *The Natural and the Human: Science and the Shaping of Modernity 1739–1841* (Oxford University Press 2016) 287–295.

122 Donald Winch, *Riches and Poverty: An Intellectual History of Political Economy in Britain, 1750–1834* (Cambridge University Press 1996) 398.

123 This register also facilitated the secularisation of information for disputes between individuals. The Register of Marriages enabled the ‘security of property’ with respect to testamentary dispositions: Cullen (n 102 above) 45. This was seen to be needed given that the ‘expansion of cities led to endless disputes over the ownership of land and hereditaments’: Edward Higgs, ‘A cuckoo in the nest? The origins of civil registration and state medical statistics in England and Wales’ (1996) 11 *Continuity and Change* 115, 118–134.

124 One distinction between the nineteenth century and the earlier registers was the level of knowledge recorded. For example, under the Births and Deaths Registration Act 1836, details of the maiden name of the mother, the profession of the father and the details of the informant were included: s 18. There is no evidence that parishes were required to record this level of detail in the sixteenth century.

125 Keenan also discusses the registration of land in terms of the tension between those involved in the Industrial Revolution and the ‘elite class that had traditionally owned estates in land’: (n 2 above) 147.

126 It may be noted, however, that it was officers of customs that kept control of the Certificates under the Navigation Act 1660 – with these officers being more closely linked to the state than the parishes and the Stationers’ Company. Given that the certificate register was instituted over 120 years after the first parish register, it is not surprising that the later one shares some similarities with the nineteenth-century registers.

127 For example, Patent Law Amendment Act 1852, s 47.

## REGISTERS AS CONSTITUTING (SOME) INDIVIDUALS

Registers reflect a particular set of ‘overlapping’ rationalities of governance.<sup>128</sup> In addition to the externalisation of governance, they also, at least partially, constituted those who were bound by registration. That is, they constituted those who participated in the system, including through the inculcation of certain moral requirements. Registers offered a finer-grained mode of regulation than was available in the law before the nineteenth century. That said, not all members of society were directly regulated by the registers.

### Constitution of those governed by registers

Most obviously, the registers see, and constitute, individuals to be self-interested.<sup>129</sup> Under the Land Registry Act 1862, given that there was no obligation to register land transfers, unless the individual saw a benefit to registration, they would not engage in the process.<sup>130</sup> The idea that individuals have a, and know their, financial (and/or reputational) self-interest is linked with the constitution of individuals as having the capacity to choose.<sup>131</sup> However, all registers (save, obviously, the registration of births and deaths) are based on choice. Capitalists choose to form, or exchange, a company (the registrable form is not the only option); an inventor chooses to seek, or exchange, a patent (many inventions are not patented); and voting is not compulsory. Of course, if they wish to get a patent or to vote, then they must engage with the register (unlike in the case of the registration of land); the point here is that the registers provide a formalisation of agency, and an acknowledgment of the subjective value individuals see in their

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128 Foucault (n 18 above) 313.

129 For Foucault (ibid 45), ‘government is only interested in interests’.

130 On that basis, land registration was not that beneficial – only 113 titles had been registered by 1885: S Rowton Simpson, *Land Law and Registration* (Cambridge University Press 1976). Simpson also noted that it was the ‘hostility of solicitors’ that was a key reason for the failure of the Land Registry Act 1862: ibid 43. One pamphlet asserts that the ‘legal profession have set their faces against Lord Westbury’s Reform, not because they suspect its soundness in law, but because it is likely to lessen professional profits’: Howard Reed, ‘Land: Its Registration and Transfer: A Letter to Landowners’ (Effingham Wilson 1864) iv–v.

131 Another example here is the registration of deeds that gave debtors ‘protection in bankruptcy’: Bankruptcy Act 1861, s 198. There was no requirement that debtors register deeds; however, it may have been in their financial self-interest.

transactions.<sup>132</sup> This, then, raises the concept of *homo oeconomicus* – ‘someone who pursues his own interest, and whose interest is such that it converges spontaneously with the interests of others’ and ‘is eminently governable’.<sup>133</sup>

Financial self-interest also applies to professional registers where an individual, if seeking to practise and make money in a field, needed to be registered (instead of working in another profession). Further, members of the professions have reputational interests – to the extent that being a solicitor, doctor or pharmacist demonstrates a particular status in society.<sup>134</sup> They all have to undergo examination to qualify, and, as such can be seen to be disciplined by their writing within their areas of knowledge.<sup>135</sup> More broadly, a registered trade mark was linked with the ‘goodwill of the business’;<sup>136</sup> and the ‘object of a trade mark’ was understood then as a means to ‘secure to a trader the benefit of his reputation’.<sup>137</sup> On the other hand, the register of newspaper proprietors under the Newspaper Libel and Registration Act 1881 was a double-edged sword for registrants – it protected them from libel claims for reports of ‘proceedings of a public meeting’;<sup>138</sup> on the other hand, the publicly accessible register<sup>139</sup> meant that it was easier for proprietors to be identified for libel suits arising from other newspaper stories.<sup>140</sup>

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132 Medieval and early modern systems were not about choice. The Domesday Book was an accounting of the land for William I. The centralisation of records of heraldic arms related to the role of the nobility in society. The registers for ships and books allowed for the regulation, by the Crown, of trade and printed materials for the good of the realm. See, further, Chris Dent, ‘Registers of artefacts of creation – from the late medieval period to the 19th century’ (2014) 3 *Laws* 239–281.

133 Foucault (n 18 above) 270.

134 A pamphlet, discussing an earlier proposal for the registration of the medical profession, said ‘by registering the members ... it formally recognises them, for the first time, as a distinct body’: John Forbes, ‘A critical examination of Sir James Graham’s Bill’ (John Churchill 1845) 14.

135 Michel Foucault, *Psychiatric Power: Lectures at the Collège de France 1973–1974* (Palgrave Macmillan 2006) 48.

136 Trade Marks Registration Act 1875, s 2.

137 Henry Ludlow and Henry Jenkyns, *Treatise on the Law of Trade Marks and Trade Names* (William Maxwell 1877) 65.

138 Newspaper Libel and Registration Act 1881, s 2.

139 *Ibid* s 13.

140 In the debate that preceded the Newspaper Libel and Registration Act 1881, it was said that ‘at present, it was very difficult to find out who was the real proprietor of a newspaper, but this registration ... would prevent a man sheltering himself under the wing of a man of straw’: HC Deb 11 May 1881, vol 261, cols 219–220, Hutchinson.

From a Foucauldian perspective, the voluntary nature of these forms of registration emphasises the lack of ‘repression’ in this form of disciplinary governance.<sup>141</sup> Even where registration is needed for some other purpose, then self-interest encouraged registration. This applies to the commercial registers, such as where a business owner needed to register their trade mark in order to prevent others from using the same mark.<sup>142</sup> The registrants’ competitors are also constituted to be part of the system, even if they do not register anything themselves. For example, that competitors could oppose patent registrations<sup>143</sup> sees non-registrants as self-interested. The key interest of competitors was ‘selfish’ and related to certainty – a patentee’s competitor could see what was in the specification and so they had knowledge of the limits of the patent right, so they could work around it. Overall, then, the choices made by all associated with registration go to the state’s answer to the question ‘Who are you?’<sup>144</sup> – the individual is, *inter alia*, a patentee, a competitor, a voter, or a professional. The legislation, then, can be seen to reflect the growing role of the individual *qua* individual in the society of the time.

### **Morality as conduct of conduct**

With respect to ‘proper conduct’ in the nineteenth century, the system of registers can be understood to reinforce moral strictures.<sup>145</sup> There are a number of aspects of the registers that suggest moral purposes underlay, but did not define, the introduction of the registers.<sup>146</sup> The most obvious is the extent to which individuals were to be protected as a result of registration. This morality, of course, was limited to the externalised modes of governance: the market and the professions – to

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141 Foucault (n 15 above) 40. Expressed differently, registration was an act of ‘freedom’ and not the result of a ‘legislative straight jacket’: Foucault (n 18 above) 68.

142 Trade Marks Registration Act 1875, s 7.

143 Patent Law Amendment Act 1852, s 12. Under this provision, interested parties could oppose an application for registration on the basis that, for example, the invention was not novel. This meant that, should a competitor already be using a machine that matched the invention described in the patent application, then the patent should not be granted – allowing the competitor to keep doing what they had been doing.

144 Tadros highlights the links between the question and Foucault’s understanding of biopower: Victor Tadros, ‘Between governance and discipline: the law and Michel Foucault’ (1998) 18 *Oxford Journal of Legal Studies* 75–103, 102.

145 Even the labels used import normative obligations. ‘Certificates of Conformity’ were issued for those who had ended their period of bankruptcy: Bankruptcy Law Consolidation Act 1849, s 198.

146 That said, there was the claim that the principles of land registration were ‘to make land transfer simple, and simplicity has an intrinsic virtue’: Ruoff (n 108 above) 12.

a large extent, then, the only morals that mattered were economic. For Foucault, the ‘problem’ was ‘one of the moral training of populations: their manners must be reformed so as to reduce the risks to bourgeois wealth’.<sup>147</sup>

Unsurprisingly, the purpose of the institution of registered companies was to limit fraud. For example, the ‘great object of the Committee which sat on this subject was to prevent the formation of fraudulent companies’.<sup>148</sup> More specifically, the

... principal object of the [Joint Stock Companies] Bill was, that there should be established a public office ... in order to know the real history of these companies ... [to] put a stop to the system that had been so long carried on of attaching the names of hon. Members, and men of importance and property, to schemes in order to entrap the unwary.<sup>149</sup>

Of course, there is an economic aspect to fraud – the loss of money – however, the use of language such as ‘entrap’ reinforces the moral component.<sup>150</sup> The registration of land titles was also, in part, to ‘prevent fraud and forgeries’.<sup>151</sup> As a final example, one justification for the introduction of registration for friendly societies was that the capacity to sue, as a result of registration, was seen as ‘necessary to prevent embezzlement of the funds by officers, or the withholding the sums due to rightful claimants’.<sup>152</sup> Registration, therefore, was seen as a mechanism to protect populations of individuals in society from immoral and illegal actions.

There is also a morality, in the sense of normative standards,<sup>153</sup> that limited access to that which was regulated by registration. The most obvious example is the property requirement for registering to vote – with the enfranchisement not being extended to those without the funds to own property. Further, the education that was required to register as a medical practitioner meant that the profession was out of the reach of most in society. And, of course, being able to register ships, or to register land, required access to substantial capital. This fits in

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147 Michel Foucault, *The Punitive Society: Lectures at the Collège de France 1972–1973* (Palgrave Macmillan 2015) 105.

148 HC Deb 3 July 1844, vol 76, col 273, Hawes. Further, the lists of stockholders, kept by the companies, was, in part, ‘to prevent fraudulent jobbing in shares’: HC Deb 10 July 1844, vol 76, col 559, Gladstone.

149 HC Deb 3 July 1844, vol 76, col 275, Gladstone.

150 For a discussion of the moral basis of political economy, at least as expressed by Smith, see Athol Fitzgibbons, *Adam Smith’s System of Liberty, Wealth and Virtue* (Oxford University Press 1995).

151 James McDonnell, ‘The Report of the Registration Titles Commission, 1857’ (1858) 2 *Journal of the Dublin Statistical Society* 191–203, 191.

152 HL Deb 12 August 1850, vol 113, col 1017, Beaumont.

153 Another inference of morality in the systems is evident from the use of ‘piracy’ to describe the infringement of registered designs: *Designs Act 1839*, s 3.

with the broader assessment that the law of the nineteenth century had a bias towards the capitalist class. For Schumpeter, the nineteenth century was a time when the ‘ascent of the business class was most nearly unimpeded, most nearly unchallenged’.<sup>154</sup>

Protection was also a reason for the creation of one of the ‘professional’ registers. The register of coalwhippers was explicitly to protect their interests as labourers – to limit their exploitation. The practices, the ‘evils’, of the time were described by Gladstone:

two-thirds of the men employed were engaged by publicans ... [T]he publicans, in order to increase their business, furnished the men with the implements of their calling. Naturally the men who drank the most would be considered the best customers to the publican. ... The result of this was that great reductions were made in the wages of the men for the drink they consumed in the public-houses, where they were engaged, to the great injury of their families, and to the moral degradation of the workmen themselves.<sup>155</sup>

That said, there was no discussion of the benefits of the register, other than that it was a central repository of names of those who could be employed, ‘on reasonable terms’ to unload coal from ships.<sup>156</sup> Despite Gladstone stating that, generally, the ‘Legislature should not interfere with labour’,<sup>157</sup> he supported the Bill. The latter sentiment fits in with one theme of writers such as Malthus who considered that workers were more than just ‘manufacturing animals’.<sup>158</sup>

Finally, the importance of ‘rent’ as a problem grew over the course of the nineteenth century. Ricardo’s definition of it – building on that of Malthus – was that ‘portion of the value of the whole produce which remains to the owner, after all the outgoings belonging to its cultivation, of whatever kind, have been paid, including the profits of the capital employed, estimated to the usual and ordinary rate of the profits’.<sup>159</sup> Rent, therefore, was seen as excess profit,<sup>160</sup> that which was not justified in terms of expenditure or an appropriate return on investment. It was, then, a moral issue, a question of unfair practices (though still related to market activity). The clearest example of registers acting as a defence to rent-seeking is those that cover industrial property rights. The Patent Law Amendment Act 1852 stipulates that

154 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (HarperPerennial 2008) 393.

155 HC Deb 1 August 1843, vol 71, col 78–79.

156 Ibid col 82.

157 Ibid col 78.

158 Winch (n 122 above) 336.

159 Quoted in R Walter, *A Critical History of the Economy* (Routledge 2011) 92–93.

160 Or it could be seen as ‘unearned income’ (Landreth and Colander (n above 72) 97), with this articulation imputing a greater moral judgement.

the 14 years of protection may start from the date of application for registration;<sup>161</sup> thereby limiting the extent to which an inventor can claim their monopoly.<sup>162</sup> The filing of the specification also meant that they could not overclaim the invention – that is, the patentee could not sue a competitor for the production of a product that was not within the confines of the specification.<sup>163</sup> Further, limiting the registration of trade marks to specific classes of goods meant that the trade mark owner could not (unfairly) overclaim the use of the mark. Overall, then, while the finding may not be surprising, the registration system shows evidence of a morality that informed aspects of its operation.<sup>164</sup>

The desire for the state to protect against fraud<sup>165</sup> or forgeries was an expression of that moral obligation. The desire for the state to protect the coalwhippers, a specific and restricted class of individuals, from exploitation reflected a similar morality.<sup>166</sup> Even the role that registers played in reducing rent seeking may be understood as a degree of protection. The point was not to

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161 Patent Law Amendment Act 1852, s 23.

162 Notwithstanding the provisions of Patent Amendment Act 1835 (still in force after 1852, as a result of s 11 of the later Act) that allowed for the prolongation of a patent where a patentee can demonstrate to the Privy Council that the patent term should be extended: s 4.

163 The registration of designs also meant that only a copy of the registered design, or a part thereof, could give rise to an infringement action: Designs Act 1839, s 3.

164 For an understanding of the role of morality in the mid-nineteenth century, see B Hilton, 'Moral disciplines' in Peter Mandler (ed), *Liberty and Authority in Victorian Britain* (Oxford University Press 2006).

165 One pamphlet argued that registration *enabled* a 'great facility [for] the introduction of fraudulent votes upon the register, [while] the most substantial freeholder in the country may be harassed year after year with impunity by groundless objections to his vote': Frederick Slade, 'A Letter to Lord John Russell ... Upon the Defects in the English Reform Act' (Saunders and Benning 1837) 22. Another pamphlet, however, argued that a key purpose of voter registration was the 'prevention of bribery and intimidation': John Chambers, 'An Examination into Certain Errors and Anomalies in the Principles and Detail of the Registration Clauses of the Reform Act' (Saunders and Benning 1832) 25.

166 Though the concern was limited – the legislation lapsed in 1856. As was noted in a pamphlet, the Act was in 'direct opposition to all the usual maxims of certain political economists, which recognise no mean term between leaving all labour to protect itself, so as to be regulated by the law of demand and supply, or the protection of all labour by the direct agency of government': William Deering, 'A Brief Account of the Origin, Establishment and Working of the Office for the Registration and Regulation of Coal Whippers of the Port of London' (np 1851) 6. For Foucault (n 18 above) 64, the new forms of governance required there be a 'free labour market' made up of 'sufficiently competent, qualified' workers. Restrictions relating to coalwhippers were not a free market process, and the workers were not necessarily competent or qualified – so did not fit the governmentalist mode.

remove all risks;<sup>167</sup> nonetheless, the majority of the expressions of morality on the part of the state were focused on the interests of those in the market.<sup>168</sup> Again, the registration of unions was in the interests of those who controlled the market, with registration allowing the registrar to check that the proposed rules were not 'objectionable'.<sup>169</sup> Further, the expressions related to the use of trade marks (protecting firms), the registration of companies (protecting shareholders), land titles (property owners) and the registration of deserters (shipowners and trading companies). Only one, the protection of patients from unqualified doctors, can be seen to have an impact on wider society<sup>170</sup> – even there, the concern may be for maintaining the health of the workers in the interests of their employers.<sup>171</sup>

### **General public, and church, not constituted by registers**

The introduction of the suite of registers did not mean that the shift to governmentality was complete. The registers could only directly guide the conduct of those who actively participated in the systems. In order to show the incompleteness, there is value in considering those who were not. The two populations to be considered here are the general public and the Church. They are, nonetheless, bound through the norms perpetuated by registrants in the 'tight grid of disciplinary coercions that actually guarantee the cohesion of the social body'.<sup>172</sup> The lack of direct guidance reflects the fact that there were no pre-existing legal commands that governed these populations prior to the rise of registration.

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167 The limited liability of joint-stock companies is a further example – 'immoral corporate behaviour was made possible by the absence of the individual responsibility of directors for their actions in their corporate capacity': Taylor (n 113 above) 30.

168 One pamphlet, similarly, suggested that an issue that arose in unions before they could be registered was that 'larceny and embezzlement were not punishable offences where only the property of Trade Unions was stolen, so that an official of such a society might, with impunity, appropriate their funds to his own purposes': Anon, 'The Trades Union Commission Report' (np 1867) 260.

169 *Eleventh Report* (n 45 above) 24.

170 Given different attitudes to livestock, it may be that the challenges posed by unqualified veterinary surgeons were market-based, rather than moral.

171 Access to treatment was not equal. Practitioners 'could be few and far between in the slumlands where they were really needed': Roy Porter, *The Greatest Benefit to Mankind* (Norton 1999) 359.

172 Foucault (n 15 above) 37.

Most obviously, individuals *qua* individuals did not seek registration.<sup>173</sup> Those who were born and those who died were registered regardless of their desires. With respect to the Representation of the People Act 1832, specifically, a provision within the statute itself noted that it was ‘expedient to form a register of all persons entitled to vote’.<sup>174</sup> Higgs has argued that the

... key concept in the history of the [General Register Office] is ... citizenship, and the transition from political and social rights based on property-owning to the concept of the citizens as having rights and obligations with regard to the nation state.<sup>175</sup>

However, there was no constitution of all citizens through registration. There was no conduct that was internalised that was consequent to registration (outside the market and the professions); even the capacity to vote was voluntary, as was the initial registration to vote.<sup>176</sup>

More broadly, there was no reference to the ‘public interest’ in the commercial registers such as under the Patent Law Amendment Act 1852. This fits with the observation that the law of the time only included ‘almost patronising views of the public’.<sup>177</sup> That said, in 1881, there was a ‘public benefit’ aspect to the ‘proceedings of a public meeting’ defence for registered newspaper proprietors.<sup>178</sup> There were, nonetheless, tangential references to the ‘public’ as an abstract collection of individuals in discussions around a small number of registers. For example, the register of medical practitioners was established to reduce the harms caused by the ‘class of uneducated ignorant quacks who practised on the credulity of the public’<sup>179</sup> Further, registered pharmaceutical chemists:

would confer a benefit on the public ... by performing in a more safe and efficient manner the duties of pharmaceutical chemists in the preparation of medicines, many of which are powerful poisons, and

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173 More broadly in law, the working classes were acted upon paternalistically. As an example, one patent was seen to be valuable to society because the invention would improve the ‘minds and morals’ of the population: *Baxter’s Patent* (1849) 5 HPC 904, 905.

174 Representation of the People Act 1832, 37.

175 Winch (n 122 above) 129.

176 Representation of the People Act 1832, s 20.

177 Chris Dent, ‘New insights in patent history’: an application of evolutionary theory’ (2018) 8 *Queen Mary Journal of Intellectual Property* 171, 179. Mill (n 30 above) 889, in his discussion of the benefits of investment in knowledge creation, focused on its benefits to ‘mankind’ or ‘those members of the community who require external aid’.

178 Newspaper Libel and Registration Act 1881, s 2.

179 HC Deb 2 June 1858, vol 150, col 1406, Cowper.

ought not to be entrusted in the hands of ignorant and inexperienced persons'.<sup>180</sup>

Even solicitors were seen as being of value to the clients they advised. The emphasis of these is as much on the ignorance of the public (echoing the state's interest in knowledge) as on their health.

Despite some of the registers, there were limits to the nineteenth-century state's interest in knowledge of the population. There was no register for charities<sup>181</sup> (beyond the regulation of friendly societies).<sup>182</sup> The focus of charities, in that century, was on 'pauperism'.<sup>183</sup> This, of course, was also the focus of the Poor Laws, which, themselves, underwent significant reform in 1834.<sup>184</sup> The limits of these forms of welfare meant that there was still room for philanthropy,<sup>185</sup> including a prevalence of 'charity bazaars'.<sup>186</sup> The state intervention was exercised by the Poor Law Commission; while the moral policing was of the recipients of charity,<sup>187</sup> rather than the donors or the charitable institutions. As such, there was little need for a register of charities; an assessment reinforced by the fact that there was no need for the state to 'know' those who were not working.<sup>188</sup> In other words, the poor, other than through the short-lived regulation of coalwhippers, were not directly regulated via registration. This group were not in a

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180 HC Deb 17 March 1852, vol 119, col 1221, Bell.

181 Though one was called for: Thomas Hawksley, 'The Charities of London, and some Errors of the Their Administration' (John Churchill 1869) 15.

182 Scrope highlighted the roles of the 'poor law, private charity [and] self-supporting and self-managed Friendly Societies' in his discussion of how the working classes can be supported in the 'praiseworthy endeavours' to 'look after themselves financially' (n 42 above) 44.

183 Megan Webber, 'Troubling agency: agency and charity in early nineteenth-century London' (2018) 91 *Historical Research* 116–136, 120. Procacci discusses pauperism from a Foucauldian perspective in Giovanna Procacci, 'Social economy and the government of poverty' in Gordon and Miller (n 12 above).

184 Under the Poor Law Amendment Act 1834.

185 Including corporate philanthropy: see, for example, Josephine Maltby and Janette Rutterford, 'Investing in charities in the nineteenth century: the financialization of philanthropy' (2016) 21 *Accounting History* 263–280.

186 See, for example, F K Prochaska, 'Charity bazaars in nineteenth-century England' (1977) 16 *Journal of British Studies* 62–84.

187 'To prevent dependency and fraud, many charities subjected the poor to intense scrutiny and distributed aid in carefully measured quantities': Webber (n 183 above) 121.

188 There was also an unsuccessful call for the registration of infectious diseases. See, for example, Joseph Rogers, 'Reports of societies: Poor Law Medical Officers' Association' (1870) 2 *British Medical Journal* 611, 617. This was after the Contagious Diseases Acts of 1864, 1866 and 1869, under which there was the forced examination of prostitutes who worked near naval and military stations.

population that was caught by the registers.<sup>189</sup> They were, however, indirectly regulated through the professions, unions and friendly societies. Similarly, the Church was not constituted by registers. This, though, did not mean that it was outside the processes of governance – as noted above, Miller and Rose considered that the Church was an externalised form just as the market was. This, of course, represented a change from the early modern period when the Crown was more actively the head of state and Church.

The shift in the relationship between the two institutions is most evident in the debates around the Register for Births, Deaths and Marriages. A justification for the register was to enable the inclusion of dissenters in the official records.<sup>190</sup> A follow-on concern of the established Church was that civil registration would result in the ‘neglect of baptism’<sup>191</sup> – limiting the knowledge of the religion around its future constituents. The secular, not the religious, practices of governance were of greater importance. Further, ‘much evil of the moral kind would also be produced ... [which would] go far to unchristianize the country’.<sup>192</sup> Hale asserted that the register was part of a ‘great scheme ... for separating religion from the state, for making the care of public worship ... a mere matter of police’<sup>193</sup> – an assessment that is almost Foucauldian. It also accords with the assessment that registers reflected the development of an English governmentality – the ‘double movement ... of state centralisation ... and of dispersion and religious dissidence’.<sup>194</sup> Notably, too, the Register for Births, Deaths and Marriages provided for the registration

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189 Procacci has discussed how the poor, in France, were subject to ‘processes of exclusion’: Giovanna Procacci, ‘Governing poverty: sources of the social question in nineteenth-century France’ in J Goldstein (ed), *Foucault and the Writing of History* (Blackwell 1994) 212.

190 The centralised register would also provide proof of marriage for those outside the Anglican Church. Prior to the 1836 Act, the registers of ‘Nonconformists ... were not admissible in court as evidence ... [and] Dissenters who were married using their own rites were not ... married for legal purposes’: Higgs (n 123 above) 116.

191 Hale (n 97 above) 10.

192 Ibid 11. Hale also asserted that the registration of births, as opposed to baptisms, meant that the ‘knowledge of the immoral habits of society, when reduced to tabular form, and calculated at the percentage of decrease and increase, has a tendency to familiarize the public mind to evil, than to keep individuals from transgression’: *ibid* 46.

193 William Hale, ‘Remarks on the Two Bills now before Parliament entitled A Bill for Registering Births, Deaths and Marriages in England and a Bill for Marriages in England’ (np 1836) 7.

194 Foucault (n 12 above) 88.

of Jewish marriages,<sup>195</sup> but not those of any other religions.<sup>196</sup> The Church was marginalised by the registers – save for the registration of certain Christian marriages. This did not mean that it was no longer relevant for inculcating certain forms of conduct within its target population, only that the Church's mode of governance was not linked with the focus on the market evident in many nineteenth-century registers.

## CONCLUSION

In sum, the introduction of the registers in a range of legal areas was an historically contingent process and can be seen as an adapted technique of governance.<sup>197</sup> These registers went far beyond the practices of the accounting of population that started, for Foucault, in the eighteenth century. The nineteenth-century registers demonstrate how the law began to be embedded within society, rather than just acting upon it. They formalised the externalisation of governance – notably to the market and professions – and contributed to the inculcation of certain norms of behaviour within those who chose to be bound by them. Even the apparent voluntariness (a suggestion of a 'freedom of behaviour'<sup>198</sup>) of many of the registers reflects the manner in which individuals then, and now, are constituted by the different rationalities. That said, the shifts in governance were not total – the broader public and the Church, without direct benefits of participating in registration, had to wait until the twentieth century in order to be more fully embedded within governmentality. Registers, however, were a clear step toward the more limited role for law evident in society now.

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195 Births and Deaths Registration Act 1836, s 30.

196 And, of course, there was no recording of marriages of other faiths under the pre-existing parish registers systems.

197 For another Foucauldian analysis of how past techniques of governance were adapted and reapplied over time, see Chris Dent, 'Patents over military equipment: shifting uses for shifting modes of governance' (2021) 30 *Griffith Law Review* 295.

198 Foucault (n 18 above) 65.