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TORY LANGUAGE AND WHIGG MEASURE:

EDMUND BURKE ON MANNERS, HISTORY, AND LAW

Submitted for the degree of doctor of philosophy

2001

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DECLARATION

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'My experience of men has neither disposed me to think worse of them; nor indisposed me to serve them; nor in spite of failures, which I lament, of errors, which I now see and acknowledge, or of the present state of affairs, do I despair of the future. The march of Providence is so slow, and our desires so impatient, the work of progress is so immense, and our means of aiding it so feeble, the life of humanity is so long, and that of the individual is so brief, that we often see only the ebb of the advancing wave, and are thus discouraged. It is history that teaches us to hope.'

— Robert. E. Lee.

'I take the true Genius of this constitution to be, Tory language and whigg measure … .'

— Edmund Burke, Letter to James Boswell (1 September 1782).

SUMMARY:

This dissertation investigates the complex relationship between manners, history, and law in the writings of Edmund Burke. In sum, this relationship was rooted in a naturalism based, not in eternal verities, but in the dynamic empiricism of his age, the legacy of the 'culture of politeness', and religious latitudinarianism. The 'moral constitution of the heart', the formation of individual character, was a sublime amalgamation of native predispositions and cultural influence. It was on this 'constitution' that Burke saw the history of European manners and progress built. In articulating this sense of progress, he was working in parallel, if not actually in partnership, with many of the most sophisticated historians and jurists of the day, especially those of the Scottish enlightenment. A 'civil economy of glory' continued, he believed, to provide the social stability necessary for improvement and a link between private and public interest. On the other hand, a commercial humanism provided energy and ambition for social change and 'communication'. And, in Ireland, it promised to dismantle both the economic monopoly of other parts of Britain over Ireland and perhaps the wider monopoly of the Ascendancy within Ireland. Here as elsewhere, Burke's use of the language of the 'civic' traditions, both ancient and modern, leavened his faith in commerce and indeed in law.

Increasingly nervous, for practical and philosophical reasons, about the implications of political radicalism, Burke's parliamentary career was largely engaged in reform (economic, religious, criminal, etc.). In this, it was not the common law courts, but Parliament that was at the centre of legal change. At its best, Parliament acted as a Senate dedicated to public virtue and independent of the vagaries of public opinion and, as a body, the influence of the crown. Finally, with none of the clarity of the 'Rights of Man', general principles of natural justice, the fruit of a 'more extensive and perfect deduction' across ages, continued to guide positive law. Ultimately, law was itself only a highly formal, though important, method of ensuring 'public' virtue and 'private' beneficence in light of manners and history. In respect to these views, especially on legal history and constitutional theory, Burke disagreed in significant ways with many of his contemporaries, not least the jurists William Blackstone, William Murray (Lord Mansfield), and fellow Irishman Francis Stoughton Sullivan.

ACKNOWLEDGEMENTS:

My thanks to all those, seen and unseen, who helped to bring this to completion.

Special thanks go to Gerry Whyte for his patience and assistance, personal and professional. The age of chivalry is, it appears, not gone.

Special thanks also to Pam Molony, Lady Dunnotter, who has acted, without ever intending to, as my benefactor.

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A special thanks to the Irish Legal History Society for the award of their 2001 research bursary. The bursary allowed me to visit the Burke archives in Northampton and Sheffield, England, as well as to collect related material in the National Library of Scotland (Edinburgh). Given the volume of information discovered on those visits and in subsequent study, I have not added these notes to my dissertation. They confirmed the points made in the work and will be essential in future work already in progress.

Thanks to those who, throughout my studies and their numerous unrequited kindnesses, have somehow remained friendly to me. Special notice goes to the Costellos, to Mairead Devlin, and to Nicola.

Thanks also to all those little platoons that I have neglected across the ocean.

My parents deserve credit, or perhaps medication, for the general, constant support they have given to their firstborn. They bought me a new pen when mine had long since run out of ink. They still wonder what I want to be when I grow up.

Finally, I want to dedicate this to Jim, who a decade ago brought me an umbrella and reminded me of sunnier days. It meant more than I realised.

Nitor in adversum.

Seán Patrick Donlan

REFERENCES:

The following abbreviations have been used in citations:

A	*An account of the European settlements in America.* Citations to volume one are made to the 1766 printing (London: J. Dodsley, 1766 (2 vols)), those to volume two to that of 1758 ((2nd edn) London: R. and J. Dodsley, 1758).
C	*The correspondence of Edmund Burke*, Thomas W. Copeland (gen. ed.). Cambridge: Cambridge Univ. Press, 1981 (10 vols.).
F(M)	The Burke materials of the Fitzwilliam (Milton) Burke collection of the Northamptonshire Record Office (England).
L	*Letters on a regicide peace* (Indianapolis: Liberty Fund, 1999 [1795-7]).
N	*A note-book of Edmund Burke: poems, characters, essays and other sketches in the hands of Edmund and William Burke now printed for the first time in their entirety*, H.V.F. Somerset (ed.). Cambridge: Cambridge Univ. Press, 1957.
PE	*A philosophical enquiry into the origins of our ideas of the sublime and the beautiful* (Oxford: Oxford Univ. Press, 1990 [1756]).
PH	The *Parliamentary history of England from the earliest period to the year 1803* London: T.C. Hansard, 1816 (30 vols.).
R	The *Annual Register*. London: J. Dodsley. As with other journals, the issue number (in this case the year) precedes the abbreviation. Because different parts of the journal were prepared separately for printing, after 1760 there were separate paginations for different sections. Following L.P. Lock, in his *Edmund Burke: Volume I 1730-1784* (Oxford: Clarendon Press, 1998), '*bis*' is added to the end of cites to the second pagination.
RRF	*Reflections on the revolution in France and on the proceedings of certain societies in London relative to that event* (London: Penguin Books, 1968 [1790]), Conor Cruise O'Brien (ed.).
S	A.P.I. Samuels, *The Early Life Correspondence and Writings of the Rt. Hon. Edmund Burke*. Cambridge: Cambridge Univ. Press, 1923.
T	Mrs Crewe, 'Extracts from Mr Burke's table talk', in (1862-3) 7 *Miscellanies of the Philobiblon Society.*
W	*The works and correspondence of the Right Honourable Edmund Burke* London: Francis & John Rivington, 1852 (8 vols.).
WWM Bk P	The Burke papers of the Wentworth Woodhouse Muniments at the Sheffield Archives, Sheffield Libraries (England).
WS	*The writings and speeches of Edmund Burke*. Paul Langford (gen. ed.). Oxford: Clarendon Press, 1997 (10 vols.).

In addition, in the body of the text, Burke's works are referred to initially by their full titles, but are then largely abbreviated.

Because of this dissertation's position between law and history, and the wide range of citation formats in use in both, a style that married these was agreed upon with my supervisor prior to completion. Additional remarks relative to these references are included in the introduction.

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MUCH EXTERIOUR ENQUIRY

'Scripture is by no means an irrelative system of moral and divine truths; but it stands connected with so many histories, and with the laws, opinions and manners of so many various sorts of people, and in such different times, that it is altogether impossible to arrive to any tolerable knowledge of it without having recourse to much exteriour enquiry (WS i.398).'

AN INTRODUCTION:

William Hazlitt once noted that to do Burke 'justice, it would be necessary to quote all his works; the only specimen of Burke is, *all that he wrote*'.[1] Contrary to appearances, I have not done that. I have thought it necessary to make extensive use of his texts in order to faithfully reconstruct Burke's meaning. Given the complexity of his thought, these texts have been very poorly, and often anachronistically, contextualised.[2] Without pretensions to being Burke's Boswell, I share a similar, perhaps more objective, admiration for my subject and a respect, at once literary and lawyerly, for his language. I have tried to treat his arguments, the language and circumstances of which are difficult for the modern reader to read without comment, in their intellectual and historical context. I am aware that, short of an anthology, the extensive use of quotations may actually risk wrenching Burke *out* of context or imposing a consistency on him. I have tried to remain sensitive to these problems and the presumption of consistency, the 'principle of charity', afforded Burke remains rebuttable. Were I to begin again, I would not, in all honesty, follow the same method. Its use has, however, had the advantage of drawing attention to texts that might otherwise have escaped notice in the twenty plus volumes of Burke writings, speeches, and correspondence. Not seeking novelty, I have been surprised to find that: (1) the materials from which Burkean jurisprudence have previously been constructed are much less abundant than might seem, making interpretation of it, by necessity, a complex investigation and reconstruction of the *whole* of his thought and (2) when this is done, there is much to challenge these common readings. The 'true genius' of the British constitution, Burke once confided to the Tory Boswell, was 'Tory Language and Whigg measure'.[3] I suggest that beyond Burke's occasionally Tory sounding language was a large amount of 'Whigg' measure.

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[1] William Hazlitt, 'Edmund Burke' in *Selected essays of William Hazlitt, 1778: 1830* (London: Nonesuch Press, 1948), Geoffrey Keynes, (ed.).

[2] This is particularly true within jurisprudence. For example, relying on only two very different sources, M.D.A. Freeman writes that Burke 'used natural law to shore up capitalist institutions and practices'. M.D.A. Freeman's *Lloyd's Introduction to jurisprudence* ((6th edn) London: Sweet & Maxwell, 1994), 112. Recent historical scholarship has sought to disentangle the eighteenth-century from such nineteenth-century anachronisms as 'liberalism' and 'capitalism'. Unfortunately, much of Burke Studies predates these changes. Cf. J.W. Burrow, *Whigs and liberals: continuity and change in English political thought* (Oxford: Clarendon Press, 1988).

LAWS, OPINIONS, AND MANNERS:

Perhaps the most influential thinker in modern historiographical debates is Quentin Skinner. Along with others of the 'Cambridge School', Skinner has stressed the necessity of contextualising both texts and canons.[4] A similar emphasis is central to a wide variety of modern methodologies. Most notable perhaps is modern hermeneutics, in which Burke's critique of the radical Enlightenment's 'prejudice against prejudice' is continued.[5] Joined by social histories and works of 'post-modern' thought, these contextual and interpretive historiographies collectively serve as important rejoinders against narrow textualism, a constricted sense of canon, and 'neutral' scholarship. By emphasising how individual actors exemplify, in their specific situations, living traditions, each has done much to reveal the extraordinary richness of eighteenth-century thought.[6] In this company, J.G.A. Pocock deserves special mention. Pocock's 'new history' closely complements the work of Skinner, but he has made significant contributions both to historiography and to Burkean scholarship.[7]

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[3] C v.35.

[4] See Quentin Skinner, *The foundations of modern political thought* 2 vols. (Cambridge: Cambridge Univ. Press, 1978) and *Liberty before liberalism* (Cambridge: Cambridge Univ. Press, 1998). For a collection of his historiographical essays and related criticism, see James Tully (ed.), *Meaning and context: Quentin Skinner and his critics* (Cambridge: Polity, 1988).

[5] See esp. Donald R. Kelley, 'Horizons of intellectual history: retrospect, circumspect, prospect' in Kelley, ed., *The history of ideas: canon and variations* (Rochester, NY: Univ. of Rochester Press, 1990) and Hans-Georg Gadamer, *Truth and method* ((2nd rev. edn) London: Sheed and Ward, 1979), J. Weinsheimer and D.G. Marshall (trs.).

[6] 'It is the only way to ensure', as Charles Taylor notes, that 'No one thinks that disengagement entered the culture from the pen of Descartes, or individualism from that of Locke. Obviously these are influential thinkers; but they are just as much articulating something which is already in train as they are helping to define its future direction and form'. Charles Taylor, *Sources of the self: the making of modern identity* (Cambridge, MA: Harvard Univ. Press, 1989), 306.

[7] See esp. *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge: Cambridge Univ. Press, 1986 [A reissue with a retrospect]); 'Burke and the ancient constitution—a problem in the history of ideas', (1960) 3 *The Hist J* 125; *Politics, language and time* (New York: Atheneum, 1971); *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition* (Princeton: Princeton Univ. Press, 1975); *Virtue, commerce, and history: essays in political thought and history, chiefly in the eighteenth century* (Cambridge: Cambridge Univ. Press, 1985); Introduction to Burke's *Reflections on the revolution in France* (Indianapolis-Cambridge: Liberty Fund, 1989); 'Edmund Burke and the Redefinition of Enthusiasm' the Context as Counter-Revolution in *The French revolution and the creation of modern political*

To a degree, I have applied these methods to both the context in which Burke acted and his corpus, setting his major and familiar works alongside lesser-known and neglected texts. Materials like the 'minute-book' of the Trinity 'Club' and the short-lived *Reformer*, while certainly juvenilia, are essential to understanding Burke's later work, especially in regard to Ireland. Another valuable source was the *Annual Register*. Although the habit of publishing anonymous reviews makes it unreliable, especially after Burke's entry into politics when his participation declined, it nevertheless provides a variety of useful clues. Burke's precise role in *The account of the European settlements in America*, written with his friend (no relation) William Burke, remains unclear. But the depth of its scholarship, and the suggestive parallels with Edmund's later work, sheds valuable light on Burke's thought. Perhaps most important to this study have been his fragmentary *Essay towards an history of the laws of England* and his unpublished, though complete in part, *Abridgement of English history*. Both provide evidence, corroborated in his better known works, of an historical and jurisprudential sophistication that ranks with the most advanced of British thinkers.

In his most famous work, the *Reflections on the revolution in France* (1790), Burke wrote that the 'science of jurisprudence, the pride of the human intellect ... with all its defects, redundancies, and errors, is the collected reason of ages, combing the principles of original justice with the infinite variety of human concerns'.[8] His training in, knowledge of, and appreciation for, the law is generally recognised. But Burke continues, it has been his fate for two centuries, to suffer from public and professional misunderstandings of his work. This is not entirely surprising. His writings and correspondence are voluminous and rich, a meal not easily digested. They frequently find him in the role of advocate, his meaning occluded by his rhetoric. Burke is variously portrayed as, among other things, a classical liberal, a Thomist, a utilitarian, and a conservative. In jurisprudence, he is seen as an exemplar of the 'common law mind', the political equivalent of Blackstone or Mansfield, or a precursor of the German historical school.[9]

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culture: vol. 3, the transformation of political culture 1789-1848) (Oxford: Pergamon Press, 1989), François Furet and Mona Ozouf, (eds).

[8] RRF 193.

[9] Two quick notes are in order here. First, 'historical jurisprudence' is used here in its more general sense, rather than that of the nineteenth-century German 'historical school'. Secondly, J.M. Kelly's comment that Burke had 'some claim to rank ... as the father of historical jurisprudence' was part of the inspiration for this work. *A short history of Western legal theory* (Oxford: Clarendon Press, 1992), 274. Because it presents law in a social and historical perspective, Kelly's work is perhaps the best introduction to jurisprudence in English. The emphasis here on context both prevented any extended comparison to these nineteenth-century jurists and confirmed my initial sense that such a comment confuses more than clarifies any relationship between the two.

Rather than a work critical of the numerous errors of Burkean scholarship, I have tried to present a positive case in his terms and within his historical context. In doing this, it is clear that the relationship between his thoughts on manners, history, and law are interrelated.[10] Indeed, Burke's extensive use of legal language obscures how little he actually wrote about the nature of jurisprudence itself. His frequent use of legal terms—contract, partnership, prescription, rights–is often intended to problematise or enrich late eighteenth-century legalism.[11] With the most sophisticated 'historical jurisprudence' of his contemporaries, British and European, Burke underscored the importance of 'manners' to law. These manners, broadly understood to include social practices and mores, were both the source of the laws and limits to their efficacy. Law, for all its uniqueness of its mechanisms and sanctions, was ultimately 'beneficence acting by a rule'.[12] This emphasis on manners and ultimately on beneficence is the cause, or perhaps the result, of Burke's wider challenge, to the epistemological transparency and ontological subjectivism presumed both by the more radical elements of the Enlightenment.[13]

Given his emphasis on context, it is particularly important that this study involves both intellectual and legal history. History and law have, of course, very different challenges and methodologies.[14] But the ties between the two–as the history of historiography itself attests–are rich and significant. And the interpretation of texts, at once a science and an art, is indispensable to any reconstruction of Burke's thought.[15] I have, in my defence, Burke himself. Speaking of theology in the *Abridgement*, he noted

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[10] Cf. R.B. McDowell's recent 'Edmund Burke and the law' in D.S. Greer and N.M. Dawson (eds), *Mysteries and solutions in Irish legal history: Irish Legal History Society and other papers, 1996-1999* (Dublin: Four Courts Press, 2001). McDowell's article is a good, brief overview, but treats few of the issues raised here.

[11] See F(M) A.xiv.12a-d on metaphor and law.

[12] L 126, RRF 149.

[13] It is the recognition of this that made it possible for the Marxist Raymond Williams to write that Burke 'prepared a position in the English mind from which the march of industrialism and liberalism was to be continually attacked.... He established ... the idea of what has been called the 'organic' society, where the emphasis is on the interrelation and continuity of human activities, rather than on separation into spheres of interest ...'. *Culture and society 1870-1950* (New York: Harper Torchbooks, 1958), 11. Cf. W iv.432.

[14] While Burke's defence of 'prejudice' opposes a genuinely neutral historiography, the use of history in legal scholarship is frequently slight and heavily coloured by 'blind, unmeaning prejudices' of ideological bias. As Mark Tushnet has noted, in discussing the revival of 'civic republicanism', '[t]aking 'it' out of its context makes it into something else.' 'Interdisciplinary legal scholarship: the case of history-in-law', (1996) 71 *Chi Kent L Rev* 909, 926.

[15] See esp. Donald R. Kelley, *Foundations of modern historical scholarship: language, law, and history in the French Renaissance* (New York: Columbia Univ. Press, 1970); 'Modern historiography' in *Faces of history: historical inquiry from Herodotus to Herder* (New Haven: Yale Univ. Press, 1998); 'Law' in *The Cambridge history of political thought, 1450-1700* (Cambridge: Cambridge Univ. Press, 1991); Kelley (ed.), *History and the disciplines: the reclassification of knowledge in early modern Europe* (Rochester: Univ. of Rochester Press, 1997).

> Scripture is by no means an irrelative system of moral and divine truths; but it stands connected with so many histories, and with the laws, opinions and manners of so many various sorts of people, and in such different times, that it is altogether impossible to arrive to any tolerable knowledge of it without having recourse to much exteriour enquiry.[16]

Unlike some Burke scholars, I would not equate his writings and speeches with Scripture. But, as his jurisprudence is enveloped within a history of manners, much 'exteriour enquiry' has been necessary. Burkean scholarship cannot be done, or cannot be done well, *sola scriptura*. To study Burke, whatever one's focus, is unavoidably to study rhetoric, art, philosophy, theology, politics, history, law, etc. It is the only way 'to arrive at any tolerable knowledge of it'. If this has become increasingly obvious to historians, it has often been less clear to jurists. The modern study of the law is, almost by its nature, a habituation into a 'subjectivist' social theory in which the individual and the state are the primary actors, and to a lesser extent, where agreements made between them are the principal source of legal relationships and claims. As a result, the various norms and mediating practices and institutions of society are often neglected, to the detriment both of any theoretical grasp of jurisprudence and of practical legal efficacy.

As I hope the following chapters make clear, this was a problem Burke saw in his own day as well. 'Manners are of more importance than laws' serves both as a biographical introduction and an overview of the themes to follow. 'The moral constitution of the heart' attempts to illustrates the corporate character of Burke's empiricism and naturalism. To this the early eighteenth-century 'culture of politeness' and religious latitudinarianism were essential ingredients of his mature thought. 'A very mixed and heterogeneous mass' investigates Burke's relationship to British and Irish history, historiography, and to historical jurisprudence. In this, his criticisms of English jurisprudence as both insular and inattentive to manners and his resulting disagreement with William Blackstone, among others, is examined. 'Bank and capital of nations, and of ages' explores the more complex history of manners, especially property and commerce, that Burke believed responsible for the European progress. In this, various 'civic' languages—humanist, 'polite', and 'opposition'—merge to create a critical vocabulary that

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See also Harold J. Berman, esp. *Law and revolution: the formation of the Western legal tradition* (Cambridge, MA: Harvard Univ. Press, 1983).

[16] WS i.398.

enriches a more narrowly jurisprudential analysis. This also makes clearer the historical case for the ‘honour ethic’ on the basis of its modernity and utility. ‘Pride of the human intellect’ turns to Burke’s views on legal reform, on the relationship of Parliament and the courts, and on natural law and rights. Here again, he presents views distinct from those contemporaries, like Lord Mansfield, with whom he is often associated. As discussed in ‘Beneficence acting by a rule’, it is suggested that, in sum, Burkean jurisprudence was not unimportantly constructed on a variety of civic traditions, on his extensive historical knowledge of European manners, and on the eighteenth-century naturalistic empiricism.

MANNERS ARE OF MORE IMPORTANCE THAN LAWS

'Manners are of more importance than laws. Upon them, in a great measure, the laws depend. The law touches us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in. They give their whole form and colour to our lives. According to their quality, they aid morals, they supply them, or they totally destroy them (L 126).'

FROM THE OLD TO THE NEW WHIGS:

When, late in life, Burke wrote his 'Appeal from the New to the Old Whigs (1791)', the nature of 'Whig' politics had been contested for at least a century. The varieties of whiggism are far too numerous to detail here, crossing from law to politics to culture, but some rough chalking-out must be made. Both in Britain and on the continent, the gradual development of a new conception of the 'state' brought to an end, more by exhaustion than enlightenment, the conflicts of the seventeenth century. The early modern state was organised around the centralisation of political power within its territories and a comparatively greater tolerance of political divisions. 'Modern' natural lawyers–Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, John Locke–played an essential role in justifying these developments. Although it is easy to overstate their differences with the classical tradition, these jurists were primarily distinguished by 'voluntarism', i.e. theological and legal positivism, that defined 'law' on the basis of fiat and command.[1] Conceived in terms of a methodological individualism, of contract, and often of moral egoism, the modern school provided a minimalist defence of rights, individual and state, based on 'self-preservation'.[2] The resulting 'balance of power', externally and internally, proved remarkably successful. In practice, the new state relied on a regular or 'standing' army supported by, and itself supporting, a higher degree of taxation. But the expanded power of the state, if not necessarily the sovereigns of Europe, was also seen as effecting a more uniform, universal application of law and many praised the attendant political and commercial benefits made possible by the newly vigorous states. In Britain, these changes took firm root with the arrival of William of Orange, and the subsequent defeat of James II in Ireland. By century's end, the establishment of a 'Bank of England' and a system of national debt had fundamentally altered British politics. For all its innovation, and the lingering animosities of civil war, the 'Glorious' and 'Financial' revolutions brought to most of Britain an era of great prosperity and peace.[3]

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[1] Intellectualism or moral realism–the bulk of the classical tradition–holds that 'moral values are inherent in the world, like other natural qualities', while voluntarism held that 'moral values are superimposed on the natural world by acts of will, first divine and secondarily human.' Knud Haakonssen, 'Introduction' in Haakonssen (ed.), *Grotius, Pufendorf and modern natural law* (Aldershot: Ashgate/Dartmouth, 1999), xiv. See gen. J.B. Schneewind, *The invention of autonomy: a history of modern moral philosophy* (Cambridge: Cambridge Univ. Press, 1998). A third school, the 'perfectionists' (Leibniz, Thomasius, Wolff, etc.), combined the rationalism of the moderns with a belief, denied by many of the moderns, in native human virtue.

[2] It cannot be too strongly stressed, however, that these changes were much more gradual than many, including the 'moderns' themselves, suggest. Cf. John Finnis, *Natural law and natural rights* (Oxford: Clarendon Press, 1980), 45 and T.J. Hochstrasser, *Natural law theories in the early Enlightenment* (Cambridge: Cambridge Univ. Press, 2000). See also N.E. Simmonds, 'Protestant jurisprudence and modern doctrinal scholarship', (2001) 60 *Cambridge L J* 271.

But these changes, and even this prosperity, were sources of no little anxiety. The participatory (or positive) liberty of the 'ancients' continued to emphasise 'virtue' or public-spiritedness, but participation was largely martial, based on concepts of public honour and glory limited to men of real property, giving them a quite literal property in the state. To supporters of this ethos, the standing army and the commercial success of Augustan Britain, along with the increased political patronage that accompanied the new state, seemed to confirm their worst fears. Declining opportunities for civic participation and the 'luxury' which followed from commerce continued to be seen, as it had for centuries of classical and Christian thought, as 'effeminate' and 'corrupting' of public virtue.[4] The 'fictions' of credit and stock holding, the bought loyalty of a salaried army, the 'dependence' on public debt, and the spoils of empire, all fuelled these worries. Among the most influential and zealous of the 'ancients' were the radical Whig 'commonwealthmen', many of whom were part of the Irish 'Molesworth Circle' formed around Robert Molesworth's home in Swords and including William Molyneux, John Trenchard, and John Toland.[5]

By contrast to the ancients, the liberty of the 'moderns' came from the *increase* of state powers, by the very distance of government from the governed. It eroded the power of local nobility, contributed to the modernisation of many feudal holdovers and an increased social mobility, particularly as offered by greater levels of social and financial commerce. In jurisprudence, this is seen most clearly in the increasingly insistence on a distinction between 'perfect' juridical-political duties (or rights) backed by public sanctions and deemed indispensable for any constituent social order and the 'imperfect' demands and institutions left over, the organs of beneficence (or benevolence). This was a change of some significance to social thought. As an important source of self-understanding, the increased universalism of the state suggested a more subjective and autonomous, indeed legalistic, concept of the individual.[6] By these developments, those social practices and institutions remaining outside the state were thrown into relief. Laws, with their attendant sanctions, were increasingly distinguished from manners and norms.[7] Many of the moderns saw themselves as making a distinction the ancients had simply missed, while failing to appreciate that the practical incapacity of the pre-modern 'state' rendered such distinctions less meaningful and, whatever their utility, these distinctions themselves relied on implicit assumption much open to doubt. The growing strength of commerce as a 'power' independent of the state only strengthened this tendency. That said, for most writers of the century, 'civil' was used to designate the civilised and organised *whole* of society, including 'state' and 'market' institutions. With Britain's prosperity, and as Whigs themselves became the establishment, they increasingly embraced the modern view.[8] Opposition Tories, especially Henry St. John, Lord Bolingbroke, as well as Swift, began to adopt and alter 'commonwealth' rhetoric as their own.[9]

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[3] Cf. the unfinished poem, 'What more blasts a State than a Kingly hand/Who share not laws in common with the Land?' in Burke's Middle Temple notebooks at F(M) A.xxx.6.

[4] See John Sekora, *Luxury: the concept in Western thought, Eden to Smollett* (Baltimore: The John Hopkins Univ. Press, 1977).

[5] Molesworth wrote *An account of Denmark* (1694) and an important preface to François Hotman's *Francogallia* (1711). Molyneaux, a friend of Locke, was the author of *Case of Ireland's being bound by acts of parliament in England stated* (1698). With Thomas Gordon, Trenchard wrote *Cato's letters* (1720-3). And, in addition to writing on English republicanism, Toland wrote the deistic *Christianity not mysterious* (1696). This Irish Whiggism remains inadequately explored. See Caroline Robbins, *The eighteenth-century commonwealthman: studies in the transmission, development and circumstances of English liberal thought form the Restoration of Charles II until the War with the thirteen colonies* (Cambridge, MA: Harvard Univ. Press, 1959). See RRF 186 (on Toland). Other, non-Irish commonwealthmen included Andrew Fletcher and Walter Moyle.

It was between these extremes of 'ancient' and 'modern' that a new 'culture of politeness', stimulated by the growth of the periodical press, emerged. In addition to Defoe, Bolingbroke's *Craftsman*, and Swift, Joseph Addison and Irishmen Richard Steele's *Tatler* and *Spectator* were especially important in the creation of an increasingly tolerant, discursive politics. Ashley Cooper, Lord Shaftesbury may have been the most important in articulating this new culture. An associate of the commonwealthmen and the Molesworth circle, Shaftesbury's sympathies were closer to Athens than either Sparta or the ancient Saxons. With conversation, association, and the arts as models, he embraced the increased tolerance of the new politics as mollifying the 'enthusiasm' and conflict of the previous century. At the level of politics, public virtue was reconceived in less explicitly political and martial terms, and 'manners', rather than militias, became the predominant analytical terms. This culture remained aristocratic, but it was an increasingly 'natural' and meritorious, rather than hereditary, aristocracy. Liberty, that of a basically just legal order, and virtue, or public-spiritedness, were joined. The philosophical counterpart of this was 'benevolism', the rehabilitation of human sentiment from its association with the Augustinian egoism of moralists and the modern natural lawyers. This was, not surprisingly, 'virtue', rather than 'law' centred. That is, law, with liberty, is ultimately dependent on the virtue of its subjects and public virtue. The common happiness and good of the community was its aim. While his focus on individual 'psychology' was important to the development of modern subjectivism, both Shaftesbury's moral theory and ontology remained one of deep interdependence and sociability.[10] It was this neo-Ciceronian politeness, stressing *social* commerce and the union of self- and public-interest, as much as any 'possessive individualism', that would gradually, and only gradually, make financial commerce and a politics of interest acceptable.[11]

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[6] This arguably both facilitated liberation from established social patterns and, in an attendant devaluation of collateral loyalties to families and local communities, to 'alienation'. See Larry Siedentop, 'Political theory and ideology: the case of the state' in David Miller and Siedentop (eds), *The nature of political theory* (Oxford: Clarendon, 1983).

[7] See John W. Cairns, 'Blackstone, an English institutist: legal literature and the rise of the nation state', (1984) 4 *Oxford J Legal Stud* 318, 345.

[8] This was especially true under Robert Walpole and establishment apologists like Daniel Defoe's *The Review*. The same Defoe, perhaps not coincidentally, wrote *Robinson Crusoe* (1719).

[9] 'Tory' is 'from the Irish *tóiridhe*, a robber or highwayman, i.e. one of the dispossessed native Irish who preyed on English settlers; applied abusively to the followers (because so many of them were Irish) of James II'. J.M. Kelly, *A short history of Western legal theory* (Oxford: Clarendon Press, 1992), 245n1.

Most of Ireland did not have the luxury of such anxieties. Beyond the Pale, the great masses of the people continued, less by choice than by social and legal and social exclusion, to live a way of life only nominally within the British cultural orbit. But if the bulk of the country remained effectively a colony rather than a civic entity, Dublin played an important part in the new culture. James Arbuckle and Frances Hutcheson, both members of the Molesworth circle, were important to the 'culture of politeness'. Under the pseudonym 'Hibernicus', Arbuckle edited the *Dublin Journal*. The journal was dedicated to Molesworth and Walter Moyle as well as to 'Liberty and Virtue'. The Scotch-Irish Hutcheson was of far greater importance to Irish and British thought. The works he composed while in Dublin, especially on the 'moral sense' and his 'aesthetisation' of ethics, made him extraordinarily influential throughout Britain. These works and his time spent as Professor of Moral Philosophy in Glasgow, also made him the 'father of the Scottish Enlightenment'.[12] Hutcheson is an instructive example of the way in which the languages of law (even 'contract') and virtue, both public and private, could be combined. The civic traditions could be spoken in a variety of dialects–humanist, republican, Ciceronian, 'polite'–but they were neither exclusive nor simply opposed to jurisprudence. As was common in Scotland, where jurisprudence was deeply influenced by Roman law humanism and pedagogy, Hutcheson taught legal as well as moral philosophy. As a jurist, he followed the Scottish 'natural jurisprudence' of his predecessor, and Molesworth associate, Gershom Carmichael. Drawing on classical, scholastic, and benevolist sources, Carmichael denied the voluntarism of the modern natural lawyers. Both he and Hutcheson infused the work of Pufendorf with a richer sociability and provided the materials for non-theistic and non-rationalist explanations of human association and law. Where Hutcheson spoke of rights, for example, they were not subjective, but derivative from the demands of the public good, to which he believed men were naturally inclined. Law, while important, remained, it might be said, ultimately secondary to love.[13] It was into Hutcheson's Dublin that Burke was born.

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[10] See gen. Lawrence E. Klein, *Shaftesbury and the culture of politeness: moral discourse and cultural politics in early eighteenth-century England* (Cambridge: Cambridge Univ. Press, 1994) and 'Liberty, manners, and politeness in early eighteenth-century England', (1989) 32 *Hist J* 583. For all their talk of legislators and constitutions, the various civic traditions never neglected wider social institutions.

[11] The reduction of the seventeenth and eighteenth centuries to a period of either liberalism or capitalism, whether one views these as positive or negative developments, is the root cause of the 'Burke problem', the supposed inconsistency of Burke's traditionalism and his views on commerce. Cf. C.B. MacPherson *The political philosophy of possessive individualism: Hobbes to Locke* (Oxford: Oxford Univ. Press, 1961) and *Burke* (Oxford: Oxford Univ. Press, 1980). Burke is certainly inconsistent at times, but the 'Burke problem' is one for historians like MacPherson, who insist on applying a liberal-capitalist paradigm on a period in history in which it is entirely inappropriate.

I NEVER FORGET THAT I AM AN IRISHMAN:

Burke was born on the first of January 1729. His father, originally from County Tipperary, was a lawyer with the Exchequer courts.[14] The senior Burke seems to have converted to Anglicanism, in all likelihood to pursue a career otherwise prohibited by the penal laws.[15] The family home on Arran Quay was just across the Liffey from the site of the contemporary Four Courts. Burke's mother, a Nagle from rural County Cork, remained a Catholic. Of the surviving siblings, Burke and his brothers were brought up as members of the established church, while his sister was raised, and later married, a Catholic. His earliest education, possibly in Irish, was among his mother's relatives in Cork's Blackwater valley, where he attended a 'hedge school' in the ruins of Monanimy Castle.[16] These years were among his happiest, but the young Burke would not have been unaware of the serious civil disabilities under which his relatives lived. This education, personal and political, continued in Ballitore in County Kildare at a school headed by the Quaker Abraham Shackleton. The school prepared students for a university education, although Quakers themselves were effectively prohibited from such studies by religious oath. When Burke enrolled at Trinity College, he left behind Richard Shackleton, the schoolmaster's son and his lifelong friend. These experiences no doubt contributed to Burke's lifelong sensitivity to politicised religion. Perhaps unsurprisingly, his own mature faith was a latitudinarian Anglicanism, emphasising broad religious tolerance and the limits of both solipsistic reason and revelation.[17]

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[12] See Michel Brown, *Hutcheson in Dublin: the crucible of his thought* (PhD dissertation, Trinity College Dublin, 2000) and 'Francis Hutcheson and the Molesworth connection', (1999) 14 *Eighteenth-Century Ireland* 62.

[13] See Schneewind, 'Classical republicanism and the history of ethics', (1993) 5 *Utilitas* 185.

[14] There is an intriguing possibility that Burke's father was attorney to James Cotter, whose trial and subsequent execution were to 'the Catholic masses ... the chief Irish political sensation of the first half of the 18th century'. William Hogan and Líam Ó Buachalla (eds), 'The letters and papers of James Cotter Junior 1689-1720'. (1963) 68 *Journal of the Cork Historical and Archaeological Society* 71, 71. After the execution, 'the leadership of Cork Catholics passed to the Ballygriffen Nagles, now the sole remaining rich landed Catholic family of the county'. L.M. Cullen, 'The Blackwater Catholics and County Cork society and politics in the eighteenth century', in Patrick O'Flanagan and Cornelius G. Burrimer (eds), *Cork History and society: interdisciplinary essays in the history of an Irish county* (Dublin: Geography Publications, 1993), 559. With the execution of Cotter, and that of distant relative (through marriage) Father Nicholas Sheehy during the 'Whiteboy disturbances' of the 1760s, in which Nagles were

In these Irish experiences, Burke was no less a part of contemporary British and European intellectual movements.[18] Ballitore would have given Burke a strong classical background and Trinity College offered an even broader, and broadly humanist, education. Law was included among his subjects, but it was largely European, mixing legal and moral theory,

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also persecuted, Burke was linked to two of the most important judicial murders of the century. On family details, see also Basil O'Connell, 'The Rt. Hon. Edmund Burke (1729-97): a basis for a pedigree', (1955) 60 *Journal of the Cork Historical and Archaeological Society* 69 and 'The Rt. Hon. Edmund Burke (1729-97): a basis for a pedigree', (1956) 61 *Journal of the Cork Historical and Archaeological Society* 115.

[15] C i.274. See gen. T.P. Power, 'Conversions among the legal profession in Ireland in the eighteenth century' in Daire Hogan and W.N. Osborough (eds), *Brehons, serjeants and attorneys: studies in the history of the Irish legal profession* (Dublin: Irish Academic Press, 1990). See also Colm Kenny, 'The exclusion of catholics from the legal profession in Ireland, 1537-1829', (1987) 25 *Ir. Hist. Studies* 337 and WS ix.569.

[16] See Katherine O'Donnell's curious 'The image of a relationship in blood: *Párliament na mBan* and Burkes' Jacobite politics', (2000) 15 *Eighteenth-Century Ireland* 98.

[17] Burke's views have often been portrayed as precisely the sort of religion he most criticised. See, e.g., Ian Harris' 'Introduction' to Harris (ed.), *Edmund Burke: pre-revolutionary writings* (Cambridge: Cambridge Univ. Press, 1993), esp. xx. Harris ignores both the many positions between mere reason and revelation as well as the wider evidence of Burke's faith. Cf. Frederick Dreyer, 'Burke's Religion', (1976) 17 *Studies in Burke and His Time* 199.

[18] There are recurrent efforts to remind the public of the 'Irish' Burke. Conor Cruise O'Brien's *The great melody: a thematic biography and comment anthology of Edmund Burke* (London: Sinclair-Stevenson, 1992) is a good recent example, but he somewhat overstates the case. Cf. Michael Fuchs, *Edmund Burke, Ireland, and the fashioning of self* (Oxford: Voltaire Foundation, 1996).

Cicero and Pufendorf, Roman law and scholasticism.[19] Burke was also a founding member of the Trinity 'Club', or 'Academy of Belles Lettres', the first such university debating society in Britain or Ireland. The Club stressed the habituation of its members to eloquence and politeness, in preparation for their roles in the natural aristocracy. As its minutebook makes clear, the ancients and moderns, 'politeness', 'luxury', and 'improvement', all found their way into Club debates. But other, less polite, issues intruded as well including the complications of Irish trade and the contemporaneous Jacobite rebellion in Scotland. After graduation, Burke entered these debates as founder and editor of *The Reformer* (1748). If it finds the young Burke wandering the coffeehouses of Temple Bar, *a la* Addison, it also reveals that he was not content to remain a spectator in public affairs. The journal's focus, initially that of reforming Dublin theatre, quickly spread beyond to wider issues of '*publick-Spirit*', to Irish culture, poverty, and landlord absenteeism.[20] 'It is the Care of every wise Government to secure the Lives and Properties of those who live under it. Why should it be less worth Consideration, to make those Lives comfortable, and these Properties worth preserving? Whoever travels through this Kingdom will see such Poverty, as few Nations in *Europe* can equal'.[21] In combining these aesthetic and political concerns, Burke would have found Swift, Arbuckle, and Hutcheson close at hand. Each stressed, in different ways, the conjoined ideal of ordered liberty and public virtue, of the individual and the common good. Burke would, throughout his career, challenge (or problematise) any definition of public liberty that sought to separate the two. Although the journal appeared to have sold well, it proved too much work even for the restless Burke, and ended after thirteen issues. At his father's goading, and with some reluctance, Burke finally began his study of the common law, and, as there was no Irish source of legal education at the time, he left for London's Middle Temple.[22]

Before ever arriving at the Middle Temple, Burke's cultural and historical sensitivity would have been significantly formed. He had already been exposed to a wide diversity of public idioms. Burke, who still had artistic aspirations, did not take immediately to his legal studies, but had the 'comfort that tho a middling Poet cannot be endured there is some quarter for a Middling Lawyer'.[23] He quickly developed deep reservations about the narrow training of the day and the quality of the public men it produced. The eighteenth-century Inns, many of whose students had not attended university, provided a notoriously poor education, almost entirely confined to attendance in court and dining with members of the bar.[24] It was, Burke later wrote, a 'narrow and inglorious study'.[25] And here Burke, famous for his appeal to practice and circumstance, may be seen to emphasise the importance of a liberal education. In this, he no doubt agreed with William Blackstone's claim that '[i]f practice is the whole [the law student] is taught, practice will be the whole he will ever know ... *ita lex scripta est* is the utmost his knowledge will arrive at'.[26] Burke's own essays of the period stress the degree to which a wide learning, particularly through the arts, and precisely because they relied on sentiment as much as reason, nursed a '*versatile ingenium*'.[27] The introduction of Blackstone's lectures on the common law to Oxford in 1758 would certainly have met with his approval. But they would have come too late for Burke. Robert Dodsley, later Burke's publisher, wrote that Burke was one 'bred to the law but having the grace not to follow it'.[28] However gracefully, after numerous disagreements with his father, Burke left his legal studies and embarked on a period of years largely lost to history. It is possible, too, that Burke suffered a minor strain of 'Hume's malady', the psychosomatic physical and mental fatigue of the intellectual that David Hume had experienced after his legal training in Edinburgh. In any event, Burke had the good fortune to meet Dr Christopher Nugent. Nugent, an Irish Catholic émigré to Bath, brought him back to health and the two remained lifelong friends. What's more, Burke married his daughter Jane, '[h]er Smiles are ... inexpressible', in 1757.[29] Jane, raised Catholic and whose mother may have been Presbyterian, conformed to her husband's Anglicanism. With a wife, and soon sons (one died early in infancy), but without any steady income, Burke found himself, and not for the last time, in financial difficulties. But, whatever obstacles he faced, he had not wasted any time. It was at this point that his writing career really began.

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[19] In addition to instruction provided by the Trinity Professors of Civil and Canon Laws, John Forster and Brabazon Disney, Burke apparently attended lectures on the Civil Law by Dr Hugh Baille as advertised in the *Dublin Journal* (C i.40). See gen. Osborough, 'Roman law in Ireland' in *Studies in Irish legal history* (Dublin: Four Courts Press, 1999).

[20] WS i.66. *The Reformer*'s first number notes the 'Morals of a Nation have so great a Dependence on their Taste and Writings, that the fixing the latter, seems the first and surest Method of establishing the former (WS i.66)'. It also contains a poem with the lines, 'Ye well-taught *Lawyers*! who for sordid Fee/Will rail no less at Wit than Honesty (WS i.69)'.

[21] WS i.96.

[22] He had been registered as early as 23 April 1747. *Register of admissions to the Honourable Society of the Middle Temple* (London: Butterworth & Co., 1944), 337. A quarter of the students at the Middle Temple were Irish.

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[23] C i.111. Given the quality of his early poems, 'Will' Burke wisely recommended to 'Ned' 'Preserve your Pen for god, but private Ends (N 27)'.

[24] See David Lemmings, 'Blackstone and law reform by education: preparation for the bar and lawyerly culture in eighteenth-century England, (1998) 16 *Law & Hist Rev* 211 and *Professors of the law: barristers and English legal culture in the eighteenth century* (Oxford: Oxford Univ. Press, 2000).

[25] WS i.323. See C i.111.

[26] Quoted from Burke's review of Blackstone's *A discourse on the study of the law* (1758) in 1758 R 452.

[27] N 86. See 'Several scattered hints concerning philosophy and learning collected here from my papers (N 81-98)'.

[28] 'Letter to William Shenstone' (1758) cited in C i.128n4.

[29] N 53.

Burke's writings of the late 1750s were extraordinarily diverse, but each in their way relevant to his understanding of both law and history. His first publication, its full title was *A vindication of natural society, or, a view of the miseries and evils arising to mankind from every species of artificial society, in a letter to Lord ****, by a late noble writer*, parodied the Tory Bolingbroke's deism, largely kept from public view during his lifetime, and its relationship to theories of governance. In his critique of 'artificial' society, the *faux* Bolingbroke writes, '[i]t is hard to say, whether the Doctors of Law or Divinity have made the greater Advances in the lucrative Business of Mystery.... We are Tenants at the Will of these Gentleman for every thing'.[30] Burke was perhaps too clever. The Swiftian elements of the piece were largely lost on its original, and many subsequent, audiences. It is true that Burke was critical throughout his life of injustice, harshness, and rigour in the law. He also displayed no little sympathy for comparatively 'primitive' cultures, including native Ireland and India. But the civil, i.e. *civilised*, and even artificial society of orders in eighteenth-century Europe was, he believed, a positive gain in human happiness.[31] The aristocratic Bolingbroke's defence of 'natural' society thus struck him as rich indeed. But Burke's targets were wider still. Rousseau's contemporaneous *Discourse on the origin of inequality* (1755) and John Locke are both within his line of fire. The *Vindication* was the first of many criticisms, however blunted in execution, of the 'state of nature' and contractualist logic, of solipsism and transparency. Such a state was irrational and unhistorical, and like the 'rights of man', was problematic even as an heuristic, distorting public debate by removing political discourse from the practical to an ideological plane. The civil society was, he wrote many years later, a 'state of nature—and much more truly so than a savage and incoherent mode of life ... . Art is man's nature'.[32] Treated with care, the *Vindication* is an essential element in understanding Burke's thought.[33]

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[30] WS i.176.

[31] There is a story, only outlined here, to be told about the increasing legitimisation of a 'private' sphere to which the growth of new scientific paradigms, market instrumentalism, religious toleration, and 'interest' politics all play important roles. See gen. Charles Taylor, *Sources of the self: the making of modern identity* (Cambridge, MA: Harvard Univ. Press, 1989). Note the references to Locke at WS i.157-8.

[32] W iv.466.

[33] Several passages, e.g. WS i.171-2, resemble Burke's 'Fragment' and his comments during the Hastings Impeachment on the 'rigour' of the laws. 'I have used *or*, instead of *and*, or some Mistake, small in Appearance, but

Begun years before at Trinity, *A Philosophical Enquiry into the Origins of our Ideas of the Sublime and the Beautiful* (1757), was a naturalistic, sensationalist aesthetics 'founded on experiment and not assumed'.[34] It was his only systematic, philosophical work and, particularly after its second edition, which included an 'Essay on Taste', the *Enquiry* was a great success throughout Europe. It was to be of particular importance to romanticism, especially the Germans Gotthold Lessing and Johann Gottfried Herder. Based on the work, Immanuel Kant said that Burke 'deserves to be called the foremost author' of the empirical approach to aesthetic judgment.[35] But it is as important to ethics and to understanding the foundations of Burkean historical jurisprudence and rhetoric. Burke draws from both ancient and modern philosophers, but especially important are the 'culture of politeness' and benevolist philosophy. Like Hume and Adam Smith, Burke presents a psychology in which common sentiment and 'sympathy', as much as reason, are vital elements. By sympathy, 'we enter into the concern of others;... we are moved as they are moved, and are never suffered to be indifferent spectators of almost any thing which men can do or suffer'.[36] Burke's theory of moral sentiments is the foundation of his famed 'organicism'.[37] It underscores his divergence from the egoism and rationalism of the modern natural lawyers (and contractualism). His was instead a theory of deep sociability and interdependence between men, their habituation through custom, and the importance of 'prejudice'.[38] But it is also more 'scientific' than the natural lawyers. 'In considering any complex matter', Burke wrote, it is necessary

> to examine every distinct ingredient in the composition, one by one; and reduce every thing to the utmost simplicity .... We ought afterwards to re-examine the principles by the effect of the composition, as well as the composition by that of the principles. ... The greater number of these comparisons we make, the more general and the more certain our knowledge is like to prove, as built upon a more extensive and perfect induction.[39]

Here and elsewhere, abstract ideas and general principles continue to play a role, without which

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dreadful in its Consequences, and have the whole of my Success quashed in a Writ of Error (WS i.174).'

[34] PE 5.

[35] Kant, *Critique of judgement* (Oxford: Oxford Univ. Press, 1952), J.C. Meredeth (tr.), 130.

[36] PE 41.

[37] Hume later sent Burke a copy of Smith's *Theory of moral sentiments* (1759) in Smith's name. Burke reviewed the book in 1758 R 485 and shortly after began a correspondence with Smith.

[38] '[T]here is one prejudice of the Enlightenment that defines its essence ... the prejudice against prejudice itself, which denies tradition its power.' Hans-Georg Gadamer, *Truth and method* ((2nd rev. edn) London: Sheed and Ward, 1979), J. Weinsheimer and D.G. Marshall (trs.), 270.

'all reasonings ... would be only a confused jumble of particular facts and details'.[40] This is not, however, the simple induction of principles from particular cases. Principles here, and in his jurisprudence, play a critical role.[41] Rather than a defence of eternal verities, Burke combined a humanist belief in a *generally* common human nature deeply influenced, potentially overwhelmed, by culture. This empiricism, while defending important 'natural' inclinations and the 'moral constitution of the heart', thus provided the mechanism for a dynamic theory of historical change and progress and the basis of his critique of real, and revolutionary, theatre.[42]

At the same time as the publication of the *Enquiry*, Burke's interest in history and in law continued. Having met William Burke at Middle Temple, the two developed a life-long friendship. An Englishman and no relation, others referred to the two collectively as 'Messrs. Burkes'. The Burkes collaborated on the anonymous *An account of the European settlements in America* (1757). The work was at once a history, a comparative ethnology, and a political and economic polemic. It is not coincidentally related to the *Vindication* and the *Enquiry*. In the spirit of contemporary comparative histories, the Amerindians provided for the Burkes a model of a more primitive culture similar, it was supposed, to that of early Europe. But the Burkes reveal, too, a typical eighteenth-century mix of wonder and horror towards the 'strange turns of the human mind, fashioned to any thing by custom'.[43] In Edmund's case, it is not unlikely that one source of this wonder was Ireland.[44] Published at the beginning of the Seven Years War with France and twenty years before the *Wealth of nations* (1776), the Burkes note:

> Indubitably the security, as well as the solid wealth of every nation, consists principally in the number of low and middling men of a free condition, and that beautiful gradation from the highest to the lowest, where the transitions all the way are almost imperceptible. To produce this ought to be the aim and mark of every well regulated commonwealth, and none has ever flourished upon other principles.[45]

The *Account* reveals both the degree to which concerns over luxury, corruption, and empire

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[39] PE 4.
[40] W vi.101.
[41] One of the more difficult problems in Burke Studies is interpreting the roles of reason and sentiment. If it is certain that reason is not merely a slave to the passions, neither did Burke think it was possible to be an 'impartial spectator'.
[42] RRF 176.
[43] A i.181. Cf., e.g., PE 135.
[44] Burke initially praised as genuine James MacPherson's *Ossian* (1762-3), presented as the translation of the work of an ancient Scots Gaelic poet. See 1760 R 253 *bis* and 1761 R 269 *bis*.

continue as well as traces of the stadial, progressive histories inspired by Montesqueiu. Primitive societies were '[g]overned ... by manners, not by laws' and, in general, it was necessary that laws were 'suited to the time, to their country, and the nature of their ... way of life'.[46] The book was favourably received and was praised by, among others, the historian William Robertson, second only to Hume and Gibbon in stature, and who also admitted to drawing from it.[47] Already by the late 1750s, Burke's knowledge of manners, history, and law was extensive, vital to the historical jurisprudence he would next undertake.

A RUDE AND BARBAROUS PEOPLE:

It was at this period that Burke wrote two works essential to an understanding of his jurisprudence. The *Fragment: an essay towards an history of the laws of England* (c. 1757) and *An essay towards an abridgement of the English history* (1757-62?) were both unpublished in Burke's lifetime and remain neglected or poorly interpreted. Together they present a forceful critique of contemporary English jurisprudence. The *Fragment* is especially critical of the lack of historical sophistication in English jurisprudence. In his *History of the common law of England* (published posthumously 1714), Matthew Hale, the most sophisticated of common law historians, failed to fully appreciate the importance of manners to law.[48] As Lord Coke had attempted to distinguish natural from *artificial* reason, it might be said that, for Burke, law was *artificial custom*. As a consequent of conflating the common law with genuine custom, a point particularly clear to the Irishman, insufficient attention was given to the actual relationship between law and manners.[49] While the insularity of English lawyers may be exaggerated, it is not uncommon. The 'present system of our laws, like our language and our learning', Burke wrote,

> is a very mixed and heterogeneous mass, in some respects on our own; in more borrowed from the policy of foreign nations, and compounded, altered, and variously modified, according to the various necessities which the manners,

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[45] A ii.118.
[46] A i.168, ii.304. Cf. A i.168-9.
[47] Burke and Robertson became friends and, in a letter to Robertson, wrote: 'now the Great Map of Mankind is unrolld at once; and there is no state or Gradation of barbarism, and no mode of refinement which we have not at the same instant under our View (C iii.350-1)'.
[48] See C iii.350-1.
[49] The 'Common Law of England is nothing else but the Common Custome of the Realm'. Sir John Davies, Irish reports (1614), preface cited by Pocock, , The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century (Cambridge: Cambridge Univ. Press, 1986 [A reissue with a retrospect]), 32-3.

the religion, and the commerce of the people have at different times imposed.[50]

What he later called the 'general bank and capital of nations, and of ages' was a European affair that extended beyond law to manners.[51]

If Blackstone's *Commentaries on the laws of England* (1765-9) were not quite so insular—consciously employing Romanist models—he would still reflect the widespread belief in a golden past of ancient Saxon liberties.[52] The *Abridgement*, complete only through the Magna Charta, is dismissive of the 'purity of [a] primitive constitution' and related Whig and Tory party histories.[53] Burke's sources are numerous–Justinian, Cicero, Tacitus, Bede, Spelman, Brady, and Selden–and it is clear that Burke was familiar with the best histories of the day. It is Montesquieu and Hume, even when he disagrees with them, who are most important. With Montesquieu's *Spirit of the laws* (1748), Burke looks to contextualise laws within manners and history.[54] And, like Hume's contemporaneous *History of England* (1754-62), Burke follows the long and chaotic path from a primitive England, through its 'communication' with Europe, to the recognised virtues of the eighteenth-century constitution.[55] Burke portrays the Saxons as he and 'Will'

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[50] WS i.325.

[51] RRF 183.

[52] See, e.g., Alan Watson, 'The structure of Blackstone's *Commentaries*', (1988) 97 *Yale L J* 795. While the first two volumes of the *Commentaries* were reviewed in 1767 R 286 *bis*, they were unlikely to be the work of Burke, whose involvement was, at best, minimal by 1767. James E. Tierney suggests that the reviewer was John Hawkesworth, although his repeated misspelling of Blackstone's name in correspondence is peculiar. See 'Edmund Burke, John Hawkesworth, the *Annual Register*, and the *Gentleman's Magazine*', (1978) 42 *Huntington Library Q'ly* 57.

[53] WS i.323. Although it is not true of Blackstone, there is a point at which contractualism and the 'antient constitution', viewed in terms of ancient Saxon liberties, could blur into one another. Cf. T.O. McLoughlin, 'Edmund Burke's *Abridgement of English history*', (1990) 5 *Eighteenth-Century Ireland* 45, 57. As McLoughlin characterises it, the 'dividing line ... before Burke wrote was whether the 1688 Revolution marked the end, as Walpole's adherents believed, of monarchical tyranny and the people's servitude, or, as [Bolingbroke's] *Craftsman* argued, it reaffirmed the spirit of liberty which had been evident in the nation's struggles since time immemorial. Burke sided with the latter view ...'. Id., 54-5. McLoughlin entirely neglects, though he is far from alone in doing so, any *via media* that viewed eighteenth-century liberty and virtue, the civil society, as the unintended consequence of a complex European past. Burke's most critical comments on the Norman conquest, the tyranny of William's forcing a 'new language upon a conquered people' leaving 'them strangers to those courts of justice (WS i.472)', would apply as accurately to the Irish experience.

[54] While Burke is likely to have read Montesquieu in French, the best known English translation (1752) was, and remains, that of Irishman and attorney Thomas Nugent, a lawyer and distant relative to Burke by marriage. In addition to Burlamaqui's *Principles of natural law* (1748) and *Principles of politic law* (1752) and Voltaire's *Essay on universal history : the manners and spirit of nations from the reign of Charlemaign to the Age of Lewis XIV* (1759), Nugent also translated Rousseau's *Emile* (1763), although it is unclear whether it is the version reviewed in 1762 R 227 *bis*.

[55] Because they were less explicitly linked to contemporary politics, Hume's *History* and 'polite' political essays of the 1740s, rather than Burke's *Reflections*, were embraced by many counter-revolutionaries. See Laurence L. Bongie, *David Hume: prophet of the counter-revolution* (Oxford: Clarendon Press, 1965).

Burke had the Amerindians. Whatever the virtues of early England, they were a 'rude and barbarous people' whose 'liberty' was licence and anarchy.[56] Equality was natural, but in such a society resulted, as he later said, in 'equal want, equal wretchedness, equal beggary'.[57]

> All these things are, I think, sufficient to shew of what a visionary nature those systems are, which would settle the ancient Constitution in the most remote time exactly in the same form, in which we enjoy it at this day; not considering that such mighty changes in manners, during so many ages, always must produce a considerable change in laws, and in the forms as well as the powers of all governments.[58]

The *Abridgement* also provides a better understanding of Burke's views on the origins and distinctions of ranks, prescription, constitutional 'inheritance', and culture. Burke's descriptions remain naturalistic, developing gradually on the basis of natural presumptions and social practices. Property, like aristocracy, was 'artificial', though highly useful, developments over time. The history of civil society was not founded in 'contract', but the adequate fulfilment of human needs, the 'consent' of the affections. Prescription, too, was less a legal concept, than a recognition of the attachment to, stability and utility of, property that becomes embodied in the laws.[59] Similarly, this was the basis for an understanding of constitutional 'inheritance' based, not on constancy, but on the contiguity necessary for the progress of society in Europe.[60] Burke does, however, in the *Abridgement* and later in the *Reflections*, emphasise the importance of the corporate clergy as counterweights to royal power, civilisers of a barbarous Europe, and trustees of learning, both ancient and modern. The 'universal' church drew Europe together into ever greater 'communication', but Burke acknowledged the importance of such an order both before Christianity and in India as well. Ireland was a part of this. Without claiming that the Irish saved civilisation, Burke thought the 'contemplative life' and the 'situation of Ireland, removed from the horror of those devastations, which shook the rest of Europe, made it a refuge for learning, almost extinguished every where else'.[61] In what amounts to a 'philosophical' history, Burke's jurisprudence, naturalistic and historically sensitive, ultimately shares more in common with his contemporaries and friends in the 'Scottish Enlightenment', especially Henry Home (Lord Kames), Hume, and Smith, than with Blackstone.[62]

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[56] WS i.430.

[57] WS ix.127. This was a commonplace. See, e.g., Edward Gibbon, *The history of the decline and fall of the Roman empire* (London: Routledge/Thoemmes Press, 1997 [1788 edn]), iv.367-8.

[58] WS i.443.

[59] It was in this sense that a constitution could 'work[] after the pattern of nature (RRF 120)'. See RRF 119.

[60] See J.G.A. Pocock, 'Burke and the ancient constitution—a problem in the history of ideas', (1960) 3 *Hist J* 125.

[61] WS i.511.

By the late 1750s, Burke had already begun to develop a rich web of friendships with many of the leading intellects and artists of the age. He was soon close to Samuel Johnson and James Bowel, the painter Joshua Reynolds, playwright and fellow countryman Oliver Goldsmith, the actor David Garlicky, the religious pamphleteer Hannah More, the writer Fanny Burney and the socialite Elizabeth Montague.[63] When Johnson later formed his 'Literary Club', Burke was made a member with his father-in-law, Reynolds, Goldsmith, Charles James Fox, Richard Brinsley Sheridan, and Smith, among others. Burke's connections to British intellectual life were further strengthened when, in 1758, he begin to edit the *Annual Register*, a yearly social and political review with sections on current events, science, character sketches, and book reviews. Especially important for Burke Studies is the review of social and political events of the year, especially a detailed analysis of the Seven Years War. Through the next decade alone, in which Burke's involvement is clearest, contributions and reviews included works by Blackstone, Ferguson, Hume, Johnson, McPherson, Montesquieu, Reid, Robertson, Smith, Lawrence Sterna, Rousseau, Voltaire, among a variety of other legal, historical, and philosophical works. But even with all of these projects, Burke remained plagued with financial concerns. To meet these, Burke took his first step towards a political career by becoming personal secretary to Sir William Hamilton, MP, though only on condition that he is able to continue his own writing. As it happened, Hamilton was soon appointed Irish Chief Secretary and Burke spent the winters of 1761 and 1763 back in Dublin.

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[62] There are few areas of Burkean scholarship so neglected and so potentially rewarding as his relationship to the Scottish Enlightenment. For a preliminary move towards such a study, see Donlan, 'An interior history of publick spirit: Edmund Burke's Scottish Enlightenment', 2001 *J Post-Graduate Research* 104. Among Scotch jurists and advocates, in addition to the influence of Hutcheson, Burke was acquainted with James Boswell, David Dalrymple (Lord Hailes), Hume, James Macintosh, John Millar, William Murray (Lord Mansfield), Smith, and John Wilde. It is unclear whether or not he knew either Adam Ferguson or Kames. Ferguson's *History of the rise, progress and termination of the Roman republic* (1799) appears Burkean, just as his *Essay on the history of civil society* (1767), reviewed in 1767 R 311 *bis*, is echoed in Burke. Burke also saw Kames' *Elements of criticism* (1762) as continuing his *Enquiry*. For some Scots, the apostasy, as they saw it, of his Whig faith, left them critical of Burke. Millar, Glasgow Professor of Civil Law, who had befriended Burke in his role as Lord Rector of the University, became progressively critical of him throughout the 1780s. His *Historical view of the English government* specifically attacks Burke's 'Appeal'. On the other hand, Macintosh had written *Vindicae Gallicae* (1791) against the *Reflections*, but came to agree with Burke, visited him, and wrote a Burkean *Discourse on the study of the law of nature and of nations* (1799) for presentation at Lincoln's Inn. Wilde, Edinburgh professor of Civil Law, consciously wrote his *Address to the lately framed Society of the Friends of the People* (1793) in emulation of Burke. With Burke and Gibbon, Wilde was an important link with to the German historical school. See Cairns, 'The influence of the German historical school in early nineteenth-century Edinburgh' (1994) 20 *Syracuse J Int'l L & Com* 191. Burke was also acquainted with, or admired by, Scot philosophers and historians James Beattie, Hugh Blair, Thomas Reid, Robertson, Tobias Smollet, and Dugald Stewart. See also n47.

[63] In an oft-repeated story, Johnson is said to have remarked that 'if a man were to go by chance at the same time with Burke under a shed, to shun a shower, he would say—"this is an extraordinary man."' Boswell, *Life of Johnson* (Oxford: Oxford Univ. Press, 1998 [1791]), 1279. Johnson assisted Blackstone's successor in the Vinerian chair of English law at Oxford, Robert Chambers. Johnson later received an honorary Doctorate of Laws from both Trinity (1765) and Oxford (1775).

Burke's return to Ireland was important for a number of reasons. It initiated a reconciliation by post with his father, though the elder Burke died before Edmund arrived. But being back in Dublin and working through Hamilton with the Irish parliament, his interest in politics, law, and history intensified.[64] Burke was also still working on his histories. He may even have attended the lectures of Trinity's Francis Stoughton Sullivan, who in 1761 following Blackstone's example, became its first Professor of Feudal and English law.[65] The reason for Burke's failure to complete the *Abridgement* remains unclear. It may have been that Hume's histories already occupied the field, but Burke would already have been aware of these when he began his work. Later writers, including Lord Acton, have regretted that it was Burke, rather than Hume, who discontinued his history. It is more likely that Burke's workload, a constant source of frustration and complaint with Hamilton, was too demanding to allow him to finish. In addition, while he was largely of the opinion that Hume's *History of England* was fair, the Scot's portrayal of the Irish Rebellion of 1641 as a 'massacre' left Burke acutely aware of the lingering philosophical and party prejudices that might have complicated the Irishman's English history.[66] The rebellion 'was not only (as our silly things called Histories call it), not utterly *unprovoked* but that no History, that I have ever read furnishes an Instance of any that was so *provoked*'.[67] It is this, rather than philosophical differences between the two anglicised Celts, that most divided them.

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[64] See 'Hints on an essay on the drama (c.1761)' in WS i. 554-563 for comments on Burke's friend, Beaumont Brenan. Brenan, who may have assisted with *The Reformer*, died young and his play, *The Lawsuit*, concerning 'low necessitous Lawyers of bad character, and profligates of desperate fortune (WS i.560)' was never published. See C i.88n1, 98n5, 143n1.

[65] Sullivan's whiggish *Historical treatise of the feudal law and the constitutional laws of England* shows knowledge of both Montesquieu and the Scots. The *Treatise* was published posthumously in 1770 and reviewed in 1772 R 235 *bis*. The reviewer notes that the 'historical method ... becomes almost necessary, in treating a science which belongs wholly to political society and civil life. The true reason of all law, is best discovered where the principles of human conduct are found, in the interest and passions of mankind (1777 R 235 *bis*)'. The second edition of Sullivan's *Lectures on the constitution and laws of England* ((2nd edn) London: Edward and Charles Dilly and Joseph Johnson, 1776) were edited by a Dr Gilbert Stuart. This is likely, I have not yet been able to confirm it, the same Stuart who was among the members of the Scottish Enlightenment and adversary of Robertson. Stuart's best-known, and contemporaneous work, was his *View of society in Europe in its progress from rudeness to refinement or inquiries concerning the history of law, government, and manners* (1778), showing a similar Montesquieuan bent.

[66] See 1761 R 302 *bis*.

Burke quickly found himself at the centre of events that revealed all too clearly the presence of the Irish past. In the 'White boy' disturbances—so-called because the participants wore white shirts over other clothing—simple rural unrest inevitably took on cultural and political overtones. The disturbances occurred throughout Munster, including the Blackwater Valley of his youth, and several Nangles were among the accused. Confiscations and conversions ensued. Through his connection with Hamilton, Burke seems to have played an important role behind the scenes in restoring calm. He seems to have inspired the report of Sir Richard Aston, Chief Justice of the Court of Common Pleas, and written to Hamilton downplaying any religious element to the disturbances. He also began writing again on Irish affairs. Both the 'Address and petition of the Irish Catholics (1764)' and especially the 'Tracts on the popery laws (1764)', catalogued and critiqued the Penal law.[68] The abuse of Irish Catholics, especially by means of law, struck Burke as particularly perverse. Among 'all kinds of public injustice and opposition, the worst species … are those which being corrupted into maxims of state, and blending themselves with law and jurisprudence, corrupt the very fountains of all equity, and subvert all the purposes of Government'.[69] Speaking in the voice of the dispossessed, he wrote '[w]e are ... neither permitted to enjoy the few broken remains of our patrimonial inheritance, nor by our industry to acquire any secure establishment to our families'.[70] Against the maintenance of estates, and attendant political and social power, by primogeniture, the laws allowed converting sons to challenge succession and fragmented estates, undermining improvement of the property as well as familial feeling. Worse, the laws permitted 'Protestant discoverers', the 'mercenary informers, and interested disturbers of household peace' to challenge attempts to circumvent the law.[71] By the 'Act for the further preventing the growth of Popery' (1699) of William III, Burke later said, a Catholic 'was rendered a foreigner in his native land, only because he retained the religion, along with the property, handed down to him'.[72] This experience of the dispersal and destruction of a traditional aristocracy, of confiscations based on cultural and religious status, was a pattern Burke later saw repeated in British India and during

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[67] C ii.285.

[68] See gen. Osborough, 'Catholics, land and the Popery Acts of Anne' in *Studies in Irish legal history*. The 'Tracts' show Burke struggling to find an effective critical, public voice and references to natural rights, otherwise avoided by Burke, appear alongside appeals to the 'general informed sense of mankind (WS ix.453)'. Cf. T.O. McLoughlin, 'Burke's dualistic vision in the *Tracts on the popery laws*', (1981) 34 *Études Anglaises* 180.

[69] C iv.118.

[70] WS ix.431.

[71] WS iii.653. See WS iii.639-40.

the revolution in France.

Nor was this merely religious, but a deeper cultural, enmity. Burke believed contemporary histories of Ireland to be both inaccurate, the work of party and factional loyalties, and dehumanising in their portrayals of the native Irish. Against these, Burke made an impassioned plea for

> an interior history of Ireland, the genuine voice of its records and monuments ...: these restore Nature to its just rights, and policy to its proper order. For ... they may show one day to all the world, that these rebellions were not produced by toleration, but by persecution—that they arose not from just and mild government, but from unparalleled oppression.[73]

Burke himself donated historical documents to Trinity and persuaded others, especially Sir John Sybarite, whose gifts made up the bulk of its early Irish collection, to do the same. With mixed results, Burke encouraged a number of Irish historians–John Curry, Thomas Campbell, Charles O'Connor, and Thomas Leland–to communicate this 'interior' history. The Anglican Leland first took up the challenge to write a 'philosophical' history, but he disappointed Burke, O'Connor, and Curry with what he confessed was a history written for a popular, i.e. British and Ascendancy, audience.[74]

Beginning with the *Abridgement*, Burke repeatedly returns to discussions of Irish history and its complex relationship to law. It was only following the Nine Years War (1594-1603), the last major resistance of Gaelic Ireland, that the 'perfect conquest', the imposition of the common law, occurred. Sir John Davies had maintained that Brehon traditions were prejudicial to the native Irish and ought to be replaced by English law.[75] Davies singled out Brehon 'tanistry', an elective system of property (and political) succession, and Irish property division–referred to as 'gavelkind' by analogy to a similar system in Kent–which divided property between all male heirs (including illegitimates).[76] In general, Burke's own views on property and inheritance, both

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[72] WS iii.641.

[73] WS i.30.

[74] See Walter D. Love, 'Charles O'Conor of Belanagare and Thomas Leland's 'philosophical' history of Ireland', (1962) 13 *Irish Historical Studies* 1. Cf. 1773 R 256 *bis*.

[75] In discussing 'juridical strategies' of colonisation, Davies 'established a paradigm for British expansion elsewhere.' Hans S. Pawlisch, *Sir John Davies and the conquest of Ireland* (Cambridge: Cambridge Univ. Press, 1985), 14.

[76] See Davies, *A discovery of the true causes why Ireland was never entirely subdued [and] brought under obedience of the crown of England until the beginning of his Majesty's happy reign* (1612). Cf. Hume, *History of*

in English and Irish jurisprudence, are similar to those of Davies. But while Davies 'boasts the benefits received by the natives, by extending to them the English law', there were instead 'unheard of confiscations .... [and] under pretence of tenures, and then of titles in the crown, for the purpose of the total extirpation of the interests of the natives in their own soil'.[77] Such a policy was carried out, not by legislation, but by extra-judicial resolutions and the precedents they created.[78] The dubious nature of Davies' claim, it was true as well of Coke and Hale, that the common law was the 'common custom of the realm' was especially clear to Burke with the elimination of the Brehon law.[79] The disparity of manners and laws could not have been clearer. By the early 1760s, both law and history had already disappointed Burke.[80]

After several arguments and misunderstandings, Burke and Hamilton finally fell out over the restrictions placed on Burke's literary endeavours. However much this may have concerned Burke at the time, it was to be a most fortuitous event. In 1765, he became private secretary to Charles Watson Wentworth, Lord Rockingham, MP, First Lord of the Treasury, and leader of the 'Rockingham Whigs'. When 'Will' Burke was shortly afterwards offered a seat in Parliament, he forfeited it in favour of Edmund. In 1766, Burke began a long period of influence with Rockingham. It was perhaps his misfortune, however, to enter politics at the end of a long period of Whig hegemony. The coming to the throne of George III to act the part of a patriot king effectively changed the long period of crown collaboration with the Whigs. In general, the patrician politics of the Rockingham Whigs sought a balance between the stability of a hereditary aristocracy, men like Rockingham, and the energy of the natural aristocracy, the new men like Burke.[81] But they ought to be seen as reformist, attempting to reconcile public virtue with the

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England, vi.58-61.

[77] WS ix.615, 615-6.

[78] See Pawlisch, 'Sir John Davies, the ancient constitution, and civil law', (1980) 23 *Hist J* 689 and 'Sir John Davies' *Law reports* and the case of proxies', (1982) 17 *Irish Jurist* 368.

[79] Burke noted in the *Abridgement* his regret over the 'narrow notions of our lawyers, who abolished the authority of the Brehon law, and at the same time kept no monuments of it; which if they had done, there is not doubt but many things of great value towards determining many questions relative to the laws, antiquities and manners of this and other countries had been preserved (WS i.433).'

[80] The clash of law and manners is a recurring theme in the novels of Maria Edgeworth. See, e.g., *Castle Rackrent* (1800), written just before the Union, but set before 1782. Cf. The introduction to J.F. McEldowney and Paul O'Higgins (eds), *The common law tradition: essays in Irish legal history* (Dublin: Irish Academic Press, 1990) and see Robert W. Gordon, 'Hayek and Cooter on custom and reason', (1994) 23 *Sw U L Rev* 453..

[81] On his own retirement from Parliament, Burke was awarded a pension and, as a result, was attacked by the Duke of Bedford, an aristocratic French sympathiser. As he had earlier found the aristocrat Bolingbroke's defence of natural society ludicrous, the Duke's republican sympathies seemed equally comic. His *Letter to a Noble Lord* (1795) is a scathing apologia, revealing Burke's mixed feelings concerning the necessity of aristocracy and their individual merits. In his later writings, Burke was straining 'every nerve to keep the Duke of Bedford in that

possibilities of 'modern' liberty and commerce.[82] In the 'civil economy', as Montesquieu had emphasised, it was in the pursuit of public *glory*, rather than private interest, that 'sets all the parts of the body politic in motion, and by its very action connects them; thus each individual advances the public good, while he only thinks of promoting his own interests'.[83] The ever wider acceptance of 'interest' in politics was rarely, in Burke or his contemporaries, a 'politics of interest' as the extensive regulation, economic and moral, of his age attests.[84] If this classical ethos, the 'invisible hand' of honour, was of questionable success, it was an important feature of the eighteenth-century world. At the time of Burke's political career, it had a far better record of progress, however meliorist, than did radicalism.

A similar point may be made about political parties. Parties had been traditionally been seen as factions more often joined by personality than principle. In attempting to distinguish themselves from both the administration and their nominal Whig allies, Burke articulated on behalf of the Rockingham Whigs a more modern concept of party politics. Parties based on public expressed principles could, like the interests of men, be turned more easily to the public good. Burke thought, not surprisingly, that the Rockingham Whigs would best accomplish this, but for most of his parliamentary career, they were not in government. He spent only two short periods as paymaster general, in which he proved an honest, if unexceptional, administrator. This extensive period in opposition was not unimportant. Burke had already displayed a use, especially in the *Abridgement*, of a neo-Roman schemata similar to that in Montesquieu's *Considerations on the causes of the greatness of the Romans and their decline* (1734). To this, he added elements of the 'civic' critique that Bolingbroke had previously applied to Establishment *Whigs*, having appropriated it from the arsenal of the commonwealthmen. These different

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situation which alone makes him my superior (WS ix.162)'.

[82] Cf. Frederick A. Dreyer's *Burke politics: a study in Whig orthodoxy* (Waterloo, Ontario: Wilfred Laurier Univ. Press, 1979). The work has numerous interesting insights, but is fundamentally flawed in its assumption that 'Whig orthodoxy' was Lockean. Locke's influence throughout the eighteenth century was largely through his empiricism and religion. Except in radical circles, his politics was almost ignored.

[83] Charles de Secondat, Baron de Montesquieu, *The spirit of the laws* (Chicago: William Benton, 1952), Thomas Nugent (tr.), *revised by* J.V. Prichard, iii.7. For similarities to the civic compromises of the American constitution, see Donlan, 'Virtue and vigour: *The federalist* and American civic republicanism', (1999) 21 *DULJ* 90.

[84] See Albert O. Hirschman, *The passions and the interests: political arguments for capitalism before its triumph* (Princeton: Princeton Univ. Press, 1977). Whereas interest (like the passions) had traditionally been viewed in negative terms, a more neutral use of the language of 'interests' was made possible by benevolism and its suggestion of harmony between private and public goods. In addition, it was thought reliance on self-interest, with its attendant dangers, made human actions more dependable, providing regularity to politics and commerce. 'It is not easy to choose men to act in conformity to a public interest against their private: but a sure dependence may be had on those who are chosen to forward their private interest, at the expense of the public (WS v.441).'

dialects would continue to play an important role in Burkean analysis. Particularly in the 'Observations on the Present State of the Nation (1769)' and the 'Thoughts on the Cause of the Present Discontents (1770)', he may be seen applying it to the influence of the crown. This was no mere rhetoric. The same language of 'standing armies', 'corruption', and the 'monies interest' may be seen in his analyses of Ascendency Ireland, British India, and Jacobin France. The conspiratorial nature of much of his thought has its roots in this tradition, one he shared to a degree with Hume and Smith. During this period, the fallout from the 'White boy' disturbances also continued. As late as 1766, Burke had begun a work on those events and subsequent prosecutions. A similar work by Curry and O'Connor made it unnecessary.[85] While Burke's concerns for Ireland continued, as a British 'Senator', he increasingly turned to wider concerns of influence and empire.

HIS UNBIASSED OPINION, HIS MATURE JUDGEMENT, HIS ENLIGHTENED CONSCIENCE:

If Burke had ever intended to leave Irish events behind him, an accent he never lost and the London rags, which caricatured him as a Whiskey-touting Jesuit (thereby combining his Irish past and the rumours of his crypto-Catholicism), ensured he could not.[86] When Burke was elected in 1774 as MP for Bristol, a free borough and prestigious trading city, it was an especially significant achievement. But Burke quickly found himself at odds, on a variety of issues, with the views of his constituency. Both the revolution in America, in which he was advising appeasement, and his attempts to remove trade restrictions on Ireland threatened Bristol's favoured trading status. In a series of speeches, most famously the 'On Conciliation with America (1777)', he counselled compromise with the colonies and chastised British claims of parliamentary right. He was, he later said, 'favourable to the Americans, because he supposed they were fighting, not to acquire absolute speculative liberty, but to keep what they had under the English constitution'.[87] This was also his first opportunity, beyond Ireland, to analyse the problems of Empire and he again saw events in 'civic' terms. In America, a standing army 'first victorious over Englishmen, in a conflict for English constitutional rights and privileges, and afterwards habituated ... to keep an English people in a state of abject subjection, would prove fatal in the end to the liberties of England itself'.[88] Burke also favoured the relaxation of restraints on English, as well as Scottish and Irish, Catholics, to which many in Bristol objected. Parliament's attempts to make such reforms, had led to the 'Gordon' riots of 1780. The 'anti-popery' mobs of the riots, named after Lord George Gordon, caused more property damage than would the revolution in France. Hundreds were killed. The home of Lord Mansfield, similarly critical of English penal laws, was burned. Burke himself evacuated his family and is said to have defended his home by sword. But Burke's defiance, and his hostility to slavery–he drafted a Slave Code at this time in hopes of meliorating its abuses–proved unpopular with the merchants of Bristol. It was in these circumstances that Burke was forced to continually reassert his belief in the independence of members of parliament. They were, in effect, the reason to the passions of popular opinion. The disparity with his constituents was too great, however, and in 1780, he 'withdrew from Bristol in anticipation of defeat', and was elected MP for Melton, the seat he held until his retirement in1794.

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[85] *A candid enquiry into the causes and motives of the late riots in the province of Munster; together with a brief narrative of the proceedings against the rioters, anno 1766* (1766). See Love, 'Burke's transition from a literary to a political career', (1964-5) 6 *The Burke Newsletter* 376.

[86] Against the government, the Rockingham Whigs had supported the admission of John Wilkes to Parliament, an event for which Burke was frequently toasted. But even Wilkes is to have said of Burke that 'his oratory would sometimes make one suspect that he eats potatoes and drinks whisky.' Quoted in Boswell, 1144.

The early 1780s were a critical time for Irish commerce and its constitution. Scotland had, since the Union of 1707, experienced great commercial success, though not without some civic anxiety. Like the Scots, Burke was attempting to construct in Ireland, a commercial humanism that saw commerce as much social as economic.[89] Even if Scotland, Burke wrote, 'paid nothing at all, we should be gainers, not losers by acquiring the hearty co-operation of an active intelligent people, towards the increase of the common stock'.[90] Particularly if combined with reform of civil disabilities, such an approach might serve the whole of Ireland. But such reform was terribly complex. While frequently championing, with Arthur Young and Adam Smith, the removal of trade barriers on Ireland, Burke was largely silent, at least publicly, about increasing demands for political devolution to Dublin.[91] Irish 'patriotism' continued to be, until

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[87] PH xxix.369.

[88] W iv.420.

[89] C ix.165.

[90] WS ix.511.

[91] Young, another of Burke's correspondents, noted that '[b]eing a dependent country, the British legislature has, upon all occasions, controuled [Irish] commerce, sometimes with a very high hand, but universally upon the principles of monopoly, as if the poverty of that country was to form the wealth of Britain'. Arthur Wollaston Hutton, *Arthur Young's tour in Ireland* (London: George Bell & Sons, 1892 [1780]), 233. See the suggestions of L.M. Cullen, in his 'Burke's Irish views and writings' in Ian Crowe, *Edmund Burke: his life and legacy* (Dublin: Four Courts Press, 1997), that Burke wrote or directly influenced Young's *Tour* and Smith's *Inquiry into the nature*

well into the 1790s, a narrowly Ascendancy affair and Burke had little truck with the Irish Whigs or commonwealthmen of the earlier eighteenth century. To Burke, it seemed that the greater the independence of the Irish parliament, the less likely reform seemed for the vast majority of Catholic Irish.[92] But, as it was the second Rockingham Administration that pushed legislative independence, Burke approached these issues with care. He had to. Rockingham himself was an 'absentee' landlord and supported an Irish militia.[93] Burke privately continued to insist that Ireland was effectively divided into two factions.[94] The Ascendancy were not properly an aristocracy, but an oligarchy, a 'junto' or 'master caste' dispensing 'jobbs' (patronage) and favours. Their interests were not joined with the body of the people, but actively opposed to them. Here the civic economy of honour was less useful, Ireland lacked the necessary link between public virtue and the public good. Burke was particularly outraged at the creation of the Irish, overwhelmingly Protestant, 'Volunteers' during the American war. '[H]ad the crown pleased to retain the spirit with regard to Ireland, which seems now all directed to America, we should have neglected our own immediate defence, and sent over the last man of our militia, to fight with the last man of your volunteers'.[95] At the same time, however, various Acts of the Irish Parliament in 1778 and 1782 provided limited Catholic relief, and Burke's public criticism abated somewhat. More interestingly, the 'martial spirit' of Irish 'patriotism' was itself a child of the earlier Irish Whigs, Molyneux et al., and where commerce and virtue were once in opposition, commercial concerns and 'improvement' were at the heart of this Protestant public virtue.[96]

Burke generally believed in the necessary supervising role of the British parliament, but as in the American crisis, he was reluctant to lay down rights that obstructed the demands and

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and causes of the wealth of nations (1776). Whatever the truth of this, Smith wrote, '[w]ithout a union with Great Britain, the inhabitants of Ireland are not likely for many ages to consider themselves as one people.' *The wealth of nations* (Oxford: Oxford Univ. Press, 1993), 461.

[92] C i.139. See PH xix.1103.

[93] He was to write Rockingham, 'I never can forget that I am an Irishman. I flatter myself perhaps; but I think, I would shed my blood rather than see the Limb that I belong to oppressed and defrauded of its due nourishment (C ii.468)'.

[94] WS ix.597.

[95] WS ix.547.

[96] See Stephen Small, 'The twisted roots of Irish patriotism: Anglo-Irish political thought in the late-eighteenth century', (2000-1) 35 *Éire–Ireland* 187. If they were not in general amenable to Catholic civil liberties, they were nevertheless hostile to British influence, or 'corruption', of their political affairs. As the sort of 'patriot' Burke criticised, Molyneux asserted, on behalf of Irish Protestants, that Ireland had voluntarily submitted to Henry II. It had thus never technically been conquered and, consequently, there was no transfer of sovereignty to England. This is itself an interesting twist on English whiggism through to Blackstone, in which they had not been conquered by

complexities of political rule. He was similarly indisposed to articulating a strict theory of the 'separation of powers' internal to Britain's mixed and balanced constitution. But Burke was forced to address the issue by a controversy involving Mansfield and other common lawyers over the respective roles of the judiciary and jury. Between the hostility towards legislation shown by both Blackstone's 'originalism' and Mansfield's 'activism', Burke saw legislators, not common law judges, as the proper agents of legal reform.[97] Parliament, rather than the courts, was at the head of the body politic. Burke maintained

> that a superintendence over the doctrines as well as the proceedings of the courts of justice, was a principal object of the constitution of this House; that you were to watch at once over the lawyer and the law; that there should be an orthodox faith as well as proper works .... being totally disengaged from the detail of juridical practice, we come something perhaps the better qualified, and certainly much the better disposed, to assert the genuine principle of the laws; in which we can, as a body, have no other than an enlarged and a public interest.[98]

This relates, too, to the complicated relationship between natural and positive law.[99] Burke certainly disagreed with the deductive *a priori* reasoning associated with continental philosophy,

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the Normans, but accepted William's rule.

[97] If natural law is, in some sense, superior to the law of parliament, then it must be possible for common law courts to overrule parliament. This was perhaps the essential dilemma for Blackstone, who seemed to give final authority to both natural law and Parliament while in practice his own judicial decisions were decidedly conservative and he was notoriously suspicious of the legislative corruption of the law. See gen. David Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge: Cambridge Univ. Press, 1989).

[98] W ii.137 (from the draft of the 'Speech on the Jury Bill' in W 137-46). Cf. WS ii.343-9, which contains only that part of the speech given. Given the very different avenues taken to reform, it seems inaccurate to note, as the editors of Burke's *Writings* do, that he 'entirely sympathized with the movement towards reform of the law *from within* of which Mansfield had been the great exponent (WS vii.113 (*italics added*))'. For Burke, legal reform came *from within* Parliament. Burke's relationship to Mansfield is complex. Mansfield, a Scot from a family of Jacobite sympathies, had studied Roman law and practiced Scots law before entering the English courts. Burke respected Mansfield's abilities and later sent him a copy of the *Reflections*. More importantly perhaps, the judge was related to Rockingham by marriage and had suffered in the Gordon riots for his views on religious tolerance and against slavery. But there had also been some controversy and clear differences between them. Mansfield seems to have suspected, with others, that Burke was the author of Junius' *Letters* (1768-72) critical of Mansfield and around which the issue of libel arose. He was also a Tory, linked to Lord Bute and the Court 'closet' Burke criticised and had refused bail to Wilkes. Finally, although Burke quotes Mansfield approvingly in the Impeachment, he was thought to be sympathetic to Hastings and Burke's praise may have been more rhetorical than real.

[99] Burke's understanding of natural and positive law has been the source of great confusion, not least among his apologists. Perhaps the best of the 'Cold war' school is Peter J. Stanlis, who properly highlights Burke's difference from the modern natural lawyers. See *Edmund Burke and the natural law* (Ann Arbor: Univ. of Michigan Press, 1958). There are legitimate links in Burke to the classical tradition, but to suggest that Burke was 'essentially a Thomist in his political philosophy' requires qualifications so heavy as to make such a claim, at least, misleading. Id., 249. Better is Burleigh Taylor Wilkins, *The problems of Burke's political philosophy* (Oxford: Clarendon Press, 1967), but he commits the opposite sin, only venial perhaps, of *understating* differences between classical and modern schools. Cf. N 90. Burke's naturalism and his appeal to natural law owe as much to Newton and European jurisprudence as to Aquinas, Pufendorf, or the common law.

especially the modern natural lawyers and later the *philosophes*. He as clearly had great respect for the inductive reasoning most associated with the common law. But for Burke, as was evident as early as his *Enquiry*, 'general principles' were of essential value in guiding or coordinating the results of induction.[100] Such principles, broader than the rules or rights of law and more flexible to circumstance, were one of the defining features of European jurisprudence, though by no means foreign to the common law.

This may be related, too, to Burke's critical view, with most of his contemporaries, of any strict doctrine of precedent.[101] In Burke, this may have gone somewhat deeper. With his inherent philosophical-epistemological scepticism towards 'precepts' and 'rules', as opposed to habit and 'prejudice', Burke was wary of the rigidity of the laws. If, as Hume and Smith strongly emphasised, the development of a uniform system of laws was considered progress over the variable local justice of the past, Burke stressed the necessity of legal flexibility to do justice. This is particularly obvious in the Hastings impeachment where Burke does refer favourably to Mansfield's equitable approach to the rules of evidence.[102] The close relationship of European culture and commerce 'opened a Communication more largely with other Countries, as the Law of Nature and Nations ... came to be cultivated; ... antique Rigour and over-done Severity gave Way to the Accommodation of Human Concerns, for which Rules were made, and not Human Concerns to bend to them'.[103] Further, the 'rule of law' did not guarantee a just legal order, a point made all too clear in the Irish Penal laws. Perhaps the central problem of Western political thought of the late eighteenth century was precisely the balance between the formal neutrality and substantive equity of law, made all the more complex by conflicting claims of popular will and natural right. It was no longer enough to extol, as Burke did, '*Sympathetick*' representation. He continued to emphasise that it was the rule of men, especially the public virtue of public men, on which justice depended. This civic commonplace, transferred to modern legislators, puts Burke at odds with the 'institutional' reliance often attributed to him (with Hume). The 'wisdom ... of government', he said, 'is of more importance than the laws'.[104] In general, it is Cicero, rather than Coke, who would have been Burke's ideal 'law-giver'. The end of government was not the 'Rights of Man', though charted, positive rights were important, but the 'general and public utility', the 'happiness' of the whole.[105] This 'utility' was not the 'hedonic calculus' of Bentham and later utilitarians.[106] It was *eudaemonic*, Cicero's *utilitas*, a necessary balance of the real, but competing, goods, of individual or social flourishing. In this, the state, whatever prudent limitations legislators ought to impose, was a necessary agent.

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[100] Michael Lobban has recently stressed the plurality of English legal sources. See *The common law and English jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991). As a result, he is critical of those who have seen the common law 'as a body of principles and rules that can be distinctly articulated and defined' and claims that for the law to 'move[] and grow ... in a Burkean way' ended with 'judges finding the single solution to legal problems'. Id., 1-2. But this is to misread Burke precisely as he claims others have misunderstood the common law.

[101] While past decisions were given great weight, *stare decisis*, whatever its virtues and vices, is a product of nineteenth-century positivism. '*Precedents* merely as such cannot make Law—because then the very frequency of Crimes would become an Argument of innocence (WS ix.502)'. Cf. Anthony T. Kronman, 'Precedent and tradition' (1990) 99 *Yale L J* 1029.

[102] There was some polemical purpose here as well as Burke was trying to convince the Lords that they were not tied to narrow views of the rules of evidence.

[103] WS vii.163. The Swiss civilian Emmerich von Vattel's *Le droit des gens ou principles de la loi naturelle* (1758), while of a 'Republican cast (WS viii.474)', was a recurrent source from the 1780s, and used extensively for the

The 'true genius' of the British constitution, Burke once confided to Boswell, was 'Tory Language and Whigg measure'.[107] Aware of the virtues of the British constitution, a belief widespread throughout Europe, he was equally aware of its vices, both in Ireland and Britain.[108] In Parliament, Burke's Tory rhetoric was spent on a number of 'progressive', if meliorist, Whig reforms. These included his support of the more humane treatment of criminals and debtors, a view he later maintained towards both the Gordon rioters and French revolutionaries. Best known, however, was his *Speech on Economic Reform* (1780). While a 'temperate reform is permanent; and because it has a principle of growth', Burke sought, of all things, to 'rationalise' government by eliminating crown patronage and feudal accretions.[109] What was 'uppermost' in the reform

> was the reduction of that corrupt influence, which is itself the perennial spring of all prodigality, and of all disorder; which loads us, more than millions of debt; which takes away vigour from our arms, wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution.[110]

Appendix to the *Remarks on the policy of the allies* (1793).

[104] W ii.140.

[105] WS ix.456.

[106] After Bentham set up a model of his wheel-shaped Panopticon prison, allowing continuous supervision of prisoners, he invited the public to see it. Burke visited and noted of him, 'Yes! there's the keeper, – the spider in his web.' Quoted in Mary P. Mack, *Jeremy Bentham: An odyssey of ideas, 1748-1792* (London: Heinemann, 1962), 204.

[107] C v.35.

[108] In Ireland, even the Glorious Revolution 'was the establishment of the power of the smaller number, at the expense of the civil liberties and properties of the far greater part, and at the expense of the political libertie of the whole. It was ... not a revolution, but a conquest: which is not to say a great deal in its favour (WS ix.614)'.

[109] WS iii.492.

[110] WS iii.483.

But this proved too daring for Parliament and was rejected. Rockingham's death in 1782 lessened somewhat Burke's influence and prepared the way for that of Charles James Fox, with whom Burke would later quarrel over the revolution in France. Radical demands, the failed Fox-North coalition of 1783, an electoral debacle in1784, and the Regency crisis of 1788-9 (brought on by the madness of King George and the uncertainty of succession) made Burke even more wary of constitutional innovation.[111] Burke's doctrine of prescription, which may be seen descriptively as early as the *Abridgement*, became a progressively more important normative requirement in his attempt to maintain a moderate reformism.[112]

It was at this time that Burke's involvement in Indian affairs began. Even more clearly than in the American war, in his actions in relation to India, Burke saw himself fighting constitutional 'corruption' brought on by Empire.[113] In the *Abridgement*, he had already discussed–in respect to the conquests of both England and Ireland–a conqueror's obligations and the possibility of a society improving by contact with another culture. Unlike many of his contemporaries and Whig allies, Burke saw the Norman conquest bring England into ever greater 'communication' with Europe, a process accelerated by later developments in commerce. The same could be, if it had not been thus far, true of Ireland. But, in India, Burke saw William Hastings, Governor General of India, and the East India Company, following, in the name of Britain, a familiar pattern in the destruction of India's native culture, religion, and aristocracy through confiscations and law. Burke condemned the abrogation of the 'refined, enlightened, curious, elaborate [and] technical jurisprudence' of Indian law that formed the 'basis and substratum to the manners and customs and opinions of that people'.[114] Perhaps as serious was the corrupting influence domestically. The colonial *nouveau riche*, the Nabobs of India, were unconnected to the natives of India, and their wealth and influence in Britain was detached from any sentiments of honour or public virtue. If Burke's assessment was right, it was instead the fruit of the most dishonourable vice. The result was that India was governed

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[111] See John W. Derry, *The regency crisis and the Whigs 1788-9* (Cambridge: Cambridge Univ. Press, 1963).

[112] Cf. John Brewer, 'Rockingham, Burke, and political argument', (1975) 18 *Hist J* 188. Brewer, following Pocock, maintains that Burke was, particularly in his *Thoughts*, defending a Whiggish 'ancient constitutionalism' in defence of 'fixed principles that could be known, and the modern constitution as degenerate and needful of restoration'. Id., 198. Rhetoric aside, given Burke's clear hostility to such a view in the *Abridgement* and the *Fragment*, I think this misinterprets his meaning in the *Thoughts*. The argument for a constitution of contiguity, rather than constancy with, or corruption from, the ancient constitution would still involve an appeal to principles. Further, the *Abridgement* also provides the basis, indeed a 'natural' basis, for his doctrine of prescription. If he thought it necessary to employ it politically for the first time in 1782 (as Brewer and Pocock suggest), it would only have been because the changes suggested were too radical for Burke. Burke no doubt exaggerated, to himself, the volume of claims on behalf of the 'Rights of Man', but history would soon prove him correct as to the logical end of such arguments.

[113] And 'if ever there was a cause in which the letter kills and the spirit gives life, it would be the attempt to introduce British forms and the substance of despotic government together into any country (WS vi.345).

> without society, and without sympathy with the natives.... there is nothing before the eyes of the natives but an endless, hopeless prospect of new flights of birds of prey and passage .... Every other conqueror of every other description had left some monument of state or beneficence, behind him. Were we to be driven out of India this day, nothing would remain, to tell that it had been possessed, during the inglorious period of our dominion, by any thing better than the ouran-outang or the tiger.[115]

The Hastings impeachment took up the whole of Burke's remaining parliamentary career. It revealed at once his most passionate, compassionate, and obsessive nature and Hastings' eventual acquittal was a great blow. It was these efforts on behalf of India, and Britain, that Burke hoped to be his 'monument' and implored his executors, perhaps in echo of Charles the Second's plea before his executioners, 'Remember! Remember! Remember!'[116] The constitutional implications of each were, he felt, profound.

Through most of his time in Parliament, Burke was considered among its most tolerant members in matters of religion.[117] But by the time of Dr Richard Price's sermon, a congratulatory address to French revolutionaries and radical interpretation of the British constitution, Burke had become increasingly suspicious of many of his fellow Protestants. In Britain, radical politics had often arisen, not from irreligion, but from devoutly religious Dissenters. This was especially true of the role of Puritan 'enthusiasm' and religious republicanism in the seventeenth century. The revelatory solipsism or transparency of the Dissenters was as important as Enlightenment *philosophes* to modern political and philosophical developments. In this way, the deism of Bolingbroke, the sensibility of Rousseau, and the theology of Price were of a piece. In contrast, Burke's Anglicanism, re-enforced by his views on science and law, was deeply corporate and admittedly cautious. Similarly, if Augustinian egoism

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[114] WS vii.285.
[115] WS v.402.
[116] C ix.62, 63 (to French Laurence, protégé of Burke and Professor of Civil Law at Oxford). Repeated in C ix.238. Cf. Bruce James Smith, *Politics & remembrance: republican themes in Machiavelli, Burke, and Tocqueville* (Princeton: Princeton Univ. Press, 1985). Smith does not connect Charles' words with those of Burke, but notes 'it was as if the last words of a condemned king had become a curse, surviving his beheading perhaps even conquering that ignominy–a kind of political spectre come to haunt Burke and the nation'. Id., 108-9n9.
[117] See Michael W. McConnell, 'Establishment and toleration in Edmund Burke's 'Constitution of Freedom'', 1995 *S Ct Rev* 393.

and 'covenant' theory were intellectual precursors to, and spiritual counterparts of, the politics of 'interest' and 'contract', Burke's links with the benevolist tradition also positioned him between the extremes of innate virtue or vice. Politically, his sense of the increasing inflexibility of radical demands, and their incarnation in 'natural' rights, piqued Burke's famous hostility to the '*Great Serbonian bog*' of eighteenth-century 'rightstalk'.[118] If not 'nonsense on stilts', the 'Rights of Man' were still a 'confusion of judicial with civil principles'.[119] They appeared to Burke as a denial of both the progressive, precarious articulation of political rights to guarantee 'ordered liberty', including that of religious toleration, and of the more fundamentally communitarian nature of human association.

In his attacks on the crown, Burke had always defended the importance of the monarchy in Britain, and indeed any extended state, along the lines of classical political theory.[120] As the American constitution was in the process of ratification, Burke opined in Parliament that one would imagine

> we were in America, in the midst of a new commonwealth, devising the best means we could to establish a new constitution, not to perfect and preserve inviolate an excellent old one.... there were many very good republics; but that there existed on earth a republic calculated as well for the happiness of a nation as our monarchy, he did not believe.[121]

When the revolution in France began, Burke was initially cautious. It was this time that Thomas Paine, soon to be the author of the *Rights of man* (1791/2) and Burke's chief ideological enemy, approached Burke for his support of the revolution. But, particularly after the failure of the Estates-General, the meeting of the constitutional orders of France, to find a constitutional solution to French demands, Burke became increasingly concerned about the implications of the revolution. In Britain, he saw many Dissenting sects operating as much as political factions as religions.[122] His *Reflections on the Revolution in France and on the proceedings in certain societies in London relative to that event* (1790) was designed to meet these challenges, particularly in Britain. In this, and a variety of anti-revolutionary writings that followed, Burke is conducting a critique of the transparency and subjectivism shared to a degree by both Dissenters and revolutionaries.

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[118] WS iii.135 (alluding to Milton's *Paradise lost*). Repeated two decades later in RRF 313.

[119] W iv.485.

[120] The 'circumstances and habits of every country ... are to decide upon the form of its government... but ... everything republican which can be introduced with safety into either [Britain or France] must be built upon a monarchy (W iv.425)'.

[121] PH xxvii.821.

[122] See 'Burke' in Ursula Henriques, *Religious toleration in England 1787-1833* (London: Routledge and Kegan

MANNERS ARE MORE IMPORTANT THAN LAWS:

The high strain of Burke's political rhetoric, here and elsewhere, cannot be denied.[123] But he defended neither ancient Saxon liberties nor feudal fealties, neither 'status' nor 'contract', but the progress of society in Europe that had already occurred *through* its traditional orders.[124] Consistent with his empiricism, the *Reflections* was at once an appeal to reason and sentiment. 'Chivalry' was a term of art in eighteenth-century analysis, expressing a union of manners and morals, martial spirit, and public virtue.[125] The clergy and nobility were essential mediating institutions and counterweights to the tyranny of either the one or the many. In France, Burke saw instead the elimination of all checks to power, leaving only the conflict and coercion of self-interest in society, in legal positivism, and in political economy. As a result of the theory of human nature on which revolutionary ideology was based, 'laws are to be supported only by their own terrors, and by the concern, which each individual may find in them, from his own private speculations, or can spare to them from his own private interests'.[126] Further, while many of the Scots seemed to suggest that commerce was the engine of modern, civilised manners and law, Burke's sense of historical progress was more precarious. While he defended a commercial humanism, designed to overcome monopolies of power and privilege, he was much less sanguine about a spontaneous commerce, *without more*, as a guarantor of future progress. It was the slow, fragile development of European manners that ultimately supported both commerce and the

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Paul, 1967), 99-135.

[123] 'It is now sixteen or seventeen years since I saw the queen of France, then the dauphiness, at Versailles; and surely never lighted on this orb, which she hardly seemed to touch, a more delightful vision (RRF 169).' The line recurs, of course, throughout Brian Friel's *Philadelphia, Here I Come*, where '[i]ts purpose is to offer gratuitously another vision, of grace, beauty, and splendour which has been dashed by a senseless world ...'. Richard Pine, *The diviner: the art of Brian Friel* ((2nd edn) Dublin: Univ. College Dublin Press, 1999), 104.

[124] Cf. Henry Sumner Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (1862). Insofar as there was in history, as Henry Sumner Maine later termed it, a movement '*from Status to Contract*', Burke was much more willing to question whether, presented in such stark terms, this movement was 'progressive'.

[125] In chivalry, 'Ambition, interest, glory, all concurred ('The rise of chivalry' (anonymous) in 1762 R 135 *bis*)'. Cf. Voltaire in 1760 R 176-8 *bis*.

[126] RRF 171. 'These public affections, combined with manners, are required sometimes as supplements, sometimes

laws. In the ‘shade’ of these manners, ‘commerce, and trade, and manufacture, the gods of our oeconomical politicians, are themselves perhaps but creatures; are themselves but effects, which, as first causes, we choose to worship. ... They too may decay with their natural protecting principles’.[127] Burke’s essential concern was for the corporate, mediating, process by which individual and popular will was balanced by public reason.

Related to this, was a progressively sharp division between ‘beneficence’ and ‘law’, the ‘imperfect’ and ‘perfect’ spheres of the modern natural lawyers. In many ways, this could be seen as an extension of ‘modern liberty’ and the ‘culture of politeness’. A ‘negative’ and more neutral conception of the rules of justice seemed to avoid the problems of faction and enthusiasm and to provide the desired balance of liberty and virtue. Smith had, for example, noted that ‘Beneficence... is less essential to the existence of society than justice. Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.’[128] But Burke again problematises the self-sufficiency and neutrality of such a sphere. It is not merely that law was ‘only beneficence acting by a rule’, but that law was insufficient without benevolence, just as reason was without sentiment.[129] A ‘regular, consistent, and stable jurisprudence’ was both consequence and contributing cause of a civilised society, but the ‘spirit of our Laws’ were founded on ‘our own dispositions, which are stronger than Laws’.[130] It is in this sense that

> Manners are of more importance than laws. Upon them, in a great measure, the laws depend. The law touches us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in. They give their whole form and colour to our lives. According to their quality, they aid morals, they supply them, or they totally destroy them.[131]

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as correctives, always as aids to law (RRF 172).’

[127] RRF 173-4. See J.G.A. Pocock, ‘The political economy of Burke’s analysis of the French Revolution’ in *Virtue, commerce, and history: essays in political thought and history, chiefly in the eighteenth century* (Cambridge: Cambridge Univ. Press, 1985) and ‘Edmund Burke and the Redefinition of Enthusiasm’ the Context as Counter-Revolution in François Furet and Mona Ozouf, (eds), *The French revolution and the creation of modern political culture: vol. 3, the transformation of political culture 1789-1848* (Oxford: Pergamon Press, 1990).

[128] *Theory of moral sentiments* (Indianapolis: Liberty Fund, 1976 [1790 edn.]), 86.

[129] WS i.330, RRF 149, 149.

[130] L 384. The laws ‘furnish the civil means of getting at the natural (L 384)’.

[131] L 126. For if ‘*laws* are corrupted. Whilst *manners* remain entire, they will correct the vices of law, and soften it at length to their own temper (WS iii.299)’.

This is a concern as much for civic, public virtue as for Christian, private virtue. There a sense here in which Burke's descriptive understanding of manners and law, if not his prescription, is much closer to Rousseau and radical republicans than to nineteenth-century 'liberals'.[132]

Burke's anti-revolutionary writings began to differ sharply from the more sympathetic early responses of other Whigs. He found himself at odds with former allies Fox and Richard Brinsley Sheridan and finally spilt from them, drawing some forty Whigs with him. Burke's 'Appeal', sought to remind those he left behind of the opinions of earlier Whigs. As he had in the *Reflections*, Burke refers extensively to the trial (in 1710) of the Tory Dr Sacheverall by the Whig establishment, to contrast the views of old and new. In doing so, he appealed specifically to the period of Robert Walpole, noting that the 'profound repose, the equal liberty, the firm protection of just laws during the long period of his power, were the principal causes of that prosperity which afterwards took such rapid strides towards perfection'.[133] The successes of Walpole, and the work of establishment writers like Defoe, had served to legitimise the modern British state and modern liberty against both Tories and commonwealthmen. Burke's critique of France also employs the civic language that had earlier been used *against* the Whig establishment by Walpole's *bete noir* (and Burke foil) Bolingbroke. France was not like other republics, which remained societies of orders, but was modelled on the 'democratic' and expansive republic of Rome. It was on the basis of this civic critique that he foretold the rise of a 'popular general'. It was a commonplace of classical political theory. The same Burke who sought to develop a commercial humanism, particularly in respect to Ireland, critiqued the 'monied interest' and 'paper currency' of France, and defended the 'unproductive' property of the clergy. In the *Letters on a Regicide Peace* (1795-7), we find Burke insisting

If wealth is the obedient and laborious slave of virtue and publick honour, then wealth is in it's place, and has it's

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[132] See Garret Barden, 'Discovering a constitution' in Tim Murphy and Patrick Twomey (eds.), *Ireland's evolving constitution, 1937-97: collected essays* (Oxford: Hart Pub., 1998), 4. Rousseau had written thirty years earlier that such manners were impressed: 'on the hearts of the citizens. This forms the real constitution of the state, takes on every day new powers, when other laws decay or die out, restores them or takes their place, ... and insensibly replaces authority by the force of habit. I am speaking of morality, of custom, above all of public opinion; a power unknown to political thinkers, on which none the less success in everything else depends. With this the great legislator concerns himself in secret, through he seems to confine himself to particular regulations; for these are only the arc of the arch, while manners and morals, slower to arise, form in the end its immovable keystone.' *The social contract* (Chicago: William Benton Pub., 1952 [1762]) Bk. II, §12. It was on Rousseau's belief in the greater ability of legislators to alter even these, and his apparent elimination of intermediate bodies, that Burke most strongly disagreed, particularly as interpreted (or misinterpreted) by the French revolutionaries.

[133] W iv.437.

> use.... If we command our wealth, we shall be rich and free. If our wealth commands us, we are poor indeed. We are bought by the enemy with the treasure from our own coffers.... where the essential publick force (of which money is but a part) is in any degree upon a par in a conflict between nations, that state which is resolved to hazard it's existence rather than to abandon it's objects, must have an infinite advantage over that which is resolved to yield rather than to carry it's resistance beyond a certain point.[134]

The distance between Burke and nineteenth-century political economy is significant. In addition, public and even martial virtues, remained essential to the modern state and to modern liberty.

Perhaps as an expression of his own public virtue, it was during the period of Burke's most aggressive attacks on the Jacobins that he was most critical of the Ascendancy.[135] In addition to organising a school for French émigrés in Buckinghamshire, he assisted in the establishment of a Catholic seminary at Maynooth in 1795. Burke's son Richard, too, served on the Irish Catholic Committee, though with little ability and less tact. As revolutionary fervour increased and the Irish Parliament resisted further reforms for Irish Catholics, his animosity towards the Ascendancy revived.[136] The 'English Government has farmed out Ireland', he wrote an Irish associate, 'without the reservation of a pepper Corn rent in Power or influence, publick or individual, to the little narrow Faction that Domineers there'.[137] To maintain his hostility towards French 'innovation' and his support for Irish 'reform', Burke distinguished between their sources. The roots of the revolution in France were not, he argued, in economic deprivation, for France had prospered most just before it began. It was French prosperity, the 'speculative' Jacobinism of *philosophes* and monied men which 'arises from Wantonness and fullness of bread', that served to ignite the revolution.[138] The source of Irish 'Jacobinism' was instead 'Penury and irritation, … scorned loyalty, and rejected Allegiance, [and] has much deeper roots. They take their nourishment from the bottom of human Nature and the unalterable constitution of things, and not from humour and caprice or the opinions of the Day about privileges and Liberties'.[139] To the end of his life, Burke's concern for Ireland continued, for 'as many as I know in our country, I honour. There never was so much ability, or, I believe, virtue, in it. They have a task worthy of both.'[140] If Britain was slowly coming to agree with Burke's appraisal of French events, his fortunes were, with his health, declining. In 1794, both his brother and his beloved son died. Richard Burke had taken his father's parliamentary seat only ten days before.[141] In July of 1797, after requesting Addison's 'On immortality', Burke died.[142] His death preceded the Irish Rebellion of the next year. While he would have understood its deep and tangled roots, he would no doubt have disapproved. He had sought a union of sentiment and communication between Ireland, Britain, and the rest of Europe. At century's end, Burke faced–or so he saw it–the root and branch destruction of enlightened Europe. There was no place for an Irish Sparta, or even a Venice, in a world of Romans.

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[134] L 70 (Letter One-1796). Cf. 'Thoughts and details on scarcity (1795)' in WS ix.119-45.

[135] Burke's 'Letter to Sir Henry Langriche (1792)', published in support of Catholic emancipation, appears to have been answered by the third Trinity Regius Professor of Feudal and English law, Dr Patrick Duigenan. Duigenan, a convert and strongly anti-Catholic, called Burke's letter 'jesuiticial'. Like Sullivan, he had also been Professor of Civil and Canon Laws prior to his appointment.

[136] See, e.g., F(M) A.xxv.87 on 'James Hyland, Catholic Soldier'.

[137] C ix.165.

[138] C ix.162. It was the '[v]ice of men of Parts (C viii.272)'.

[139] C ix.162.

In concluding, it may be helpful, if slightly dangerous, to peer into the future. Burke's historical sense has often led him to be linked with the nineteenth-century German school of historical jurisprudence, especially Karl von Savigny.[143] But, in the end, the *Volksgeist* resembles nothing so much as the Saxon 'spirit' of Bolingbroke or Blackstone. Nor should Burke be linked to Jeremy Bentham or John Austin, whose nineteenth-century positivism would have struck him as curiously naïve and unhistorical, virtually eliminating, in eighteenth-century parlance, the 'imperfect' sphere of manners and beneficence from their consideration. With the best of the eighteenth century, Burke's historical jurisprudence is, even in the piecemeal fashion that we have it, arguably superior both as history and jurisprudence to any of these. If he may be compared to any nineteenth-century figure, it is Alexis de Tocqueville. An aristocrat born after the initial revolution, Tocqueville trained in law, acted as a magistrate, and studied history before turning to writing and subsequently becoming, like Burke, a legislator. He confronted his own revolution in 1848, his own Napoleon shortly thereafter.[144] His *Old Regime and the French revolution* (1856) consciously cites, and unconsciously emulates, Burke. But Tocqueville had, of necessity, to accept modernity in a way in which Burke might still have thought possible to avoid, if only just.[145] He saw the positive elements of such changes in a way that Burke did not. But the 'central position' of his *Democracy in America* (1836-40) remained that 'Laws are always unsteady when unsupported by mores; mores are the only tough and durable power in a nation.'[146] Both men reflect, not simply a sociological-historical relationship between manners and law, but a denial of any sharp division between 'normative' and 'analytical' jurisprudence, between beneficence and law. Both of these, it seems to me, are lessons repeatedly relearned and forgotten in Anglo-American jurisprudence.[147] Burke saw the virtues of modern liberty and the rule of law, but had an Irish awareness of the limits and potential perversion of law. Manners may achieve polemical precedence over laws, and even, commerce when there appeared, as in Ireland, so little law uncorrupted by faction, so little commerce unobstructed by mercantile restrictions. Whatever the precise relevance of Burke's thought to modern society, his legacy, or at least the principles and maxims strewn throughout his writings and speeches, remain ours in usufruct.

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[140] WS ix.638. 'I doubt not they will perform it, for the stability of the church and state, and for the union and the separation of the people: for the union of the honest and peaceable of all sects; for their separation from all that is ill-intentioned and seditious in any of them (WS ix.638).' See Burke's will at WWM Bk P 49.

[141] 'He was made a publick creature; and had no enjoyment whatever, but in the performance of some duty (WS ii.171).'

[142] *The Spectator* No. 111 'On immortality; beautiful speculation tending to establish its probability from the fact of unlimited progressiveness of the soul towards perfection'.

[143] See Kelly, 274 and Carl Joachim Friedrich, *The philosophy of law in historical perspective* ((2nd edn) Chicago: Univ. of Chicago Press, 1969), 140. Burke no doubt influenced, through the *Enquiry* as well as his late anti-revolutionary writings, both romanticism and the German school. But the Irishman had no truck with the idealism, psychological and philosophical, or nationalism of the *Volksgeist*. Cf. M.D.A. Freeman, *Lloyd's introduction to jurisprudence* ((6th edn.) London: Sweet & Maxwell Ltd., 1994), 783. Nor did he, as some have claimed, pit history *against* reason and politics, but denied here as elsewhere such sharp distinctions. Cf. Harold J. Berman, 'The origins of historical jurisprudence: Coke, Selden, Hale', (1994) 103 *Yale L J* 1651.

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[144] See gen. Tocqueville's *Recollections: the French revolution of 1848* (New Brunswick: Transaction Pub., 1997 [originally published posthumously 1893]), J.P. Mayer and A.P. Kerr (eds) and George Lawrence (tr.). See also the new introduction by Fernand Braudel, translated by Danielle Salti..

[145] Burke 'made no secret of his horror' as the revolution gradually 'revealed its aspect as a grim, terrific force of nature, a newfangled monster, red of tooth and claw ...'.*The Old Regime and the French Revolution* (New York: Doubleday, 1983 [1856]), Stuart Gilbert (tr.) 4,3. But he 'did not see that what was taking place before his eyes was a revolution whose aim was precisely to abolish that 'ancient common law of Europe', and that there could be no question of putting the clock back'. Id., 21. See esp. 2-4, 21, 75, 88-9, 205-6.

[146] *Democracy in America* (New York: Harper Perennial, 1969 [1835]), J.P. Mayer (ed.) and George Lawrence (tr.), 308, 274. This is not taken from Burke, for Tocqueville's trinity of influences were Montesquieu, Rousseau, and Pascal, but his thought reflects the same mix of the civic and jurisprudential traditions. In general, the links between Burke and Tocqueville remain inadequately explored.

[147] Particularly in the Anglo-American world, there is a cycle of amnesia and the rediscovery 'that while some social norms are certainly rational, others are clearly affected by ... history, broadly understood, including tradition, institutions, customs, and habits'. that appears to be repeatedly rediscovered. Amitai Etzioni, 'Social norms: the rubicon of social science' in *The monochrome society* (Princeton: Princeton Univ. Press, 2001), 181. Cf. Siedentop, 'Two liberal traditions' in Alan Ryan, *The idea of freedom: essays in honour of Isaiah Berlin* (Oxford: Oxford Univ. Press, 1979).

THE MORAL CONSTITUTION OF THE HEART

'Poets, who have to deal with an audience not yet graduated in the school of the rights of men, and who must apply themselves to the moral constitution of the heart, would not dare to produce such a triumph as a matter of exultation (RRF 176)'.

BURKE'S THEORY OF MORAL SENTIMENTS:

This chapter will primarily concentrate on Burke's theory of human nature and association. The two are inseparable and the foundation for his understanding of manners, history, and law. In this, the division between man's 'nature in general' and that as 'modified by his habits' was essential. But these habits, whether personal qualities or the social conventions of culture, were not opposed to his physical nature or native dispositions, but were the necessary—and necessarily social—means by which it is expressed. 'Art is man's nature'. One element of this was Burke's alignment with those who underscored, against egoists and rationalists, human interdependence through sociability, sympathy, and sentiment. The 'common sense' to which Burke appealed was both a sense of the commons and a shared property of the community. This social life was the very basis on which human happiness and improvement might be achieved, the 'partnership ... in all perfections'. This did not, of course, exclude hierarchies of merit and learning. In fact, in required them in the unavoidably corporate process of improvement. Human 'communication', in both the narrow linguistic sense, as well as a broader sense of social commerce, provided a wealth of common experience from which men could draw. If in this appeal to 'common sense' and 'communication', Burke drew on a variety of classical and civic traditions, he joined them to both the 'culture of politeness' and to contemporary empiricism.[1] Rather than a defence of unchanging eternal verities, this provided a theory in which culture was extremely sensitive to change, the basis of the 'organicism' for which he is rightly credited. It also provided him, as it did for many others, with an implicit model of individual and cultural progress. In sum, Burke's views relied on neither philosophical rationalism nor theology. Within the limits of eighteenth-century science, his view was naturalistic. If these were confirmed by his faith, he did not defend it on that basis. His religious views are, however, of great value in understanding the deeply communitarian nature of his thought and will be discussed briefly. In both secular and spiritual debates, Burke was highly critical of the epistemological transparency and ontological subjectivism common to the late eighteenth century.

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[1] J.G.A. Pocock has noted the possibilities of combining these different languages with jurisprudence. See 'Cambridge paradigms and Scotch philosophers: a study of the relations between the civic humanist and the civil jurisprudential interpretation of eighteenth-century social thought' in Itvan Hont and Michael Ignatieff (eds), *Wealth and virtue: the shaping of political economy in the Scottish Enlightenment* (Cambridge: Cambridge Univ. Press, 1983), 246. But he may overemphasise the difference of these from the civic traditions.

A MORE EXTENSIVE AND PERFECT INDUCTION:

As noted, Shaftesbury, Addison, and Hutcheson were of great importance to the development of a polite culture. Shaftesbury never himself elaborated a detailed psychology, but was deeply critical of the 'Epicurean' empiricism of Hobbes and his tutor Locke.[2] These were at once vicious and vulgar, presenting an Augustinian concept of human nature as well as ignoring, in its determination to eliminate the innate ideas of Cartesianism, any natural intuitions or inclinations. Shaftesbury's benevolism, the belief that human benevolence was an essential element of human nature, did not simply posit man's goodness, but sought instead to balance reason and sentiment, virtue and vice, the private and the public.[3] In doing so he drew heavily on the ancients, including Aristotle, but especially the Stoics.[4] Addison exemplifies the degree to which such sentiments became an unavoidable element of popular culture. In the main, Hutcheson followed these moves in debates with another generation of egoists. Hutcheson's own naturalism was important to British moral philosophy, to the Scottish Enlightenment, and, more indirectly, to jurisprudence.[5] With his predecessor Gershom Carmichael at Glasgow and fellow Dubliner Arbuckle, Hutcheson leavened the moral and legal voluntarism of Pufendorf and the modern natural lawyers with an emphasis on natural sociability, the concordance of private and public virtue.[6] Burke drew on Shaftesbury and Addison, among many others. But he would have found Arbuckle and Hutcheson even closer at hand.[7] If their brand of low Whig politics had little appeal to him, their moral and aesthetic works were important sources for Burke's early writings.[8] Beyond the similarity in title to Burke's *Enquiry*, the influence of Hutcheson's *Inquiry into the original of our ideas of beauty and virtue* (1725) is especially obvious. In an early poem, too, Burke suggests that Hutcheson's *Essay on the nature and conduct of the passions and affections* (1728) was a continuation of the work of the Greek Longinus, whose *On the sublime* was the stated inspiration of Burke's work.[9] But the connections to Hutcheson and the culture of politics went far deeper.

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[2] Burke saw something of the same Epicureanism in the 'new fashioned feelings introduced into the World by Rousseau, Sterne &c, & said this had produced much trash for circulating Libraries, in which could be found Apologies for Mrs. This, Mrs. That & the other, who ought never to have boasted of their own weakness, nor endeavoured to corrupt others by their distorted morality. Shame, he said, which so long served as a safeguard to Folly was considered in the light of weakness, & many, in consequence of this had exposed themselves, who might have past muster otherwise (T 36)'.

[3] While Hobbes' 'Character and base slavish Principles in Government took off the Poyson of his Philosophy', it was Locke 'that struck at all Fundamentals, threw all Order and Virtue out of the World.... Thus virtue ... has no other measure, law, or rule, than fashion and custom.' *Life, unpublished letters, and philosophical regimen of Anthony, Earl of Shaftesbury* (London: S. Sonnenschein & Co., 1900), 403-4.

[4] Both Hobbes and Locke had 'adopt[ed] 'paradoxical systems' in their attempt to extinguish the 'ghost of Aristotle''. Shaftesbury, *Characteristics of men, manners, opinions, times* (Cambridge: Cambridge Univ. Press, 1999 [1711]), 45n.

To borrow terms applied to Whig political thought, the empiricism of Burke's aesthetics in the *Enquiry* was more 'scientific' than 'vulgar'.[10] It combined both a methodology in which the development of general theories was 'founded on experiment and not assumed', in line with contemporary science, and a naturalistic theory of individual psychology.[11] This was broadly inductive and appealed, in a quasi-Socratic manner, to the reader's (or spectator's) own beliefs. For this reason, Burke's deeply social theory was expressed in a method that often focussed on the individual. Like Hutcheson's work, the theory of the *Enquiry* was 'naturalistic', founded in a

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[5] See Schneewind, 'Classical republicanism and the history of ethics', (1993) 5 *Utilitas* 185.

[6] See James Moore and Michael Silverthorne, 'Natural sociability and natural rights in the moral philosophy of Gerschom Carmichael' in V. Hope (ed.), *Philosophers of the Scottish Enlightenment* (Edinburgh: Edinburgh at the Univ. Press, 1984); 'Gershom Carmichael and the natural jurisprudence tradition in eighteenth-century Scotland' in Itvan Hont and Michael Ignatieff, *Wealth and virtue: the shaping of political economy in the Scottish Enlightenment* (Cambridge: Cambridge Univ. Press, 1983); Nicholas Phillipson, 'The pursuit of virtue in Scottish University Education: Dugald Stewart and Scottish moral philosophy in the Enlightenment' in Phillipson (ed.), *Universities, society, and the future* (Edinburgh: Edinburgh Univ. Press, 1983). See gen. Knud Haakonssen, *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (Cambridge: Cambridge Univ. Press, 1996).

[7] See Arbuckle, *Collection of Letters and Essays* (1728, first published as *Hibernicus's letters* in 1722). Hutchinson's *Reflections upon laughter, and remarks upon 'The fable of the bees'* (1750), criticising Mandeville, were also published in Arbuckles' *Dublin Journal.* Cf. Peter J. Stanlis, 'Burke and the sensibility of Rousseau', (1962) 66 *Thought* 246.

[8] Cf. David Berman, 'The Irish counter-enlightenment' in Richard Kearney (ed.), *The Irish mind: exploring intellectual traditions* (Dublin: Wolfhound Press, 1985). Unfortunately Berman insists, anachronistically, on dividing 'liberal' and 'right-wing Lockeans' and puts Burke in the latter category.

[9] 'Like thee too great Longinus did before/The secret movements of the Soul explore,/But that great Work which Time so long withheld/From mortal Sight is now by thee reveald (WS i.30)'. See C i.18. Hutcheson's son was also a contemporary of Burke's at Trinity, though there is no evidence of any relationship between them.

[10] Duncan Forbes draws the distinction between 'vulgar whiggism' (the insular, often contractualist, adoration of Saxon liberty, a view in no way limited to Whig politicians) and the more 'sceptical' or 'scientific' philosophical and political thought of Hume and Smith. It has been of great use in suggesting a complexity in British debate far deeper than any Whig/Tory divide. Cf. Forbes, 'Scientific whiggism: Adam Smith and John Millar', (1954) 7 *Cambridge J* 653; 'Sceptical whiggism, commerce, and liberty', in A.S. Skinner and T. Wilson (eds), *Essays on Adam Smith* (Oxford: Clarendon Press, 1975); *Hume's philosophical politics* (Cambridge: Cambridge Univ. Press, 1975).

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common and moral 'sense', rather than on theistic presumptions. But Burke disputed the scientific nature of the work. As a friend of Burke's aptly observed, Hutcheson's *Inquiry* was a 'moral', while Burke's *Enquiry* was a 'critical work'.[12] Burke thought the application of aesthetic terms to moral theory distorted both aesthetics and ethics. The 'general application of [beauty] to virtue, has a strong tendency to confound our ideas of things'.[13] Burke sought to make the discussion even more scientific, to explain art (including drama) by 'remounting to the natural passions or dispositions of men'.[14] His concentration was thus not on concepts like beauty, for example, but on the senses, the 'great originals of all our ideas'.[15] While Burke never emphasised the importance of climate to the degree that Montesquieu did, his influence may be seen here, too. A similar 'sensationalism', or reliance on the senses, was central to the '*spirit of the laws*'.[16] Burke, whose early interests had been more artistic than political, continued to see the study of aesthetics as having a moral purpose, for the

> Deprivation of Taste is as great as that of Morals, and tho' the correcting the latter may seem a more laudable Design, and more consistent with *public-Spirit*; yet there is so strong a Connection between them, and the Morals of a Nation have so great Dependence on their Taste and Writings, that the fixing the latter, seems the first and surest Method of establishing the former.[17]

As a result, Burke's sensationalist empiricism was at once a 'science' of art and of morality, and well within the 'culture of politeness'. This is a point made even clearer in his early essays, contemporaneous to his work on the *Enquiry* and his legal studies. Particularly important is the neo-Ciceronian 'Several scattered hints concerning philosophy and learning collected here from my papers', stressing the degree to which a liberal education, particularly through the arts (and precisely because they relied on sentiment as much as reason) nursed a '*versatile ingenium*'.[18] This view was no doubt influenced by the narrow, insular legal education he found at the Middle

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[11] PE 5.
[12] S 212.
[13] PE 102. 'This loose and inaccurate manner of speaking, has therefore misled us both in the theory of taste and of morals; and induced us to remove the science of our duties from their proper basis (our reason, our relations, and our necessities) to rest it upon foundations altogether visionary and unsubstantial (PE 102)'.
[14] WS i.557. See Burke's Middle Temple notes on the passions and 'enlarged considerations' at F(M) A.xxx.6.
[15] PE 22.
[16] See Dugald Stewart, *The collected works of Dugald Stewart* (Edinburgh: Thomas Constable and Co., 1855 reprinted in Bristol by Thoemmes Press, 1994), William Hamilton (ed.), v.213n1.
[17] WS i.66.
[18] N 86. See also T37 and WS i.73.

Temple.

For the benevolists, as it was the portrayal of the passions as inherently base that encouraged egoism, it was the pretensions of rationalists, religious and deistic, that encouraged scepticism. Burke adopts, albeit implicitly, a similar stance. His well-known animosity towards speculative reason easily blurs his cautious optimism about the possibilities of human enlightenment through corporate experience. In the *Enquiry*, this had both ancient and modern sources. The influence of Cicero and Aristotle, for example, are among the most important to Burke's thought.[19] But Burke draws as well on the modern science of Bacon and Newton in his methodology.[20] 'In considering any complex matter', he wrote,

> we ought to examine every distinct ingredient in the composition, one by one; and reduce every thing to the utmost simplicity ... . We ought afterwards to re-examine the principles by the effect of the composition, as well as the composition by that of the principles. ... The greater number of these comparisons we make, the more general and the more certain our knowledge is like to prove, as built upon a more extensive and perfect induction.[21]

This methodology is, of course, analogous to that of the common law.[22] But it is essential to understanding Burke's science and his jurisprudence that abstract ideas and general principles continue to play a role, without which 'all reasonings ... would be only a confused jumble of particular facts and details'.[23] Neither the wisdom of science nor that of jurisprudence develop from an simple induction, but from this 'more extensive and perfect induction'. Such principles are falsifiable, and continually 're-examined' after experience, but they remain vital guides for human knowledge.[24] Moreover, if he believed our understandings are limited, the 'inability to

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[19] In both his *Enquiry* and in the *Note-book*, Burke cites the same passage from Cicero, 'to consider and to contemplate nature is the essential food for our spirit and intelligence'. See PE 5 and N 92-3.

[19] In both his *Enquiry* and in the *Note-book*, Burke cites the same passage from Cicero, 'to consider and to contemplate nature is the essential food for our spirit and intelligence'. See PE 5 and N 92-3.

[20] The 'elevation of the mind ought to be the principal end of all our studies (PE 48)'. Cited in Thomas Reid, *Essays on the intellectual powers of man* (1785) in *The works of Thomas Reid* (Edinburgh: Longmans, Green, & Co., 1895),

Empiricism was novel neither to the eighteenth century nor to jurisprudence. See Harold J. Berman, 'The origins of historical jurisprudence: Coke, Selden, Hale', 103 *Yale L Rev* 1651, 1729 and Harold J. Berman and Charles J. Reid, Jr, 'The transformation of English legal science: from Hale to Blackstone', (1996) 45 *Emory L J* 437, 450.

[23] W vi.101. And 'without the guide and light of sound, well-understood principles, all reasonings in politics, as in everything else, would be only a confused jumble of particular facts and details, without the means of drawing out any sort of theoretical or practical conclusion (W vi.101)'.

[24] In an early 'Plan for arguing', Burke wrote the 'Credibility of Matter of fact is made out, 1st, by considering its Probability with Regard to General Experience. 2ndly, by its Agreement with the particular circumstances of time, place, manners, Customs, etc. 3rdlt, by the Credit of the Relator'. N 45. 'The Arguments that persuade to any Resolution are taken either 1st. from Justice, 2nd, from Interest or 3rd, from Affection (N46)'.

push it indefinitely is no argument at all against it'.[25]

The circumspection with which Burke treats reason, particularly the solipsisms of rationalism, may also be seen as linked to the benevolist rehabilitation of sentiment and sociability. Burke's legal training no doubt played a role, but his investigation of reason and sentiment is much deeper than would have been provided at the Middle Temple.[26] Although there were significant interpretive differences, by mid-century the principle of 'sympathy' had become a central organising principle for moral theory. Students of Hutcheson, and later friends of Burke, Hume and Smith are especially important here for comparison.[27] For each, 'sympathy' provided a natural, non-rational and non-theistic, basis on which human sociability and benevolence could be understood. For Burke in the *Enquiry*, writing after Hume's philosophical works and before Smith's *theory of moral sentiments* (1759), it is by sympathy

> that we enter into the concerns of others; that we are moved as they are moved, and are never suffered to be indifferent spectators of almost any thing which men can do or suffer. For sympathy must be considered as a sort of substitution, by which we are put into the place of another man, and affected in many respects as he is affected ... .[28]

So understood, sympathy is not an innate *idea*, but a psychological mechanism and its attendant feeling. It is native, prior to, and regulative of, experience. But it was more properly felt, than judged of, acting 'without any recourse to reasoning'.[29] In this way, the methodological

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[25] PE 5.

[26] On the 'scepticism' or pragmatism of Matthew Hale, see his 'Reflections by the Lrd. Chieife Justice Hale on Mr. Hobbes his dialogue of the lawe', criticising Hobbes' *A dialogue between a philosopher and a student of the common laws of England* (c.1662-75), reprinted in William Holdsworth, *A history of English law* (London: Methuen & Co. Ltd., 1938 (14 vols.)), v.499-513, esp. 504. See J.G.A. Pocock, 'Burke and the ancient constitution—a problem in the history of ideas', (1960) 3 *The Hist J* 125,134-7. Pocock suggests that Burke became increasingly sceptical about historiography, gravitating to the position, that of Hale, he had rejected in his *Fragment: an essay towards an history of the laws of England* (c. 1757) or, Pocock does not mention it, in his *Essay towards an abridgement of the English history* (1757-?). Burke was always sceptical about the historiography and jurisprudence of those trained in these disciplines. The *Abridgement*, like the *Fragment*, was at once critical of accepted scholarship and positive, making its own claims about history and law. This scepticism would only have been more pronounced as those trained in neither, began to pronounce judgment on both.

[27] Where for Hume 'sympathy' was the 'fellow feeling' for others, for Smith it was instead a more subjective desire for social approval. Knud Haakonssen, *The science of a legislator: the natural jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge Univ. Press, 1981), 72. See also F.L. van Holthoon, 'Adam Smith and David Hume: with sympathy', (1993) 5 *Utilitas* 35 and D.D. Raphael, *Justice and liberty* (London: The Athlone Press, 1980), 160 *et seq.*. A good discussion of Hume that relates closely to the study of Burke may be found in Gerald J. Postema, *Bentham and the common law tradition* (Oxford: Clarendon Press, 1986), chps. 3-4. As will be clear, however, I think Postema's otherwise fine discussion of 'classical common law theory' is marred by his comments on Burke. See Id., 61.

[28] PE 41. See PE 47-8.

[29] PE 22. We 'yield to sympathy what we refuse to description (PE 160)'. See John Mullan, *Sentiment and*

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individualism of empiricism provided a principle deeply inter-subjective, occluding any sharp distinction between private and public spheres.[30]

Burke quoted in full the first chapter of Smith's *Theory of moral sentiments* in his highly favourable review for the *Annual Register*. Smith sought the 'foundation of the just, the fit, the proper, the decent, in our most common and most allowed passions' and made 'approbation and disapprobation the tests of virtue and vice, … shewing that those are founded on sympathy'.[31] Basing moral theory on the 'whole of Human Nature', it was, he wrote, 'rather painting than writing'.[32] The book had actually been presented to Burke by Hume, whom Burke had met a year or so before, in Smith's name.[33] Hume, Smith, and Burke were all, in their different ways, following Hutcheson's lead.[34] And each was to turn this more naturalistic understanding of human association to the empirical and historical enrichment of the law and history.[35] It was this, perhaps above all else, that secured Hutcheson's role as 'father of the Scottish Enlightenment'.[36] Hume, having himself rejected a career in law after legal studies in Edinburgh, was to use its language and concepts, especially prescription and property, throughout his philosophical, 'polite', and historical works. And Smith, as is increasingly obvious, played a critical role in the jurisprudence so central to the Scottish Enlightenment and his *Lectures on jurisprudence* (1762-3/1776) are an important link between the *Theory of moral sentiments* and the *Wealth of nations* (1776). Burke's association and sympathy with both, at the time he was writing his own *Essay towards an abridgement of the English history* (1757-?), was of great significance in his own

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sociability: the language of feeling in the Eighteenth century (Oxford: Clarendon Press, 1988).

[30] 'Virtue will catch as well as vice by contact (WS iii.328).'

[31] 1758 R 485.

[32] C i.129, 1758 R 485. In a letter to Smith, Burke wrote, 'I have ever thought that the old Systems of morality were too contracted and that this Science could never stand well upon any narrower basis than the whole of Human Nature (C i.129)'.

[33] Writing to Smith, Hume referred to Burke as 'an Irish gentleman, who wrote lately a very pretty Treatise on the Sublime' (12 Apr. 1759) in *The letters of David Hume* (Oxford: Oxford Univ. Press, 1969), J.Y.T. Grieg (ed.), i.303. Hume noted he was 'very well acquainted' with him 'was much taken with your Book. He got your Direction from me with a View of writing to you, & thanking you for your Present: For I made it pass in your name'. Id. (28 July 1759), 312. Smith may already have known of Burke. A rumour, likely apocryphal, suggests that after reading Burke's *Enquiry*, Smith had stated that the author, unknown to him at the time, ought to have a chair in moral philosophy.

[34] See gen. Haakonssen, *The science of a legislator*.

[35] See esp. Peter Stein, *Legal evolution: the story of an idea* (Cambridge: Cambridge Univ. Press, 1980) and 'Law and society in eighteenth-century Scottish thought' in N.T. Phillipson and Rosalind Mitchison (eds.), *Scotland in the age of improvement: essays in Scottish history in the eighteenth century* (Edinburgh: Edinburgh Univ. Press, 1970). See C vi.466.

[36] See T.D. Campbell, 'Francis Hutcheson: 'Father of the Scottish Enlightenment', R.H. Campbell and Andrew S. Skinner (eds), *The origins and nature of the Scottish Enlightenment* (Edinburgh: John Donald Pub, 1978).

natural, historical jurisprudence. All would, through their individual links to Hutcheson and polite culture, enrich the lean sociability of the modern natural lawyers. This also made possible a critique of the rationalism and subjectivism implicit in contractualism by challenging both the atypical and ahistorical nature of such theories. To found a theory of human nature or government on actual consent, whatever its appeal, was simply naive.[37] Far from being provincial, Scottish jurists were trained, at continental universities, in the broad legal humanism of the Roman law, combining legal and moral theory.[38] Jurisprudence was, in this tradition, deeply informed by the different civic traditions of European classical theory and scholasticism.[39] And, if the languages of virtue and right were by no means synonymous, neither were they distinct. With the 'natural' foundations of Carmichael and Hutcheson and, towards mid-century, the deeper historicism of Montesquieu, Scottish jurisprudence became more detached, analytic and empirical, far more sophisticated than jurists of the previous century like Pufendorf or Hale.[40] Burke, from similar sources, would develop his own natural and historical jurisprudence on parallel lines.

While Burke does see some sociability arising from man's weakness, the foundation of the sociability of the modern natural lawyers, he appeals as well to the classical and scholastic tradition. 'I remember an old scholastic aphorism', he noted later, 'which says that the man who lives wholly detached from others, must be either an angel or a devil'.[41] The phrase, which Burke would almost certainly have known, was scholastic by way of Aristotle, for whom association was not a necessity so much of our condition, but of our nature. In Burke, if the actual association of men does not necessarily give 'positive pleasure in the enjoyment; ... absolute and entire *solitude* ... is as great a positive pain as can almost be conceived'.[42] Happily, such solitude was not possible. 'Men are never in a state of *total* independence of each other. It is not the condition of our nature: nor is it conceivable how any man can pursue a considerable course of action without its having some effect upon others.'[43] Throughout his works, Burke underscored this sociability.[44] 'Like all great public collections of men', he told parliament, 'you possess a marked love of virtue, and an abhorrence of vice'.[45] Neither believing 'all the world to be equally wicked and corrupt' nor 'expecting to find perfection in men, and not looking for divine attribute in created beings, in my commerce with my contemporaries I have found much human virtue... not a little public spirit; a real subordination of interest to duty; and a decent and regulated sensibility to honest fame and reputation'.[46] If Burke's belief in human benevolence was confirmed by his faith, he did not defend it on that basis.[47]

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[37] In sociology, these are also called 'institutions'. In jurisprudence, however, particularly in the Roman traditions, 'institutional' writings refer to those related structurally or thematically to the Emperor Justinian's *Institutes*. I have used 'practices' in contrast to the formal institutions of state and law.

[38] It created a 'pan-European legal culture, a *Respublica Jurisconsultorum*'. John W. Cairns, 'The formation of the Scottish legal mind in the eighteenth century: themes of humanism and enlightenment in the admission of advocates' in Neil Maccormick and Peter Birks (eds.), *The legal mind: essays for Tony Honoré* (Oxford: Clarendon Press, 1986), 260.

[39] Burleigh Taylor Wilkins has noted the 'warmed-over scholasticism' of the Trinity curriculum, including Franco Burgersdicii, *Institutionum logicarum libri duo*, Eustachius, *Ethica, sive summa moralis disciplinae*, Martin Smiglecki's *Logica*, and Robert Sanderson, *De juramenti promissori obligatione* and *De obligatione conscientiatre. The problem of Burke's political philosophy* (Oxford: Clarendon Press, 1967), 33.

[40] See David M. Walker, *A legal history of Scotland: vol. 5, the eighteenth century* (Edinburgh: T & T Clark, 1998) and *The Scottish jurists* (Edinburgh: W. Green & Son, 1985). Cf. gen. Berman, 'The origins of historical jurisprudence'.

[41] WS ii.320.

But because the empirical conception of sympathy required real interaction or 'communication', benevolence was necessarily limited. This commonplace belief, Kant later called it an 'asocial sociability', explained, beyond any possible 'natural' instincts, the attachment to family and nation, in both positive (familialism and patriotism) and negative (factionalism or tribalism) terms. Physical, and cultural, contiguity was critical and moral universalism, without attention to this, impractical.[48] The importance already afforded habituation in humanism and the ancients could be deepened significantly by eighteenth-century empiricism.[49] Given this importance, families and local communities were the primary sites of a necessarily sentimental education.[50] For '[a]ll creatures love their offspring; next to that they love their homes: they have a fondness for the place where they have been bred, for the habitations they have dwelt in, ... the natal soil has a sweetness in it beyond the harmony of verse.'[51] This bond was a necessary foundation for benevolence and for broader, 'enlightened' fealties.[52] 'To be attached to the subdivision, to love the little platoon we belong to in society', he wrote, 'is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love of our country and to mankind.'[53] These institutions, the 'inns and resting-places' for our affections could not simply be legislated, they were 'formed by habit, and not by a sudden jerk of authority'.[54] Socialisation was thus as important as it was unchosen, and an essential element in the formation of individual personality. In France, he saw '[b]enevolence to the whole species, and want of feeling for every individual with whom the professors come in contact'.[55] Where 'communication' could be effected, less by precept than practice, the results were significant. Perhaps because of his empiricism, this was less a simple sharing as in conversation, though it was that too. It was a blending, as an alloy of metal 'communicated' its original elements.[56] As a principle of his historical and political analysis, Burke saw such communication as critical to liberal education, the progress of society in Europe, and the relationship between Ireland and Britain.

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[42] PE 40. The review of Adam Ferguson's *Essay on the history of civil society* (1767), noted that '[m]any of the authors who have written on man ... have set out by considering him as an animal, solitary by nature; and others, not satisfied with this blindness to what we read and see of his condition, in almost all ages and countries, have no less preposterously made him a mischievous one (1767 R 308 *bis*)'. Given the date, the review may not be Burke's, but I believe the sentiment is. Cf. *An essay on the history of civil society* (Cambridge: Cambridge Univ. Press, 1995), 93.

[43] L 135. Cf. Ferguson, 55.

[44] See WWM Bk P 10/65 (on 'virtue'), 25/57 (on 'communion'), and 27/104.

[45] WS ii.453. 'A conscientious person would rather doubt his own judgment, than condemn his species. He would say, I have observed without attention, or judged upon erroneous maxims; I trusted to profession, when I ought to have attended to conduct. Such a man will grow wise, not malignant, by his acquaintance with the world. But he that accuses all mankind of corruption ought to remember that he is sure to convict only one (WS iii.326).'

[46] WS ii.278, WS iii.326. But cf. 'There is no safety for honest men, but by believing all possible evil of evil men, and by acting with promptitude, decision, and steadiness on that belief (WS viii.299).'

[47] Where sympathy might, for example, have been sufficient in Hume to dispense with God, for Burke the sentiments and the 'general informed sense of mankind (WS ix.453)' corroborated religious belief. The 'more accurately we search into the human mind, the stronger traces we everywhere find of his wisdom who made it (PE 48)'. As with Bishop Joseph Butler's *Analogy of religion* (1736), Burke saw his own empiricism as confirmation of a purposive universe. The 'argument from analogy is ... undoubtedly of weight on the side of religion'. Joseph Butler, *The analogy of religion, natural and revealed to the constitution and course of nature* (London: Scott, Webster, and Geary, 1838 [1736]), 10. Nevertheless, Burke is never reliant on God for causal explanations.

[48] See WS vii.153 (on India). Even Rousseau warned: 'Distrust those cosmopolitans who go to great length in their books to discover duties they do not deign to fulfil around them. A philosopher loves the Tartars so as to be spared

The same was true of nations. In the impeachment of Hastings, Burke declared that the Parliament 'must not think to force Hindus into the narrow circle of our ideas; we must extend ours to take in their system of opinions and rites'.[57] He elaborated on this late in his career in respect to the 'Commonwealth' of Europe.

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having to love his neighbours (From *Emile* reviewed in 1762 R 227 *bis*)'. Cf. WS iii.501.

[49] See J-F. Suter, 'Burke, Hegel, and the French Revolution' in Z.A. Pelczynski (ed.), *Hegel's political philosophy: problems and perspectives, a collection of new essays* (London: Cambridge Univ. Press, 1971), 58.

[50] 'To corrupt family relations is to poison fountains; for the sources of the commonwealth are within the Housholds; and errours there are irretrievable (C iii.457)'. See PE 24, PE 151.

[51] WS vii.416.

[52] A 'Nation is a moral essence, not a geographical arrangement, or a denomination of the nomenclator (L 139).'

[53] RRF 135. Cf. 'No cold relation is a zealous citizen (RRF 315)'. See WS i.372, 377.

[54] RRF 315. 'The love to the whole is not extinguished by this subordinate partiality (RRF 315).'

[55] WS viii.314. No doubt with Rousseau in mind, he wrote that the 'bear loves, licks, and forms her young: but bears are not philosophers .... Thousands admire the sentimental writer; the affectionate father is hardly known in his parish (WS viii.315).'

[56] See N 94-5. Cf. A.

> Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals. Nothing is so strong a tie of amity between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. They are obligations written in the heart. They approximate men to men without their knowledge, and sometimes against their intentions. The secret, unseen, but irrefragable bond of habitual intercourse holds them together, even when their perverse and litigious nature sets them to equivocate, scuffle, and fight about the terms of their written obligations.[58]

Cultures then, like those of Britain and India, might find it 'very difficult for our sympathies to fix upon' them.[59] This was, indeed, one danger among many in any colonial system. But worse still was the hatred amongst peoples whose proximity should otherwise bind them.[60] This was true both of the relationship between Britain and Ireland and, more dangerously, within Irish sectarianism. The loss of 'all feeling for those who have grown up by our sides', he wrote, 'is such a disarrangement of the whole system of our duties, that I do not know whether benevolence so displaced is not almost the same thing as destroyed, or what effect bigotry could have produced that is more fatal to society'.[61] The perversion of these was not merely the loss of solidarity, but rank tribalism.

Following Hobbes, Mandeville and others suggested that the 'private vice' of self-interest led to 'public benefits'. As with Hume and Smith, Burke sought to acknowledge self-interest while denying its priority. In this way, he problematised the harmony of the individual and public interests earlier benevolists seemed to suggest. Unlike the ephemeral nature of private and public virtue, self-interest, with all its potential faults, could be seen at least as reliable in any practical system of morality or state.[62] This is a point of great importance in the history of ideas, making appeals to 'interest', in politics and commerce, increasingly acceptable. But, generally speaking, such appeals remained within the limits of the public good. Smith's *Wealth of nations* (1776) is a good example, designed as it was to be read within his *Theory of moral sentiments*. But 'Selfish passions in reality have mere common reason very much with 'em,—it favours them .... if Reason is exerted by ... Benevolence, it is generally on the restraining side, which is its

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[57] WS vi.276.
[58] L 132.
[59] WS v.404.
[60] The 'Roman Empire ... was an Empire of continuity (WS vi.105).'
[61] WS ix.461.
[62] See gen. Albert O. Hirschman, *The passions and the interests: political arguments for capitalism before its triumph* (Princeton: Princeton Univ. Press, 1977).

weak side; Especially as it is to resist that Generous Enthusiasm which ever accompanies strong Benevolence'.[63] The virtue of benevolence—'beneficence' was largely interchangeable–was contrasted to being 'exactly just' or precise, and the 'Good Man' was 'directed in all his actions rather by the impulse of his own excellent spirit than by any exact Rules of Casuistry.'[64] Benevolence was essential, but often impractical and counterproductive. Indeed,

> No vicious disposition in the mind stands in need of the sway of reason, and a continual guard, more than this Godlike one of Benevolence. The good man is apt to spend more than he can spare, to borrow more than he can pay, and to Promise more than he can perform; by Which he often appears neither beneficent, just, nor generous.[65]

The precision of reason, like that of the laws, was checked by benevolence. In his 'Tracts on the popery laws', Burke would again cite Cicero's admonition that: 'This then, ought to be the chief end of all men, to make the interest of each individual and of the whole body politic identical. For, if the individual appropriates to selfish ends what should be devoted to the common good, all human fellowship will be destroyed.'[66] Within the bounds of a social theory that did not see the future development of the market, this is a significant note, emblematic of the ethics of honour that remained dominant throughout the eighteenth century.

In addition to sympathy, Burke leavened his theory with instinctual, pre-conscious responses.[67] This distinguished his ideas from the more 'vulgar' empiricism that could imply a *complete* alteration of an original *tabula rasa* by impulses of pleasure and pain.[68] If this provided the basis for a wider sense of 'natural' equality, at least at birth, it also made more difficult the existence of any standards, artistic or moral. In addition, if habituation was all-important, then any natural equality was quickly and radically eliminated.[69] But if

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[63] N 118.

[64] N 114, 113, 114.

[65] N 116. Cf. 'Strict bare justice is not the most pleasing Virtue ... he that does it has no thanks, and he that receives it thinks he receives no favour (N 102)'.

[66] Cicero, *De officiis*, iii.26 (quoted in WS ix.456).

[67] See PE 24 and WS ix.171. 'Who ever said, we *ought* to love a fine woman ... to be affected, there is no need for of the concurrence of our will (PE 100).'

[68] Burke instead used 'pleasure' and 'pain' analogously to psychological states, including 'our fears and our hopes (PE 17)'.

[69] Hutcheson had already shown that 'sense' was a term pregnant with meaning, and could be extended to 'internal' (but non-intellectual) as well as 'external' properties. Cf. Hutcheson in Peter Kivy, (ed.), *Francis Hutcheson: An inquiry concerning beauty, order, harmony, design* (The Hague: Martinus Nijhoff, 1973 [1725]), 36. As should be clear, however, Burke thought this moral sensibility was nowhere as straightforward as Hutcheson appears to have.

> it must be allowed that many things affect us … not by natural powers, but by association; so it would be absurd … to say that all things affect us by association only; since some things must have been originally and naturally agreeable or disagreeable, from which others derive their associated powers; and it would be … to little purpose to look for the cause of our passions in association, until we fail of it in the natural properties of things.[70]

These inclinations provided Burke with 'eudemonic' ends beyond the simple responses of pleasure and pain, by which acts, individual and social, may thus be judged. He had no place for the sort of hedonic calculi later associated with Bentham and utilitarianism.[71] But, if these inclinations were not insignificant, they were deeply influenced, perhaps distorted, by culture and by experience. The result is a Burkean concept of *both* individual 'alienation' and cultural adaptation. 'Man is a gregarious animal. He will by degrees provide some convenience suitable to ... his natural disposition; and thus this strange thing may, some time or other, assume a more habitable form. The fish will at length make a shell which will fit him.'[72] Again, this 'association' of ideas was not unlike the use of analogy in common law induction. But only the most vulgar view of this process failed to acknowledge the role of habit and principles, express or implied.[73]

Generally speaking, empiricism suggested the basis of both a psychological and historical theory, by which the individual or society could learn and progress over time. Burke saw something of this ability to change, for man was 'in a great degree a creature of his own making'.[74] The intuitions he defended provided a language of critique by which human actions or practices could be judged, though with difficulty.[75] Among the most important links in the 'great chain of society' was human ambition, which made 'improvement', both individual and social, possible.[76] Without such a principle there was a stasis, an 'eternal circle' where '[m]en must remain as brutes do, the same at the end that they are at this day, and that they were at the

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[70] PE 118-9.

[71] Cf. Nicholas Phillipson, *The Scottish Whigs and the reform of the Court of Session 1785-1830* (Edinburgh: The Stair Society, 1990 [Reprint of 1967 PhD]).

[72] C vi.80.

[73] 'Analogy and precedent are the stuff of the law.... the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively.... [and] fills in the gaps left by more general theory, gaps which must be filled because choices must be made and actions taken.' Charles Fried, 'The artificial reason of the law or: what lawyers know', (1981) 60 *Tex L Rev* 35, 57. See N 35, WS viii.81?

[74] RRF 189.

[75] Thus Burke has, in a sense, a theory of 'alienation' or 'corruption' from 'natural' predispositions.

[76] PE 46.

beginning of the world.'[77] This ambition was seen within a civic economy of public glory, not market success, which saw competition between nations and ideas as important. The great flexibility left to culture meant that man could develop practices and institutions that failed to achieve, or disrupted, human happiness. If our first or 'physical' nature, our 'gross animal existence', provides limits, the 'operation of this second nature on the first produced a new combination'.[78] While Burke suggests that the 'power of distinguishing between the natural and the acquired ... remains', the effect of this second nature was considerable.[79] Built up by habituation and experience, it was not easily shed. This is ultimately the source of Burke's critique of the revolution in France. Particularly as human progress was rarely consciously and purposively made, it was precarious.[80] Native inclinations were largely negative boundaries rather than positive guides and consequently weak, though real, barricades against the indoctrination of revolutionary culture, their '*ethics of vanity* ... attempted a regeneration of the moral constitution of man'.[81] The 'whole drift' of the various French institutions was 'contrary to that of the wise Legislators of all countries, who aimed at improving instincts into morals, and at grafting the virtues on the stock of the natural affections'.[82] Culture was powerful, but beyond legislation. Human progress was real, but hard won and easily lost.

A CREATURE OF PREJUDICE, ... OPINIONS, ... HABITS, AND OF SENTIMENTS:

The appeal to prejudice was less novel then it now appears, having both positive and negative meanings. While the Enlightenment is rightly criticised for failing to recognise their place, in comparison to deductive reason, even Voltaire recognised that there were 'universal and necessary prejudices, which constitute virtue itself'.[83] In Burke, however, his use of prejudice is

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[77] PE 46. Cf. WS i.431.

[78] RRF 299.

[79] RRF 194. 'It is no easy operation to eradicate humanity form the human breast (WS ix.176).' See PE 14.

[80] Interestingly, Rousseau argued that we ought not to 'attribute to the stage a power of changing opinions or manners, when it has only that of following or heightening them'. Rousseau, *A letter from M. Rousseau of Geneva, to M. d'Alembert, of Paris, concerning the effects of theatrical entertainments on the manners of mankind* in 1759 R 479-84.

[81] WS viii.315

[82] L 127. 'I have from good authority, that under the scaffold of judicial murder, and the gaping planks that poured down blood on the spectators, the space was hired out for a shew of dancing dogs (L131).'

[83] Voltaire, *Philosophical dictionary* (London: Penguin Books, 1972 [1764]), 343. '[T]here is one prejudice of the Enlightenment that defines its essence ... the prejudice against prejudice itself, which denies tradition its power.' Gadamer, 270.

typically that of our second or 'moral' nature, that of culture. His use is most often merely descriptive. In this sense, such prejudices were simply a necessary element of human nature and culture, of our experience and habituation.[84] As a 'creature of habit', the transmission of social practices is as much affective as reflective.[85] They take root in 'deep-seated feelings of love and loyalty, beginning with the family and the neighbourhood, and spreading out to the country and the nation'.[86] By contiguity, there was a natural subsidiarity of sentiment and prejudice. These were an unavoidable element of human life, the source of tradition and custom, and of any possible improvement in human affairs.[87] The institutions of family and local community, as well as colleges and courts, mediate the corporate wisdom of a people. Man is 'in his progress through life, a creature of prejudice, a creature of opinions, a creature of habits, and of sentiments growing out of them. These form our second nature, as inhabitants of the country and members of the society in which Providence has placed us'.[88] Prejudices, built up on the whole battery of affective influences, play a key role in the 'moral constitution of the heart'.[89] This moral constitution was, unlike the civil constitution, not easily changed and in changing offered little control to the outcome of any changes made. Both manners and the civil constitution were absolutely dependent on it. In this, habit and experience, rather than the reason of the 'legislator', was most important.

Critical to his understanding of the 'Rights of Man', it was by sympathy and imitation 'far more than by precept ... we learn every thing; and what we learn thus we acquire not only more effectively, but more pleasantly. This forms our manners, our opinions, our lives. It is one of the strongest links of society '.[90] It was the result of limited actions and unintended consequences, both positive and negative. 'Imitation', another principle of human nature, was a stabilising force on ambition and a property of individuals and nations alike.[91] Indeed, a tradition served as a sort of *social* 'association of ideas' that permitted the growth and maturation of the society in much the same manner as happened in the individual.[92] Although Burke might later regret the bluntness of the statement, he had written in *Enquiry* that '[c]ustom reconciles us to everything'.[93] In mediating this, the 'imagination' was essential, a 'sort of creative power ... either in representing at pleasure the images of things in the order and manner in which they are received by the senses, or in combining those images in a new manner, and according to a different order'.[94] This dynamic creative ability, based on foundations of individual nature and social practices or prejudices suggests the extraordinary sensitive nature of human interaction. The most private of actions was also necessarily public.

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[84] Cf. The 'most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side'. Alexander Hamilton, John Jay, and James Madison, *The federalist: a collection of essays written in favor of the new constitution as agreed upon by the federal convention September 17, 1787* (Dubuque: Kendall/Hunt Pub. Co., 1990 [1787-8), George W. Carey and James McClellan (eds.), Nr. 49 (Madison).

[85] WS iii.321.

[86] RRF 135. In *the Reformer*, Burke quoted Cicero's 'blameless piece (C i.74)' *De officiis* to the effect that '[o]f all social ties none is stronger, none dearer, than that between each of us and our country (WS i.83)'.

[87] See PE 94. Cf. Henry Home (Lord Kames), *The art of thinking* (London: Routledge/Thoemmes Press, 1993 [1761]), 9.

[88] WS vii.540. 'Providence' in Burke is not, as is sometimes suggested, the active hand of God in human affairs. It is typically used simply to indicate God's continuing presence and plan, in a manner similar to the use of 'fate'. See, e.g., WS i.346-7, 399, and esp. 388. On religion, see also WS i.350-9, 394. Cf. A i.160 and A ii.95. Burke's faith in providence paled beside that of the revolutionaries in progress. See WS i.388.

[89] RRF 176. 'If any thing is ... out of the power of man, it is to *create* a prejudice (WS ix.662).'

[90] PE 45. See PE 46 (on Aristotle). '[M]anners and morals were of a Kin to each other (T 23)'.

Because of the limits of individual and speculative reason, the prejudices of collective experience were a vital tool of enlightenment.[95] This was primarily descriptive.[96] In this sense, prejudice was

> of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue, and does not leave the man hesitating in the moment of decision, sceptical, puzzled, and unresolved. Prejudices renders man's virtue his habit; and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.[97]

Burke could also use prejudice in a more prescriptive manner, and distinguished between 'just' and 'blind, unmeaning' prejudices.[98] Prejudice properly understood was thus a positive,

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[91] 'Man is an imitative animal (WS i.555).'

[92] Underscoring the empiricist-associative basis of the benevolists and the linkage of aesthetic and moral 'senses', James Engell includes as associationists: Hutcheson, Turnball, Burke, Burke's publisher Dodsley, Kames, Beattie, as well as the 'Common Sense' School. See Engell, *The creative imagination: enlightenment to romanticism* (Cambridge, MA: Harvard Univ. Press, 1981), 145.

[93] PE 135.

[94] PE 16.

[95] See Jaroslav Pelikan, *The vindication of tradition* (New Haven: Yale Univ. Press, 1984); Edwards Shils, *Tradition* (London: Faber and Faber, 1981). Cf. Harold J. Berman, 'The Western legal tradition in a millennial perspective: past and future', (2000) 60 *La L Rev* 739.

[96] He was not, however, a nominalist. Cf. John E. Faulkner, 'Edmund Burke's early conception of poetry and rhetoric', (1970-1) 12 *Studies in Burke and His Time* 1747 and Burleigh T. Wilkins, 'Burke on words', (1969) 11 *Studies in Burke and His Time* 1305.

[97] RRF 183.

[98] 'Speech on the representation of the Commons in Parliament (1782)' in Peter J. Stanlis, *Edmund Burke: selected writings and speeches* (Washington, D.C.: Regnery Publishing, Inc., 1963), 398

formative principle of human association.[99] Critically, it is not that Burke applies the legal doctrine of prescription to social life, but finds the legal doctrine, *and indeed all authority and government*, rooted in a native presumption.

These prejudices were self-justifying, but this fact did not deny the possibility of reflection on them.[100] The reason behind custom was not unimportant (or necessarily nonexistent), but infrequently obvious. Arising from common experience, 'just' prejudices were not 'destitute of reason, but involving in it profound and extensive wisdom'.[101] While Burke occasionally suggests that this reason was inaccessible, in general, it is a question of complexity. As the great majority of individuals were not scientists, philosophers, theologians, such reflection was not necessarily constructive in the manner in which many of the Enlightenment suggested. While sociability was universal (in sum), knowledge and wisdom were not. Given the complexity of human life, a practice open to criticism on the basis of 'pure' reason might still fulfil human needs more effectively than anything specifically contrived to meet them. And as part of a larger social whole, the effect of change could be unclear. Burke did not reduce rationality to convention or restrict society to the status quo. In his politics, he found much to criticise and reform, but his belief in the complexity of social practices and their growth through the 'stable prejudice of time' made Burke critical of those who would recreate, from nothing but speculative reason, entirely novel social and political orders.[102] As a younger man, he had written 'I am almost tempted to think we ought to learn not so much to cure Doubts, of which we have too few, as to learn how to doubt'.[103] In the face of increasing speculation on human nature and society, and his own involvement in the late eighteenth-century *real politick*, Burke clearly thought that many had learned only to doubt. It was 'one of the many instances of the Vanity of this Age, that man should suppose he could improve all nature'.[104] The practicing politician, the 'philosopher in action', had little time for such speculation, particularly if he wanted to effect

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[99] In the 'Appeal from the new to the old Whigs', Burke noted that the 'moral sentiments, so nearly connected with early prejudice as to be almost one and the same thing, will assuredly not live long under a disciple which has for its basis the destruction of all prejudices'. Cited by Wilkins, *The problem of Burke's political philosophy,* 110n2, I have been unable to locate the quotation.

[100] Cf. Swift, 'A treatise on good-manners and good-breeding' in (1762) R 166-9. Used in a narrow sense, he wrote that '[a]s the best law is founded upon reason, so are the best manners'.

[101] RRF 183.

[102] WS ix. 467. See Basil Willey, *The English moralists* (London: Chatto & Windus, 1964), 288.

[103] N 88. 'To have the mind a long time lost in Doubts and uncertainties may have the same Effect on our understandings that fermentation has on liquors. It disturbs them for a while, but it makes them both the Sounder and clearer after that (N 89).' Cf. W iv.461-2.

[104] T 42.

reform.[105]

It was in this way that the Enlightenment, sometimes evangelical, attempt to escape such prejudices and past narratives risked severing the historical link on which civilisation depended.[106] If 'frequently Preposterous on a first view', customs were the 'standing Wisdom of a Country'.[107] The publication of Burke's *Vindication*, parodying the argument for 'natural' liberty, the year before the *Enquiry* was not coincidental. Sociability was natural to the individual, but necessarily found expression socially.[108] Benevolence could be distorted, or supported, in varying degrees by different practices and institutions. To dissolve man's social ties was to threaten all the opportunities found in social life, the 'partnership ... in all perfection'.[109] Especially after their gradual creation over ages, their destruction might *produce* Hobbesian individuals. 'When antient opinions and rules of life are taken away; the loss cannot possibly be estimated. From that moment we have no compass to govern us; nor can we know distinctly to what port we steer.'[110] Isolated from the human society natural to man, individuals could easily become, like the famous contemporary accounts of 'wild children', bestial. Art, like clothing itself, was natural and, in its development, a sign of civilisation.[111] 'Art is man's nature. We are as much ... in a state of Nature in formed Manhood as in immature and helpless infancy'.[112] The primitive was, in fact, a retarded, and less fulfilling version of these natural and social dispositions. 'Nature is never more truly herself, than in her grandest forms'.[113] Similarly, distinctions between men, both native and acquired, will arise by necessity.[114] This would be of

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[105] 'It is the business of the speculative philosopher to mark the proper ends of government. It is the business of the politician who is the philosopher in action, to find out proper means towards those ends, and to employ them with effect (WS ii.317-8).'

[106] See RRF 192-3.

[107] T 62. See T49. Cf. Hale in Holdsworth, v.504.

[108] 'Neither Burke nor Marx substantially altered Aristotle's idea that social life is the medium in which man in relationship with his fellow-men fulfills his nature.' Ruth A. Bevan, *Marx and Burke: a revisionist view* (La Salle, IL: Open Court Pub., 1973), 177-8.

[109] RRF 194.

[110] RRF 272-3.

[111] The same naked/clothed distinction could be made between the insane and the sane. See Christopher Reid, Burke, the Regency Crisis, and the 'Antagonist world of madness'' 59 *Eighteenth-Century Life* 59. See also Rousseau's 'On the use of fables for instructing children' (from *Emile*) in (1762) R 169-74.

[112] W iv.466. Cf. Ferguson: 'We speak of art distinguished from nature; but art itself is natural to man. He is in some measure the artificer of his own frame, as well as his fortune, and is destined, from the first age of his being, to invent and contrive (quoted in 1767 R 311 *bis*)'.

[113] L 217. Not 'genuine sentiment and sound policy (L 217)'.

[114] The proverbial maxim, 'When Adam delved and Eve span,/Who was then the gentleman?' is 'fully equal to all the modern dissertations on the equality of mankind; and it has one advantage over them, —that it is in rhyme (W iv.468)'.

great consequence to Burke's defence of social orders on the basis of their utility. His belief that associations, acting 'in corps', and societies were greater than the sum of their parts was essential to his defence of party as well as the more conspiratorial suggestions in his works. Finally, the development of the civil society was a matter of human action and invention, but not necessarily conscious or purposeful choice.

The greatest danger of any enthusiasm, rational or sentimental, was the disregard paid to the actual consequences of such theories. 'There are people', he wrote,

> who have split and anatomized the doctrine of free government, as if it were an abstract question concerning metaphysical liberty and necessity, and not a matter of moral prudence and natural feeling. They have disputed whether liberty be a positive or a negative idea; whether it does not consist in being governed by laws, without considering what are the laws, or who are the makers; whether man has any rights by Nature; and whether all the property he enjoys be not the alms of his government, and his life itself their favour and indulgence.[115]

This was not merely foolish, but also irresponsible, and the cause of positive harm. When pressed as an ideology, as it had been in debates on the American war, it could impede civil, reasoned debate and constructive compromise.[116] There were graver dangers. Because, as he saw it, those who employed this language thought little of the distinctions and compromises of human governance, 'speculations are let loose as destructive to all authority as the former are to all freedom; and every government is called a tyranny and usurpation which is not formed on their fancies'.[117] This was matched by a tendency to blur the individual in the sweep of history. While '[a] conscientious man would be cautious how he dealt in blood', Burke felt the revolutionaries were 'not fatigued with the contemplation of human suffering through the wild waste of centuries added to centuries of misery and desolation. Their humanity is at their horizon—and, like the horizon, it always flies before them'.[118]

For Burke, conventions are not opposed to nature, but are the necessary means by which

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[115] WS iii.317. 'No moral questions are ever abstract questions ... things are right or wrong, morally speaking, only by their relation and connection to other things.... It is the direct office of wisdom to look to the consequences of the acts we do (W vi.109-10)'. See RRF 142.

[116] 'I must see with my own eyes; I must in a manner touch with my own hands, not only the fixed, but momentary circumstances, before I could venture to suggest any political project whatsoever (WS viii.295)'. Cf. RRF 90, SDP 387, WS v.404.

[117] WS iii.318.

[118] WS iii.302, ix.176-7. Cf. WS iii.300-1.

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it is expressed.[119] For the 'mass of mankind', 'Habits and customs are their support, because it would be impossible that civil society could subsist long if we were all philosophers'.[120] There was 'yet a Variation in Customes, in the Characters and Manners of the Age, of which every Age has its own'.[121] Like language, such practices are inherently inherited, communal, and evolutive. They might be embraced or (at some point) rejected, but were not chosen. As all truth came through language, though not directly, so too it could come from metaphor and analogy, from narrative and ritual. It was an element of Burke's faith in common sentiment that folk-beliefs or 'superstitious' religion could house wisdom within details that were, strictly speaking, untrue.[122] Language and culture were thus both constitutive and expressive and enveloped the formal political, legal, and religious institutions of a community or society.[123] The power of analogy was thus obvious to Burke before he began his legal studies. Indeed, analogy requires common meanings themselves embedded in language communities. The gradual, 'natural' emergence of artificial practices and institutions, and the 'natural' emergence of prescription, based on habit and experience were the sources of European civilisation. As in the individual, reason was important in this, though more as a check on custom, than any ability to create a culture *ex nihilo*.

Perhaps in response to Hume's 'On the standard of taste', Burke added his own 'Essay of Taste' to the *Enquiry*'s second edition. The importance of such a standard was more than aesthetic, implicating as it did the question of moral standards. Burke argued that differences in taste were 'rather apparent than real, [and] it is probable that the standard both of reason and Taste is the same in all human creatures'.[124] But these 'standards', like 'principles', might be universal without being entirely uniform (or congruous).[125] Instead, the 'conformation of their

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[119] Cf. Hume, *A treatise on human nature* (Oxford: Clarendon Press, 1967 [1739-40]), 484.
[120] T 56. See T 57-8.
[121] N 95. 97
[122] It is a commonplace of modern philosophy, and even the philosophy of science, to observe the guiding, indeed enlightening, nature of such directed attentions. See esp. Thomas Kuhn, *The structure of scientific revolutions* ((2nd edn) Chicago: Univ. of Chicago Press, 1970 [1962]). 'In a science ... a paradigm is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions'. Id., 23.
[123] On these points, see esp. James Boyd White, *When words lose their meaning: constitutions and reconstitutions of language, character, and community* (Chicago: Univ. of Chicago Press, 1984). 'The center of Burke's achievement is to see that culture and self exist in a reciprocal relation, subject to perpetual reconstitution ...'. Id., 229. Cf. *The Book of common prayer*, 'A catechism' question, 'How many Sacraments hath Christ ordaind in his Church?.
[124] PE 11. On Burke and 'taste', see Joel C. Weinsheimer, *Eighteenth-century hermeneutics: philosophy of interpretation in England from Locke to Burke* (New Haven: Yale Univ. Press, 1989).
[125] 'We find people in their disputes continually appealing to certain tests and standards which are allowed on all

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organs are nearly, or altogether the same in all men, so the manner of perceiving external objects is in all men the same, *or with little difference*'.[126] He recognises both that customs and habits may adapt one to 'alien pleasures, but if a

> man be found who declares, that to him tobacco has a Taste like sugar, and that he cannot distinguish between milk and vinegar; or that tobacco and vinegar are sweet, milk bitter, and sugar sour, we immediately conclude that the organs of this man are out of order, and that his palate is utterly vitiated. ... We do not call a man like this wrong in his notions, but absolutely mad.[127]

While there is no explicitly common measure and native sensibilities, experience, and training are important in generating diversity, there was yet a meaningful consensus on standards.[128] There were general consistencies, but precisely because these are reliant on physical impulses of the senses, they could quickly vary in practice. The 'degree in which these principles prevail in the several individuals of mankind, is altogether as different as the principles themselves are similar'.[129] 'Madness' remains natural, but anomalous.[130] While differences in taste and culture were increasingly pronounced, Burke's views remained linked to a long humanist tradition that had emphasised a similarity of all men beneath the differences in culture.[131] This also provides the basis on which individual and cultural experience, like human knowledge, may be seen as cumulative and progressive.[132] 'Taste (whatever it is)', Burke writes, 'is improved exactly as we

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sides, and are supposed to be established in our common nature (PE 11)'. Cf. 'A standard properly signifies, that which is of such undoubted authority as to be the test of other things of the same kind.' Hugh Blair, 'On Taste' extracted in 1783 R 139 *bis*.

[126] PE 13. The point of the *Enquiry* was 'to find whether there are any principles, in which the imagination is affected, so common to all, so grounded and certain, as to supply the means of reasoning satisfactorily about them.... (PE 13)'.

[127] PE 14.

[128] As he wrote forty years later, 'Individuals are physical beings, subject to laws universal and invariable. The immediate cause acting in these laws may be obscure; the general results are subjects of certain calculation (L 63).'

[129] PE 22-3. See gen. PE 20-3.

[130] This is related again to his discussion of taste, for the 'cause of a wrong Taste is a defect of judgment…. aris[ing] from a natural weakness of understanding … or … from a want of proper and well-directed exercise …. Besides that ignorance, inattention, prejudice, rashness, levity, obstinacy, in short, all those passions, and all those vices which pervert the judgment in other matters, prejudice it no less in this its more refined and elegant province. These causes produce different opinions upon every thing which is the object of the understanding, without inducing us to suppose, that there are no settled principles of reason. And indeed on the whole one may observe, that there is rather less difference upon matters of Taste among mankind, than upon most of those which depend upon the naked reason; and that men are far better agreed on the excellence of a description in Virgil, than on the truth or falsehood of a theory of Aristotle (PE 23)'.

[131] See Paul Fussell, *The rhetorical world of Augustan humanism: Ethics and imagery from Swift to Burke* (Oxford: Clarendon Press, 1965).

[132] Of customs, '[o]ur fathers, ruder indeed than we ... practiced them; we should follow them. But they ought not to

improve our judgment, by extending our knowledge, by a steady and attention to our object, and by frequent exercise'.[133] This occurs by 'cultivation', not 'mere naked reason'.[134] The result is a psychology that underscores a deep interdependence of men through sentiment *and* a dynamic ability on the part of human cultures to change. Burke's endorsement of human communication broadly understood, and commerce narrowly understood, served to provide a wealth of experience from which men could draw.[135]

THE COMMON SENSE AND COMMON FEELING OF MANKIND:

Although Burke nowhere makes the precise relationship between reason and sentiment clear, like Aristotle and the benevolists, he seems to suggest that, without sentiment, reason could not motivate to action.[136] 'Man acts', he later said, 'from adequate motives relative to his interest, and not on metaphysical speculations. Aristotle, the great master of reasoning, cautions us, and with great weight and propriety, against this species of delusive geometrical accuracy in moral arguments, as the most fallacious of all sophistry'.[137] Of 'human nature', he said 'reason is but a part, and by no means the greatest part'.[138] For the individual, the 'passions fire zeal and vehemence. The understanding bestows design and system. The whole man moves under the discipline of his opinions'.[139] The 'wise man' learns to balance his reason and the passions, and he does so in light of the 'general Sense of the publick'.[140] Indeed,

> Those things which appear to depend wholly on reason and prudence have always some inferior supports in our

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affect us beyond their just value (N 90-1)'.

[133] PE 25. However, because habit is so much an element in this process, progress was deeply precarious. Even in his discussion of taste, the elements he later underscored in his counter-revolutionary analyses may be seen. 'The rude hearer is affected by the principles which operate in these arts even in their rudest condition..... But as the arts advance towards their perfection, the science of criticism advances with equal power ... (PE 25)'.

[134] PE 25, 26. Cf.

[135] These standards were, as in Hume, probabilistic rather than fixed and timeless. Cf. Hutcheson, *Beauty*, 37.

[136] Reason is limited, its 'influence ... in producing our passions is nothing near so extensive as is commonly believed (PE 41)'.

[137] WS iii.157.

[138] WS ii.66.

[139] L 170. This is mirrored at the social level, for even 'vehement passion does not always indicate an infirm judgment. It often accompanies, and actuates, and is even auxiliary to a powerful understanding; and when they both conspire and act harmoniously, their force is great to destroy disorder within, and repel injury from abroad (L 218).'

[140] N 89. 'It is but reasonable that our general conduct should be a good deal modelled by the general Sense of the publick.... I would willingly give something to reason as well as Custom; I would be its humble Servant but not its Slave (N 89)'

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> passions; even reason and prudence themselves depend, if not for their substance, yet certainly for their colour and bent on our native constitution and complexions. A certain adjustment of passions, and a certain mode of understanding, are as requisite to form a wise man as a certain degree of reason and good sense.[141]

Sentiments were the '*cords of man*'. [142] There were, of course, more destructive sentiments as well, a point sometimes obscured in benevolist suggestions of the harmony of individual and social interests. Reason policed more than guided the less rational elements of human nature. 'Our physical well-being, our moral worth, our social happiness, our political tranquillity, all depend on that controul of all our appetites and passions, which the ancients designated by the cardinal virtue of Temperance.[143] This stoic prudence was the core of Burke's personal and political beliefs. 'Society cannot exist unless a controlling power upon will and appetite be placed somewhere.... Men of intemperate minds cannot be free. Their passions forge their fetters.'[144] But the fact that men did not and could not rely on reason alone was not a loss, for it was 'not uncommon to be wrong in theory and right in practice: and we are happy that it is so. Men often act right from their feelings, who afterwards reason but ill on them from principle'.[145]

The affective nature of communication, both narrowly and broadly construed, was of great importance to rhetoric. In the minute-book of the Trinity 'Club' was noted, in an analogy particularly interesting in this 'enlightened' age:

> Language is the eye of Society, without it we could very ill signify our wants for our own relief, and by no means could communicate our knowledge, therefore without it the comforts and delights of life could not be enjoyed, no conveyance of learning, of chastisement, of praise, of solace, scarce virtue be practised, friendship subsist, nor religion ever taught and defended. And as language is the cement of Society so is the perfection thereof perhaps its greatest ornament, and not the least of its Blessings. In it Innocense & truth find a defence and reward, and guilt from it, its discovery, conviction and disgrace.[146]

It was important, in this sense, to the creation of individual character. This habituation, the 'bias the mind takes ... gives direction to our lives; and not any rules or maxims of morals and

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[141] N 108.
[142] WS iii.157. See L 313.
[143] L 273.
[144] WS viii.295
[145] PE 49.
[146] S 227-8 (Mr. Buck).

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behaviour'.[147] 'Dry precepts and reasoning do little'.[148] The exercise of eloquence was both formative and functional, particularly for the new men of the 'natural' aristocracy. Its 'great Benefits ... are not in giving precepts but creating habits' and through the arts and conversation, one is 'modelled insensibly into a disposition to elegance and humanity'.[149] The arts, precisely because they appealed to the passions, were invaluable in creating 'that *versatile ingenium* which is of very great use in Life'.[150] This belief was central to a liberal, classical education, whereby knowledge was the 'Culture of the mind'.[151] The 'Chief use of Learning,' Burke wrote as a young man, 'is to implant an elegant disposition into the mind and manners and root out of them everything sordid, base or illiberal.... the polite arts are rather better calculated for this purpose than any others; and this for the very reason that some condemn them; because they apply to the passions'.[152] This emphasis on habituation is, of course, important again in the common law.[153] When Burke writes, for example, that '[a]rt can never give the rules that make an art' as 'artists have been too occupied in the practice', it is easy to imagine that he understood this to be true of the common lawyer as well.[154] But Burke's experiences at the Middle Temple convinced him that legal education, such that it was, that was restricted to an habituation in law only, might make efficient, but rarely 'liberal' and just, jurists. For that a wider sense of history and principle was as necessary as an awareness of the artistic tradition was to the great artist.

This was at the core of his rhetorical theory. Public oratory and writing must be both intellectual and emotional (as well as a balance of general principles and particular facts). Burke's speaking abilities have been much praised, though not without qualification. The exceptional hyperbole to which he was prone was an essential element of this, however unfortunately it may obscure his thought. He himself noted that a 'very great part of the

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[147] N 88. Education should 'be considered as improvement to the heart as well as mind (T 21)'.

[148] N 96.

[149] N 88.

[150] N 86.

[151] N 83. As the editor of the *Note-book* observes, 'culture' was most used as a verb in reference to 'ploughing for sowing later (N 83n1)', a point of some importance in Raymond Williams, *Culture and society 1870-1950* (New York: Harper Torchbooks, 1958).

[152] N 87-8. 'When a man is conversant in all the variety of Arts and Sciences, in the Stories, opinions, Customs, manners, achievements of all ages and all nations,' he wrote, 'it must by a sure consequence wear away those little prejudices of little parties that Cause such heats and animosities amongst mankind (N 85)'.

[153] Hale had written that 'men are not borne Comon Lawyers, neither can the bare Exerciss of the Faculty of Reason five a man a Sufficient Knowledge of it, but it must be gained by the habituateing and accustomeing and Exerciseing that Faculty by readeing, Study and observation to give a Man a compleate Knowledge thereof'. In Holdsworth, v.507.

[154] PE 49.

mischiefs that vex the world, arises from words. People soon forget the meaning, but the impression and the passion remain'.[155] His writings, constructed on the same principles, nearly all reflect the priority of the spoken word. If the reach of conversation and discourse was limited, it was 'nearer to action' and, as a result, 'goes further towards influencing our Conduct' than does reading.[156] He carried this into his political career. In Parliament, 'though not one vote is gained, a good speech has its effect'.[157] But language had limits. '[W]hen we define,' he wrote in the *Enquiry*, 'we seem in danger of circumscribing nature within the bounds of our own notions, which we often take up by hazard, or embrace on trust, or form out of a limited and partial consideration of the objects nature comprehends, according to her manner of combining'.[158] The power of the 'sublime' was precisely the difficulty involved in containing, and articulating, the elements of the world.[159] 'It is our ignorance of things that causes all our admiration, and chiefly excites our passion.'[160] This was of great importance to rhetoric. 'It is one thing,' he wrote, 'to make an idea clear, and another to make it *affecting* to the imagination'.[161] This was of some importance to both his epistemology and his rhetoric. The difference between the 'clear' and the 'strong' expressions was that the 'former regards the understanding; the latter belongs to the passions'.[162] But if words suffer in exactness, they 'fully compensate for their weaknesses in other respects'.[163]

Public opinion, too, was largely the product of sentiment and sympathy. In this way, 'by the contagion of our passions, we catch a fire already kindled in another'.[164] This relationship was frequently characterised by Burke in dramaturgical terms. The affective, pedagogical superiority of theatre, real or revolutionary, over intellect is a recurring theme in his anti-Jacobin writings. The theatre, he wrote in the *Reflections*, 'is a better school of moral sentiments than

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[155] WS ix.647.

[156] N 90.

[157] Boswell, 902. During the Regency Crisis, Burke wrote a parliamentary colleague that the 'tone of calm reasoning … does not belong to great and affecting interests (C v.440)' and that the 'people, to be animated, must seem to have some motive to *action* (C v.443)'.

[158] PE 12.

[159] See WS ii.433.

[160] PE 57. 'No work of art can be great, but as it deceives (PE 70)'.

[161] PE 55. 'In reality a great clearness helps but little towards affecting the passions, as it is in some sort an enemy to all enthusiasms whatsoever (PE 56).' See PE 56-7.

[162] PE 160. Indeed, a 'clear idea is ... another name for a little idea (PE 58)'.

[163] PE 160.

[164] PE 160.

churches'.[165] The propaganda of revolutionary carnival could 'overbear all the laws that ever blackened the cumbrous volumes of our statutes'. As the 'Generality of those who frequent Plays, may rather be called Spectators, than an Audience', so the revolutionary masses were disciples of revolutionary oligarchy, rather consumers than citizens.[166] As a result, opinion was often driven by sentiment, too, rather than reason. If those practices and institutions that mediated opinion were eliminated, civilised man could accordingly be reduced to barbarism.[167] It is in this sense that manners, combining habit and affection 'were more important than laws'.[168]

In many respects, Burkean psychology appears closer to that of the ancients–from whom the benevolists drew–than it is to the natural lawyers, classical or modern, to whom Burke is often compared. In general, Burke emphasises not philosophical reason, but that of 'common sense', the *sensus communis*, as understood in the humanist tradition. The *sensus communis* was not merely good sense, though it was also that, but a sense of the commons, of humanity. Particularly in the thought of Cicero and the Stoics, it combined a practical and ethical dimension in which attention to circumstance and history was central.[169] It was also linked to the classical

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[165] RRF 176. There were '[a]ll sorts of shews and exhibitions calculated to inflame and vitiate the imagination, and pervert the moral sense (L 127)'. See C vi.10 and L 62. The 'appointment of festive anniversaries has ever in the sense of mankind been held the best method of keeping alive the spirit of any institution (WS viii.379-80)'. See Peter H. Melvin, 'Burke on theatricality and revolution', (1975) 36 *J of the History of Ideas* 447. Cf. Hume, *An enquiry concerning the principles of morals* ((2nd edn) La Salle: Open Court, 1966 [1751]), 56.

[166] WS i.81. In the *Enquiry*, Burke's discussion of sympathy, is followed by a discussion 'On the Effects of Tragedy', noting that 'in some senses we derive as much or more pleasure from that [the imitation of real calamities] than from the thing itself (PE 43)'. Cf. Addison's claim to 'live in the World, rather as a Spectator of Mankind, than as one of the Species ...'. *The Spectator* No 1 in Angus Ross (ed.), *Richard Steele and Joseph Addison: selections The Tatler and The Spectator* (London: Penguin Books, 1982), 199. A letter addressed to *The Reformer*, possibility written by Burke's childhood friend Richard Shackleton, notes 'You, Sir, are a *Reformer*, I am a humble Spectator (in WS i.110)'. The idea of a neutral observer was central to the Enlightenment and later liberalism, but it is a position that Burke would have challenged.

[167] Burke was 'locked in a conflict with the Revolution's well-wishers, both moderates and radicals, for interpretive authority'. Francis De Bruyn, *The literary genres of Edmund Burke: the political uses of literary form* (Oxford: Clarendon Press, 1996), 168.

[168] L 390. Speaking literally of theatre, Burke wrote the Irish Shakespearean critic and editor, Edward Malone: 'An History of the Stage is no trivial thing to those who wish to study Human nature in all its Shapes and positions. It is of all things the most instructive to see, not only the reflection of manners and Characters at several periods, but the modes of making this reflection, and the manner of adapting it, at those periods, to the Taste and disposition of mankind. The Stage indeed may be considered as the Republick of active Literature; and its History as the History of that State. The great events of political History when not combined with the same helps towards the Study of the manners and Characters of men, must be a study of an inferiour nature (C vi.181).' Cf. WS i.79, i.553, and PE 43-4. See also Seamus Deane, *Strange country: modernity and nationhood in Irish writing since 1790* (Oxford: Clarendon Press, 1997).

[169] 'Historica is a totally different source of truth from theoretical reason. This is what Cicero meant when he called it the vita memoriae. It exists in its own right because human passions cannot be government by the universal prescriptions of reason'. Hans-Georg Gadamer, *Truth and method* ((2nd rev. edn) London: Sheed and Ward, 1979), J. Weinsheimer and D.G. Marshall (trs.), 23.

traditions of rhetoric, of eloquence and propriety. As emphasised by Shaftesbury, it was both a social and sentimental virtue.[170] And, through Shaftesbury and Hutcheson, a related Scottish School of 'Common Sense' philosophy developed in the decades after the *Enquiry*. Numerous members of the Common Sense school, including Thomas Reid, James Beattie, and Dugald Stewart were to remark on their sympathy with, or the influence of, Burke's *Enquiry*.[171] Like the benevolists, the Common Sense philosophers were attempting to avoid, on the one hand, a rationalist epistemology and ethics, and on the other, scepticism. In many ways, they sought, like Burke, a scientific basis for the 'culture of politeness'.[172] And, if the explicit target of much of Reid's criticism was the more radical implications of Humean epistemology, he adopted many neo-Humean arguments in defence of science and religion.

Burke is thought to have considered a similar critique of Berkeley and Hume. In the course of a famous passage in his *Life of Johnson*, James Boswell reported that he and Johnson

> stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that every thing in universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his food with a mighty force against a large stone, till he rebounded from it, 'I refute it *thus*.'

–Johnson's action–

> was a stout exemplification of the *first truths* of *Père Bouffier*, or the *original principles* of Reid and of Beattie; without admitting which, we can no more argue in metaphysicks, than we can argue in mathematics without axioms. To me it is not conceivable how Berkeley can be answered by pure reasoning; but I know that the nice and difficult task was to have been undertaken by one of the most luminous minds of the present age, had not politicks 'turned him from calm philosophy aside.' What an admirable display of subtilty, united with brilliance, might his contending with Berkeley have afforded us! How must we, when we reflect on the loss of such an intellectual feast, regret that he should be characterised as the man,

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[170] See Shaftsbury, 29-69.

[171] Among other members of the Scottish Enlightenment, Hugh Blair, Henry Home (Lord Kames), David Hume and Adam Smith all praised the *Enquiry*. See Kames, *Essay on the principles of morality and natural religion* (1751). Burke 'looked upon Kames's work [the *Elements of criticism* (1762)] as continuous with his own'. Gerard W. Chapman, 'The organic premise' in Daniel E. Ritchie (ed.), *Edmund Burke: appraisals and applications* (New Brunswick: Transaction, 1990), 250n22. See 'Burke, Hume, Smith, and Beattie', chapter three of Wilkins, *The problem of Burke's political philosophy*, 50-71.

[172] In this respect the influence extended to America as well through the Scottish-American James Wilson. See Stephen A. Conrad, 'Polite foundation: citizenship and common sense in James Wilson's republican theory', 1985 *S Ct Rvw* 359.

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'Who born for the universe narrow'd his mind,
And to party gave up what was meant for mankind?'[173]

Burke would, of course, find little opportunity in his political life to address philosophical issues directly. But whatever the truth of this project, Burke's personal and philosophical sympathies with the defence of both a sense of the commons and of common sense is clear.[174]

As Hume noted, to avoid the sceptical implications of his thought, Burke maintained that 'men are much more naturally inclined to belief than to incredulity'.[175] The appeal to 'common sense and common feeling of mankind' remained a staple of his thought.[176] In both, this is common, not by being shared equally amongst individuals, but rather corporately and even hierarchically. The emphasis is–in science, religion, politics, law–on the remedial and corporate nature of human reasoning.[177] The cumulative corporatism of time was similarly important. Custom provided the stable foundation on which further progress could be made. Unlike Hume, however, Burke was less likely to disparage common beliefs as mere superstition without underlying 'reasons', though these might not be those believers might maintain. Indeed, the wise man will begin to see deeper truths in common notions.[178] The more widespread a custom was, the more likely it reflected essential principles of our nature.[179]

At the same time, there is a sense in which Burke's epistemological scepticism rivals that of Hume. In his defence of British political practice in the *Reflections*, he wrote

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[173] Boswell, *Life of Johnson* (Oxford: Oxford Univ. Press, 1998 [1791]), 333-4 (these last lines are those of Oliver Goldsmith). The Jesuit Claude Buffier's *Traite des vérités premièes* (1717) prefigured the approach of the School.

[174] See James Prior, *A life of the Right Honourable Edmund Burke* ((5th edn) London: Henry G. Bohn, 1854), 38. Cf. L 324. The *Annual Register* review of Beattie's *Dissertations moral and critical* may be Burke's. It noted that Beattie 'establishes the standard of Truth in *Common Sense*' and his 'grand effort ... has been to expose the sceptical systems of Bishop Berkeley and Mr. Hume (1771 R 253, 255 *bis*)'. In Stewart, 'Account of the life and writings of Thomas Reid' in *The works of Thomas Reid* ,i. Cf. PE 5.

[175] PE 18.

[176] L 324. Cf. WS iii.144-5.

[177] In the *Vindication*, Burke had sought to illustrate that the 'same Engines which were employed for the Destruction of Religion, might be employed with equal Success for the Subversion of Government (WS i.134)'. Burke thought, it is a constant refrain in his works, that any such rule-centred pedagogy (or formalism) was both practically and epistemologically problematic. In this sense, 'what would become of the world, if the practice of all moral duties, and the foundations of society, rested upon having their reasons made clear and demonstrative to every individual (WS i.136)'. Because moral duties were felt, rather than judged of, it was a distortion of the process by which men actually held beliefs in religion, government, and morality to claim that these were simple matters of choice or consent. The political equivalent was contractualism. See WS i.155. Cf. RRF 112.

[178] 'The more a man's mind is elevated above the vulgar the nearer he comes to them in the simplicity of his appearance, speech, and even not a few of his Notions. He knows his reason very well and therefor he is suspicious of it. He trusts his passions more on some occasions; he reins them, but does not fetter them (N 90)'

[179] See N 90.

> We are afraid to put men to live and trade each on his own private stock of reason because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages. Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice, and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence.[180]

But, as in science and in law, general principles played a critical, paradigmatic role in guiding reflection and debate. In the rationalist tradition, these could be viewed as mathematical axioms, but they need not be. Where it was relevant to speak of 'consent' to such principles at all, it resulted from recognition of their seeming aptness and utility, rather than any status as eternal verities. This is the basis on which Burke's political and jurisprudential thought rests.

In this, as with the appeal to history, Burke is not denying reason by emphasising sentiment, but attempting to clarify its role in human nature and association. The 'End of all speculation should be practice of one sort or another', in part because such speculation inevitably, if not necessarily purposively, altered practices.[181] And if Burke was critical of the application of abstract and formalist reasoning to practical affairs, he did not deny it a place. He noted that he did 'not vilify theory and speculation: no, because that would be to vilify reason itself', but practice was the 'true touchstone of all theories which regard man and the affairs of men–Does it suit his nature in general?—does it suit his nature as modified by his habits?'[182] Throughout Burke's writings there is this attempt to understand man's 'nature in general' and that as 'modified by his habits'. It was a constant element of his rhetoric as well. His 'Speech on economic reform', for example, was 'laid, not in official formality, nor in airy speculation, but in real life, and in human nature, in what 'comes home (as Bacon says) to the business and bosoms of men'.[183] It is true that he never fully articulated his views on this area. As a politician, of course, he never had to. But it is clear that Burke believed it was practical reasoning that was native to man. 'Man is made for Speculation and action; and when he pursues his nature he succeeds best in both'.[184]

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[180] RRF 183. 'For man is a most unwise and a most wise being. The individual is foolish; the multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and, when the time is given to it, as a species, it almost always acts right ('Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 398).'

[181] N 82.

[182] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 399-400. '[M]en are made of two parts—the physical part, and the moral (WS vii.540)'.

[183] WS iii.545. 'Those things which are not practicable, are not desirable (WS iii.546)'.

HIS RELIGION IS WHOLLY THAT OF LOVE:

If Burke's views were not products of his religious thought, it remains true that his religious beliefs are of great value in understanding their deeper harmonies.[185] Because these views relate to his understanding of manners, history, and law, a brief discussion of them may suggest how similar expressions of his political thought ought to be read.[186] After Scottish anti-Catholic riots in 1779, Burke wrote to Dr. John Erskine, a Presbyterian minister he believed bore some responsibility for creating the climate in which such riots could occur. He noted that he was 'by choice and by Taste, as well as by Education, a very attached Member of the Establish[ed] Church of England'.[187] Burke's Anglicanism was broadly 'latitudinarian', opposing both religious rationalism and strict scriptology, while disregarding much of the ritual of the earlier church.[188] In theological terms, latitudinarian thought emphasised the limits of *both* reason and the 'enthusiasm' Johnson had defined as a 'vain belief in private revelation; a vain

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[184] N87. 'Example' was the 'only argument of effect in civil life (WS ii.296)'.

[185] These beliefs have often been portrayed as those with which he had least sympathy. See esp. Ian Harris (ed.), *Edmund Burke: Pre-revolutionary writings* (Cambridge: Cambridge Univ. Press, 1993). Creating an all too sharp dichotomy between deism and revelation, Harris claims that Burke implies 'that revelation is more certain than reason (Id. xx)'. Harris' examples are obscure and ambiguous. The 'extempore commonplace of the Sermon of Our Saviour on the Mount' is interesting, but given the frequent role-playing in the Trinity 'Club', its minute-book is not, in isolation, a reliable source. Burke himself noted that its members 'act[ed] ... not in our real but certain personated characters (S 237)'. The second, included in the *Note*-book, is more important, but Harris' points seem to be contradicted both internally and in Burke's numerous other statements on religion and education. He seems intent on finding Burke in defence of some aristocracy of the elect, in the process both distorting his religion and his actual defence of aristocracy. See instead Frederick Dreyer, 'Burke's Religion', (1976) 17 *Studies in Burke and His Time* 199 and Michael W. McConnell, 'Establishment and toleration in Edmund Burke's 'Constitution of Freedom'', 1995 *S Ct Rev* 393.

[186] But, as in so many other areas, religion 'can never operate for the Benefit of human Society but when we think it is directed quite another way: because it then only operates from its own principle (N 67).' Burke compares this to those [Hutcheson?] who seemed to 'make the end of Religion to be its Utility to human society' and consequently 'change its principle of Operation, which consists on Views beyond this life, to a consideration of another kind, and of an inferiour kind ... (N 67)'.

[187] C iv.84. See C vi.215.

[188] It also influenced 'new standards of proof in criminal and civil cases and the new theories of evidence expounded by common lawyers, and more generally, the adversary system of trial procedure'. Berman and Reid, 'The transformation of English legal science', 507.

confidence in divine favour or communication'.[189] In practical terms, it meant a broad tolerance of religious opinion. In both senses, it mirrored, and indeed contributed to, the 'culture of politeness', particularly in its Ciceronian, conversational emphasis. When asked late in life to recommend religious texts, Burke singled out Joseph Butler, a Bishop in the established church, among 'metaphysical' works.[190] Butler was a contemporary of, and influence on, Hutcheson. Butler's *Fifteen Sermons* (1726) and *The analogy of religion* (1736) made him one of the few philosophical writers to rival his popularity. Burke laid even greater emphasis on 'more popular works such as may be found in Addison's *Spectator*'.[191] Addison's popularity and influence was greater than either Hutcheson or Butler. He 'became a Christian, in the most enlarged sense of the word, by examining into his own Nature & finding that there were Chasms in his soul which could be filled only with Religion'.[192] In an early character sketch, Burke portrays the ideal of a the 'good man', whose

> Religion is wholly that of Love; and, to say the truth, it operates less to restrain him when he would go wrong than to inspire and animate him when he pursues his own natural disposition. His devotion is warm and fervent but apt to have intermission. He is not perfect in this point, and he knows that he is not.[193]

Burke's own religion was deep, sincere, and broad. Except where he began to see political rather than theological beliefs dominate, it was among the most tolerant of his age.[194]

For Burke, man was a 'religious animal', and he claimed to remain 'attached to Christianity at large; much from conviction, more from affection'.[195] In his theology, like his aesthetics, he relied neither on 'mere naked reason' nor on 'revelation'. Morality is universal and in some sense prior to religion, but is necessarily embodied in the particular prescriptive religion of a people.[196] The 'Cause of the Church of England is included in that of Religion, not that of Religion in the Church of England'.[197] Indeed, if we understand 'natural religion' in its more literal sense, rather than the Enlightenment rationalism with which it is often associated, Burke's faith was may be seen as that of a *corporate*, natural religion. In the *Notebook*, Burke had written, in rather schematic notes on religion,

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[189] E.L. McAdam and George Milne (eds), *Johnson's Dictionary: a modern selection* (London: Cassel, 1963 [1755]), 166. See Burke's comments on 'zeal' in the Scottish Anti-Catholic riots at WWM Bk P 8/49b.

[190] T 55.

[191] T 55-6. See also WWM Bk P 26/40. Burke requested Addison's 'On immortality' on his deathbed.

[192] T 55-6. 'Our nature inclines us to gratitude for all our blessings (T 55-6).' Burke saw the belief in an after-life as near-universal and 'natural'. See N 72 and WS i.353.

[193] N 115. Cf. Burke's comments on party and the honour ethic at WS iii.324. This description is surprisingly close to that of Voltaire's 'Theist (Deist)', who believes '[t]o do good ... is his cult. To submit to god, that is his doctrine'. *Philosophical dictionary* (London: Penguin Classics, 1972 [1764]), 386. Given Burke's financial dealings, it is interesting that the 'good man is apt to spend more than he can spare, to borrow more than he can pay, and to Promise more than he can perform (N116)'.

[194] 'The main form of opposition against rationalism in seventeenth-century England... sprang from ... the Church of England itself'. Frederick C. Beiser, *The sovereignty of reason: the defense of rationality in the early English Enlightenment* (Princeton: Princeton Univ. Press, 1996), 8-9.

> We have a Relation to other Men.
> We want many things compassable only by the help of other beings like ourselves.
> They want things compassable within our Help.
> We love these beings and have a Sympathy with them.
> If we require help, 'tis reasonable we should give help.
> If we love, 'tis natural to [do] good to those whom we love.
> Hence one Branch of our Duties to our fellow Creatures is active–Hence Benevolence.
> *This is the foundation of Morality.*[198]

This is consistent with Burke's naturalism. What is of particular importance is the sense that the sociability Burke suggests is not a collectivity of fear, as it often seemed in more Augustinian visions of human nature, but of love. Instead,

> God has for the most Parts made Men the Instruments of all the Good he does to Men.
> Most of their strength is from mutual Assistance.
> Most of their knowledge is from mutual Instruction'.[199]

'Revelation', as Burke and many others understood it, was not a privileged salvation or epiphany, but itself a communal process. For 'there must be men appointed to teach them,—and Books written to record.... There must therefore be a Society for this Purpose'.[200] If, in Burke's case, this society was the Anglican communion, he saw it as only one of many varieties of

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[195] RRF 186-7, C vi.215.
[196] See N 70. Beyond religion, the 'Edifice of Virtue in Individuals may be supported by Conscience, Moral Taste &c. (T 3-4)'.
[197] C ii.389.
[198] N 70.
[199] N 74 (speaking of revelation). See T 9.
[200] N 74-5. There is a link here, too, from the organicism and benevolism of the Cambridge Platonists, who influenced Shaftesbury, through Hutcheson and Burke, to the Romantics.

Christianity, or religion, which expressed these fundamental beliefs.[201] He believed, too, that a corporate clergy had been an essential element in the civilisation of Europe.

To Erskine, Burke expressed the wish 'that we may not be so far Englishmen or Scotchmen as to forget that we are Men.... so far Presbyterians, or Episcopals as to forget that we are Christians, The one being our common bond of humanity, as the other is our common bond of religion'.[202] These were views he maintained in Parliament where he was seen, until his anti-revolutionary writings, as among the champions of religious tolerance. There he said of religion,

> Perhaps I sometimes think I see many strong Marks of human Error and infirmity in all its Divisions; tho' I can much more easily support the modesty which induces me to treat them all with respect, than the presumption which leads me to find fault with any of them. It is in this manner I think of the whole Christian Church; I mean the Great Bodies of the East and West, including all their particular descriptions; which I am willing to consider, rather as divisions, made for convenience and order, than Seperations, from a diversity of Nature, or from irreconcilable contradictions in principles. I think so of the whole and of all the considerable parts of those who profess our common Hope; having at the same time, that degree of respect for all other religions, even for those who have nothing better than mere human Reason, or the unregulated instincts of human Nature, for their Basis, that I could not prevail on myself to bestow on the Synagogue, the Mosque or the Pogoda, the language which your Pulpits lavish upon a great part of the Christian world.[203]

Burke was especially sensitive to the difficulties involved in theological disputation. For

> Scripture is by no means an irrelative system of moral and divine truths; but it stands connected with so many histories, and with the laws, opinions and manners of so many various sorts of people, and in such different times, that it is altogether impossible to arrive to any tolerable knowledge of it without having recourse to much exteriour inquiry.[204]

Referring to these hermeneutic difficulties, he noted '[w]hether you chuse the figurative or literal sense, you will fall upon one of the horns of the same dilemma'.[205] There was a communion,

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[201] It is not sufficient in itself as proof of his theology, but Burke's statement in a letter to Shackleton, that '[made] it our study to please Him the best we can, both in faith and works (S 58)' seems, at least, to confirm his divergence from a theological belief in 'faith alone'.

[202] C iv.84.

[203] C iv.84-5.

[204] WS i.398.

[205] WS ii.362. 'Let me then ask them what books they will hold canonical; for there have been debates, and fierce

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though not a priesthood, of all believers. As in other areas of life, again science and law, a trained elite of interpreters was essential and of great benefit. The corporate clergy reflected, not spiritual election, but a legacy of learning and wisdom.

This intersects, of course, with moral philosophy and jurisprudence. The voluntarism of Hobbes, Pufendorf, and even Locke were, as Shaftesbury and others believed, joined to a hedonic egoism that neglected man's benevolence. They were also proponents of a command theory of moral and positive law by which, in order to preserve the absolute sovereignty of God or the state, could dictate the Good by fiat.[206] Arising from medieval and Reformation 'nominalism', this view was anathema to the bulk of the ancient, classical, and scholastic traditions. While Burke never presents his own views of these issues systematically, it is clear that he is closer to the *ontic logos*, the inherent rational order of the ancients and benevolists. Burke is, of course, writing in a tradition in which the language of modern natural law is unavoidable. 'Self-preservation', the foundation of the modern school, is an element in his *Enquiry*. It is true, too, that the *Enquiry* suggests a sense of the power of God (or nature), a sense in which Christianity is mysterious.[207] Burke grants a role for self-interest, more in line with Butler perhaps than Hutcheson, but denies egoism. And if there is little specifically to confirm or contradict a command theory of moral law, he makes numerous, well-known criticisms of theories that base law on human will. It is 'reasonable to suppose that our Actions here are made the *Causes* of our future happiness or Misery & not that our future Misery & Happiness are designed as the sanctions of our Duties here'.[208] In religious terms, with its close jurisprudential equivalent, sanctions are not the defining characteristic of moral virtue or duty, but motives to actions. Burke notes 'how weak an Obligation, Morality consider'd in itself would be, may be seen, by supposing Laws imposed on a Nation, without Rewards for those who kept, or

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debates, too, upon this point. ... the bible is one of the most miscellaneous books in the world, and exhibits by no means a regular series of dogmas, or a summary of religion proper, on account of its brevity and precision, to be subscribed by a publick teacher. The schemes of God are inscrutable; his ways are not our ways, nor this thoughts our thoughts (WS ii.360-1).'

[206] The problem, Plato's 'Euthyphro Dilemma', was an ancient one, 'whether a thing was 'just' (or 'good' or 'true') by virtue of God having willed it, or whether God willed it because it was of itself just'. Mark Goldie, 'The reception of Hobbes' in JH Burns and Goldie (eds), *The Cambridge history of political thought 1450-1700* (Cambridge: Cambridge Univ. Press, 1991), 589. The first of these is voluntarism, the second realism (or intellectualism).

[207] Harris sees Burke, by emphasising God's power, as contradicting Shaftesbury and Hutcheson's moral realism as weakening man's sense of his moral duties. See esp. xix and 59. But Burke's use of 'pleasure and pain' (as indications of the moral good) first, expands the meaning of these hedonic responses and second, do not define the law, but are merely motivational. Burke's naturalism was to deepen, not to contradict, the benevolists.

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Punishments for those who broke them'.[209] Burke was not a Thomist, but he was far closer to the 'classical' tradition of natural law than to the 'modern'.

Beyond his lifelong attempt to remove the civil disabilities placed on Irish and British Catholics, Burke was a recognized champion of broad religious toleration. Such toleration was a 'part of natural Religion', a 'principle favourable to Christianity and as a part of Christianity', its 'best and surest support'.[210] Reflecting sentiments he had earlier shared with his friend, the Quaker Richard Shackleton, Burke declared, 'Do not promote Diversity. When you have it, bear it. Have as many sorts of religion as you find in your Country. There is a reasonable worship in them all'.[211] Burke 'would give full civil protection … to Jews, Mahometans, and even Pagans; especially if they are already possessed of those advantages by long and prescriptive usage, which are as sacred in this exercise of rights, as in any other'.[212] In 1781, Burke also took in the Brahmin Hunmon Row, a victim of religious scorn in his tour of England.[213] Beyond the most primitive of religions, he saw doctrinal differences as diverse, but equally worthy, traditions. They were all '*prescriptive* religions' and Christians, no less than others, had 'their religion as an habit, and upon authority, and not on disputation–as all men who have their religion derived from their parents and the fruits of education *must* have it, however the one more than the other may be able to reconcile his faith to his own reason or to that of other men'.[214] This has implications, of course, for theories of state. Burke's defence of the established church was a product both of his membership of it and his wider support for various native, established religions. For Burke, an established church was the basis of general tolerance. The one provided stability, the other perhaps improvement. While the Burkes had been critical of religious persecution and extremism in the early American colonies, discussing the religious liberty provided in Quaker Pennsylvania, they wrote that the

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[208] N 72-3.

[209] WS i.115.

[210] WS ii.387, 383, 381. See WS ii.387. 'Toleration an attack upon Christianity! What then are we come to this pass to suppose that nothing can support christianity but the principles of persecution? (WS ii.383)'.

[211] WS ii.388.

[212] C ii. 17-9. 'Even the man who does not hold revelation, yet who wishes that it were proved to him, who observes a pious silence with regard to it, such a man, though not a Christian, is governed by religious principles. Let him be tolerated in this country. Let it be but a serious religion, natural or revealed, take what you can get. Cherish, blow up the slightest spark: one day it may be a pure and holy flame (WS ii.389).'

[213] Burke thought this 'owing more from the ignorance not to the unkindness of this Nation (C iv.368)'. To a Dissenter, Burke noted that, in his actions on behalf of India, he was 'endeavouring ... to relieve twenty Millions of Dissenters from the Church of England, in Asia from real grievances, which God forbid any of the Dissenters in Europe [should suffer] (C vi.470)'.

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> diversity of people, religions, nations, and languages ... is prodigious, and the harmony in which they live together, no less edifying.... when there is no longer an union of sentiments, it is glorious to preserve at least an union of affections; it is a beautiful prospect, to see men take and give an equal liberty; to see them live, if not as belonging to the same church, yet to the same christian religion; and if not to the same religion, yet to the same great fraternity of mankind.[215]

In a speech on Irish trade during the American war, Burke stated that, unlike much of Europe, the 'expanded policy of America had established the *Christian* religion on the broad basis of universal tolerance. They will not ask the useful mechanic, that shall fly to them for security and freedom, what tenets he professes or what dogma he admits? But Papist or Protestant, Presbyterian or Episcopist, he is welcome, and he is free'.[216] This was a position Burke would like to have seen adopted in Ireland, where the prescriptive religion of the people was not that of the ruling Ascendancy.[217]

Burke is here already conducting a critique, complementary to that of his politics, of both epistemological transparency and ontological subjectivism. The first was the 'enthusiasm' of autonomous reason or sensibility, the belief in a privileged and precise grasp of human and divine knowledge. The second was the growing tendency to view the world in individualistic terms. Neither was limited to religion.[218] Burke saw the same pretensions in the rationalism of

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[214] WS ix.662.

[215] A ii.199-200. See A ii.231, 233.

[216] WS ix.505 (as reported in the *London Evening Post* (7 Apr 1778)). 'By this means the persecuted of every persuasion–the enslaved of every country–the miserable mechanic–the discouraged artist–the depressed manufacturer–the unrequited man of science, will fly to America, as the rich soil of universal vegetation (WS ix.505).'

[217] It is important to note, however, that in the *Tracts* Burke emphasizes that '[t]he most able antiquaries are of opinion, and Archbishop Usher [James Ussher (1581-1656)], whom I reckon amongst the first of them, has I think shewn, that a Religion not very remote from the present Protestant persuasion, was that of the Irish, before the Union of that Kingdom to the Crown of England (WS ix.469)'.

[218] In his *History of the rise, progress, and termination of the Roman Republic* (1799), 'Ferguson explained the Tacitean moment, in which the Romans moved directly from republican virtue to despotic corruption, by indicating an ancient transparence; the Romans, he said, lacked a code of manners which could mediate between their personalities and render them mediocre and sociable, so that if they could not rise above the city as gods they must sink below it as beasts.' J.G.A. Pocock 'Edmund Burke and the Redefinition of Enthusiasm' the Context as Counter-Revolution in *The French revolution and the creation of modern political culture: vol. 3, the transformation of political culture 1789-1848)* (Oxford: Pergamon Press, 1990), François Furet and Mona Ozouf, eds, 31 (citing Ferguson v.418n). This was, Pocock suggests, 'probably written in conscious endorsement of Burke'. Id., 36n29. These comments are, however, also found in the first edition of Ferguson's *Roman republic* in 1783, long before Burke's statements. See S.L. Tucker, *Enthusiasm: a study in semantic change* (Cambridge: Cambridge Univ. Press, 1972).

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the *philosophes* and the sensibility exemplified by Rousseau.[219] For eighteenth-century Britain, however, it was the religious and political union of enthusiasm that was important. It was both the source of the violent, 'Godly' commonwealth of the previous century and an important spur to the 'culture of politeness'. This enthusiasm, whether in its rationalist form among deists or its revelatory form among religious dissenters, is rightly seen as the vanguard of the solipsism and transparency of the late, radical Enlightenment. Burke critiqued the shared philosophical and political implications of each. The deism of Bolingbroke, the target of the *Vindication*, and the 'low' church theology of Dr Richard Price, whose sermon on the revolution in France was the true target of Burke's *Reflections* were here of a piece.[220] Both constructed a 'Fairy land of philosophy' shorn of practical-moral responsibility.[221] This criticism of both 'free-thinkers' and 'Sectaries' occurs as early as *The Reformer*.[222] These represented the 'two greatest Enemies of Religion … [and] *Infidelity* and *Blind Zeal*, the former attacks it like an open Enemy, and the latter like an indiscreet Friend, does it more Harm than Good'.[223] Like 'prejudice', Burke could use 'enthusiasm' in both negative and positive meanings.[224] Enthusiasm, as 'a sort of Instinct' could 'supply the want of Reason'.[225] Some balance between the two was essential, using 'our Enthusiasm to elevate and expand our Reasoning; and our Reasoning to check the roving of our Enthusiasm.'[226] In Burke, this balance was ensured at the group level. His defence of a society of

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[219] Alfred Cobban called them 'puritans of the intellect'. *Edmund Burke and the revolt against the eighteenth century: a study of the political and social thinking of Burke, Wordsworth, Coleridge, and Southey* ((2nd edn) London: Allen and Unwin, 1960), 2.

[220] Speaking of the 'affected Mystery of the Law (WS i.177)' in the *Vindication* (in the voice of Bolingbroke), Burke writes 'unhappily for us, in proportion as we have deviated from the plain Rule of our Nature … we increased the Follies and Miseries of Mankind. The more deeply we penetrate into the Labyrinth of Art, the further we find ourselves from those Ends for which we entered it (WS i.172)'. See gen. WS i.171-7, esp. 176. Every development in a system of justice, the discretion of judges, the varied interpretation of laws, the clash of legal authorities, all meant less genuine justice. The end of the 'Professors of Artificial Law ... [and] Artificial Theology.... [was] confounding the Reason of Man, and abridging his natural Freedom (WS i.173)'.

[221] WS i.135. In his explanation to the *Vindication*, he wrote that a 'mind which has no restraint from a sense of its own weakness ... may very plausibly attack everything (VNS 53)'.

[222] WS i.116.

[223] WS i.116. 'They are not true friends to Virtue, who would deprive it of any thing which serves to enforce or strengthen it; they are like the Wolves in the Fable, who enter'd into a Treaty with the Sheep, wherein it was stipulated, that they should dismiss the Dogs; and then they tore the flock to Pieces (WS i.115-6). These free-thinkers, believing they have 'got a Reason more substantial … form a Set of rules at once to indulge their Passion and lull their Conscience (WS i.116).'

[224] Cf. N 68-9. In America, '[t]hat enthusiasm which was reversing every thing at home, and which is so dangerous in every settled community, proved of admirable service here. It became a principle of life and vigour, that enabled them to conquer all the difficulties of a savage country (A ii.144-5)'.

[225] N 68. This 'whole' was important. 'I have too much reverence for our nature to wish myself divested even of the weak parts of it (N 92).' Cf. RRF 181-2.

[226] N 68-9. Burke criticised those who, 'shamed and frightened at the Imputation of Enthusiasm, endeavour to cover

orders was that of mediatory practices and institutions designed both to accumulate and preserve learning and to instruct others in that knowledge. This is of a piece with Burke's critique of rationalism and his views on scientific empiricism, including a model of human nature that undermined any 'contractual' or indeed transactional account of human activity.

Burke's parliamentary activities received accolades from many dissenters. He himself wrote, 'I certainly never had any ill wishes to these Gentlemen as a *body*; and there are not persons on earth I love and respect more than I do some individuals amongst them'.[227] But as he began to see the political implications of much low church theology, he became progressively critical of their principles and politics. [228] In the *Account*, the Burkes noted that since the Reformation, a Protestant schism existed between the established church, which 'had chosen gradually and almost imperceptibly to recede from the church of Rome', and dissenters of 'more zeal and less policy'.[229] The political connection is made explicitly, as 'they learned an aversion to the episcopal order, and to religious ceremonies of every sort; they were impregnated with an high spirit of liberty, and a strong tendency to the republican form of government'.[230] But this liberty, like that of many republics, was exclusive, for colonists 'who in England could not bear being chastised with rods, had no sooner got free from their fetters than they scourged their fellow refugees with scorpions'.[231] The 'Witchcraft delusion' was but the 'last paroxism of the puritanic enthusiasm in New England'.[232]

Burke's own comments of this period are similar. The Methodists, for example, choose 'all their terms with a wicked wisdom ... for fear the Understanding should have any play. Thus, '*the new light*', '*the inward feeling*', '*born again*'. When a reason of their faith is demanded, this cant is the answer you receive'.[233] Consistent with the gradual, prescriptive prejudices of his empiricism, it is precisely the idea of being born again, whether of faith or in France, that Burke opposed. The 'atheism' he rails against in later years is more accurately a 'new fanatical religion'

Religion under the Shield of Reason (N 67)'.

[227] WS vi.102.

[228] See 'Burke' in Ursula Henriques, *Religious toleration in England 1787-1833* (London: Routledge and Kegan Paul, 1967), 99-135.

[229] A ii.139.

[230] A ii.139.

[231] A ii.151-2. Indeed, it is here that the Burkes' write, 'The remembrance of the past, the dread of the future, the present ill, will join together to urge them forward to the most violent course (A ii.152-3)'.

[232] A ii.161. The Burkes make the point, however, that the 'principles which give rise to it are common to all mankind, and they influence them as they are men, and not as they belong to this or that persuasion (A ii.153)'.

[233] N 97. See N 96-7, 100-1. 'I have only to wish, that the nation may be as happy and as prosperous under the influence of the new light, as it has been in the sober shade of the old obscurity (W iv.451).

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of anarchy which 'rejects all establishments, all discipline, all ecclesiastical, and in truth all civil order'.[234] He was aware, of course, that this was an element, and not a merely negative element. 'All Protestantism, even the most cold and passive, is a sort of dissent'.[235] 'Calvin refined on Luther, as Luther refined on Popery—Presbyterians have reasoned away much of that wholesome enthusiasm which has long been cherished in the Breasts of both good Catholics and good Protestants'.[236] His concern was with the slippery slope to which this could lead. Accepted without measure, the 'most perfect Protestant … protests against the whole Christian religion'.[237] These dangers were not simply theological, but political. When a religious sect became a political force, fuelled by the self-righteousness of the elect, it acted as a faction in opposition to the public good. The political activities of religious dissenters and their demands had increased throughout the 1780s. From this period to the revolution, Burke became increasingly concerned about the social and political consequences of their beliefs. For example, by the 1790s, the 'political catechism' of the Unitarian Society 'contained no precept of religion whatsoever', but was 'one continued invective against kings and bishops'.[238] The *philosophes* and revolutionaries of France, if they were often closer to deism than dissent, shared many of the same traits. Previous tyrants like Henry the VIIIth could have done little better than their 'short form of incantation – '*Philosophy, Light, Liberality, the Rights of Men*''.[239] Richard Price drew together all of Burke's fears of a British, and European, civil war and his hostility to the unchecked enthusiasm of the radical enlightenment.

Burke, in fact, saw a hostility towards Catholicism at the root of much of this. 'This War against Popery furnishes me with a Clue that leads me out of a *Maze* of perplexed politics.... I can now account for the whole.'[240] But these religious prejudices, like any others, were natural and universal. In the complexity of human nature and association, natural dispositions could be perverted. In what initially sounds like the *faux* Bollingbroke, Burke wrote in the *Reflections*:

> History consists, for the greater part, of the miseries brought upon the world by pride, ambition, avarice, revenge,

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[234] WS ix.647.

[235] WS iii.121. 'But the religion most prevalent in our northern colonies is a refinement on the principle of resistance; it is the dissidence of dissent, and the protestantism of the Protestant religion (WS iii.121-2)'.

[236] T 8-9. The 'Protestant without a certain Creed' had 'no religion at all (C ix.261)'.

[237] WS ix.608.

[238] PH xxviii.436-7.

[239] RRF 218.

[240] C ix.163. See gen. ix.161-72. '*It is a religious war* (WS viii.485).' He spoke of the 'protestant Apostle (C

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> lust, sedition, hypocrisy, ungoverned zeal, and all the train of disorderly appetites, which shake the public with the same '—troublous storms that toss/The private state, and render life unsweet.'

—It is these natural vices that are at the root of human discord—

> These vices are the *causes* of those storms. Religion, morals, laws, prerogatives, privileges, liberties, rights of men, are the *pretexts*.

—But these are the same natural sources of virtue—

> The pretexts are always found in some specious appearance of a real good. You would not secure men from tyranny and sedition, by rooting out of the mind the principles to which these fraudulent pretexts apply. If you did, you would root out every thing that is valuable in the human breast.[241]

Benevolist impulses were the same spring from which tribalism and sectarianism began. Indeed, for all his sympathy with the 'culture of politeness' and with religious tolerance, Burke's own experiences, from Ireland to France, would have made him less sanguine than many of his contemporaries about the harmony between individual interest and public will. Men were as attracted to the power of the sublime as they were to the beautiful. Burke's thought, nursed and moulded in its infancy in Ireland, made him aware of the limits of such conversation. Politeness and liberality were necessary, but not sufficient, conditions for human knowledge or happiness.[242] For Burke, the laws 'furnish the civil means of getting at the natural'.[243]

CONCLUSION

Empiricism was the natural foundation for all of Burke's thought. The 'moral constitution of the heart', the formation of individual character, was a sublime amalgamation of native predispositions and cultural influence.[244] For all the importance of nature, *culture*, in both the

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vii.261)' Paine and the 'Zealous Protestant Buonoparté (C ix.162)'. Cf. C vii.119.

[241] See RRF 247-8. The quote is from the mythic romance and chivalry of Edward Spencer's *Faerie Queene* (1589-98). Spencer was also to write on Irish affairs and, for these, Burke was to criticise him, with the jurist and Spenserian poet John Davies. Spenser may also, however, have been a distant relative of Burke's mother.

[242] N 104, 106.

[243] L 384.

[244] RRF 176. See WS viii.131.

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sense of development and of the lived practices and institutions of a community, was perhaps even more significant.[245] This is not unrelated to Burkean jurisprudence. Burke, in fact, believed that culture, in both senses, was neglected in legal pedagogy and scholarship. The Inns of Courts were inattentive, or inexpert in their attention, to the character of the public men they produced. In addition, English jurisprudence was negligent of the importance of manners to law. Closely connected to this was the importance of time and history. Given Burke's views on habit and habituation, this is hardly surprising. The inattention he saw in many contemporaries to the complexity of human nature was partly this neglect of the role of time to individual lives and human history. The 'enthusiasms', religious or atheist, that sought subjectivist shortcuts, epistemic or emotive, to knowledge were equally misguided. Human knowledge, much less wisdom, was a necessarily communitarian and historical process. Further, the manners of a culture, being mixed with the habits of men, could not easily be regulated by law. They *were*, however, deeply sensitive to change. It is this sensitivity that magnified, for Burke, the importance of mediating institutions to the progress of society. In this, hierarchies played a critical role, whether in the stability of the hereditary aristocracy or the energy of the natural. Expert opinion, in matters of science, law, and even faith, was of no little importance. On the other hand, there was no guarantee that such opinion, as continuing links between British historiography and political thought made clear, would result in truth. Here the influence of manners, and prejudice, to laws was all too obvious.

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[245] This is a point recognized across the modern political spectrum. See esp. Williams 3-12 and Mark C. Henrie, 'Edmund Burke and contemporary American conservatism' in Ian Crowe (ed), *Edmund Burke: His life and legacy* (Dublin: Four Courts Press, 1997).

A VERY MIXED AND HETEROGENEOUS MASS

'[T]he present system of our laws, like our language and our learning, is a very mixed and heterogeneous mass, in some respects our own; in more borrowed from the policy of foreign nations, and compounded, altered, and variously modified, according to the various necessities which the manners, the religion, and the commerce of the people have at different times imposed ... (WS i.325)'.

BURKE ON HISTORY AND LAW:

This chapter turns from the natural foundations of Burkean jurisprudence to the historical. As will be clear, these are not easily separated. Burke's empiricism provided the basis for a social theory in which time and the *sensus communis* provided clues to the natural origins of jurisprudence and the necessary continuing reliance on traditional, corporate communities of experience and interpretation. The fact that such histories could be contested, however, was confirmed by Burke's education, both formal and informal. His Irish experiences, as well as wider debates about Whig politics, and eighteenth-century philosophy all pointed to the continuing presence of the past. The importance of history to law cannot be denied. The previous century had seen a steady advance in the depth of English jurisprudence and legal history. But when he left his legal studies, Burke would have found British and Irish historiography as well as English jurisprudence largely undeveloped and partisan. From a wide variety of sources, Burke developed a progressive theory of history that was far more sophisticated than those he found at the Inns of Court. He was, in fact, deeply critical of English jurisprudence and the whiggish histories to which both Tory and Whig politicians referred. In developing his theory, he drew not only on jurisprudential and civic sources, but also on contemporary 'comparative' and 'philosophical' histories. These works are often neglected, perhaps because they date largely from the period before his entry into Parliament. They provide, however, a bracing reminder of the complexity of Burke's thought. Indeed, his later anti-revolutionary arguments and use of legal terminology, especially 'prescription' and 'inheritance', take on significant depth when read in light of his earlier historical works. They also reveal the degree to which Burke must be read as an Irishman and European.

AN INTERIOR HISTORY:

From his earliest days, certainly among his relations in the Blackwater valley, Burke would have been educated in the passionate, contested histories of Ireland. His interest is obvious at Trinity where, along with math, logic, and poetry, history had been one of Burke's 'furors'. Beyond the formal requirements of the curriculum, he spent hours in the libraries of Dublin 'endeavouring', he told Shackleton, 'to get a little into the accounts of this our poor country'.[1] But the difficulties of Irish historiography are numerous. Still current histories, like Sir John Temple's *The Irish rebellion* (1646) or the earl of Clarendon's *History of the rebellion and civil wars in England* (1702-4) and *History of the rebellion and civil wars in Ireland* (1719-21), were Anglo-centric. Irish audiences of what would soon be called the 'Ascendancy' were largely in agreement with such histories, though they differed in critical respects as well. Ascendancy or 'patriot' writers objected to the portrayal of the British presence in Ireland as a conquest, thereby depriving their Ascendancy descendants in Ireland of local control of Irish affairs. William Molyneaux's *Case of Ireland's being bound by acts of parliament in England stated* (1698) was the best known of these. Molyneaux asserted that Ireland had never been conquered, but had accepted English rule. No 'right of conquest' resulted. Sovereignty and power was thus never transferred to Britain, but remained in the Irish parliament. This elaborate apologia is similar to the commonplace English response to the Norman Conquest, where the 'Norman yoke' is alternatively imposed or accepted.[2] But with other British histories, these Irish accounts were hostile to those of the native, overwhelmingly Catholic population. In addition to the penal restrictions on education, the restriction of historical documents and materials, like those in the Trinity archives, made any more sympathetic history a difficult chore. There was much to complicate or obstruct any work that not favourable to British or Ascendancy audiences.[3]

Burke, who was of course not so restricted, once wrote that he had studied Irish history 'with more Care than is common'.[4] He was disgusted by these histories. He believed them to be both inaccurate as history, the work of factional loyalties, and dehumanising in their portrayals of the native Irish. He strongly resented 'those miserable performances which go about under the names of Histories of Ireland' and which 'would persuade us, contrary to the known order of Nature, that indulgence and moderation in Governors is the natural incitement in subjects to rebel'.[5] Against these, was

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[1] C i.68.

[2] It was also possible to see the 'conquest' in a light similar to that of 1688-9, with William the Conqueror having a valid claim to England and merely replacing the head of the English court, leaving intact the body politic.

[3] Tocqueville wrote that Trinity 'was founded by Elizabeth with the estates confiscated from Catholics, the fathers of whom we had just seen wallowing in their mud at the poorhouse!' Emmet Larkin (tr./ed.), *Alexis de Tocqueville's journey in Ireland: July-August, 1835* (Dublin: Wolfhound Press, 1990), 25.

[4] C ii.285. See WWM Bk P 8/8 (on the 1760s), 8/192-3 (on the 'State of Ireland' in the 1770). Cf. William Burke's notes on Ireland at WWM Bk P 40.

> an interior history of Ireland, the genuine voice of its records and monuments, which it speaks a very different language from these histories ...: these restore Nature to its just rights, and policy to its proper order. For they even now show to those who have been at the pains to examine them, and they may show one day to all the world, that these rebellions were not produced by toleration, but by persecution—that they arose not from just and mild government, but from unparalleled oppression.[6]

Burke spent considerable energy trying to ensure this 'interior history' was told.[7] He met, however, little success or satisfaction. Burke, with some prominent Irish Catholic historians, had hoped that Thomas Leland's *History of Ireland* (1773) would be such a history.[8] But the Anglican Leland's work, he himself admitted, was directed to the book buying audience among which there were relatively few Catholics in any part of Britain. Burke, who supplied some materials for Leland and is explicitly thanked in the work, was particularly frustrated. Another mutual friend, the Irish Catholic historian Dr John Curry received a similar, and similarly dubious, honour.[9] Curry, on the other hand, wrote a partisan history of his own from the opposite perspective.[10] The prejudices, blind and unmeaning, of English and Irish history were ready reminders of the difficulties involved in any such work.[11]

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[5] TPL 271-3.

[6] WS i.30. The 'miserable Natives of Ireland, who ninety-nine in a hundred are tormented with quite other cares, and are bowed down to labour for the bread of the hour, are not, as gentlemen pretend, plodding with antiquaries for titles of centuries ago to the estates of the great Lords and 'Squires, for whom they labour (WS ix.657).'

[7] Burke played a role in the donation of the Sebright manuscripts to Trinity. See Walter D. Love, 'Edmund Burke, Charles Vallancey and the Sebright manuscripts', (1961) 95 *Hermathena* 21.

[8] Ferdinando Warner's *The history of Ireland* (1763), for example, taught that '(for the mutual advantage of both countries) to lay aside our prejudices against, and jealousies of Ireland; and gives us the following fine lesson in politics, that fair and equal dealing to all parts of an empire, is the true interest of the whole (1763 R 258 *bis*)'. But Burke criticises the work for not discussing Tanistry and the Brehon law and alludes to Warner's second volume, which 'will exhibit the Irish nation in their intercourse with a powerful foreign people (1763 R 264 *bis*)'. But that volume, dealing with 1641, followed party lines.

[9] See 1773 R 253 *bis*. Curry had already written an *Historical memoirs of the rebellion of 1641* (1758), which Burke helped to get a favourable review by the historian-writer Tobias Smollet.

[10] Curry's *An historical and critical review of the civil wars in Ireland from the reign of Queen Elizabeth to the settlement under King William* (1774-5) was far from even-handed. The Irish Catholic historian Charles O'Conor, Curry and Burke's mutual friend, noted in a letter to his son, that the *Review* was 'not history, which like every true picture should consist of shade and colouring; but it is a mere justification on our side, and a disguised invective on the other'. Cited in Walter D. Love, 'Charles O'Conor of Belanagare and Thomas Leland's 'philosophical' history

In understanding Burke's views on history, his relationship with David Hume is especially enlightening, if largely unexplored.[12] Hume argued, as would Burke, that the British constitution was rooted in neither a Saxon golden age nor even the conscious, farsighted political choices of legislators. This 'sceptical' whiggism differed considerably from the more 'vulgar' whiggism, an often insular English view of English history, emphasising the persistence of the principles of the 'ancient constitution'.[13] It is for this that he was most criticised by his contemporaries. But on these points Burke largely agreed. He believed that, in general, Hume's histories were solid and unprejudiced. But Burke was outraged by Hume's treatment of the Irish Rebellion of 1641 as a 'massacre' on the part of native Irish Catholics.[14] It is this, rather than the philosophical differences that one might suspect between the two anglicised Celts, that most divided the men. An early biographer relates that Burke

> considered himself, though no Catholic, as referred to on the subject .... Mr. Hume and he had met at Garrick's, and the massacre was one of the subjects discussed. Mr. Burke endeavoured to prove that the received accounts were in a great degree unfounded, or at least much exaggerated, and quoted affidavits deposited in Trinity College, Dublin. He described absurd stories that had been propagated and believed by many concerning the Irish; among others, that the ghosts of murdered Protestants frequented the banks of the Shannon almost from its source to the sea. Mr. Hume maintained the justness of the account, which makes part of his history.[15]

Because no suitably unbiased history was ever written, this subject remained important to Burke throughout his life. The rebellion 'was not only (as our silly things called Historys call it), not

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of Ireland', (1961) 13 *Irish Historical Studies* 1, 25. See Curry's letter on O'Conor at WWM Bk P 1/1062.

[11] This 'retrospective wisdom, and historical patriotism, are things of wonderful convenience, and serve admirably to reconcile the old quarrel between speculation and practice (WS ii.257)'.

[12] The personal, philosophical, and political relationship between the Burke and Hume remains poorly understood. See, however, David Miller's discussion of Hume, Burke and Smith in *Philosophy and ideology in Hume's political thought* (Oxford: Clarendon Press, 1981), 196-204.

[13] An important related view saw political changes viewed as negative as the corruption of the 'ancient constitution'. This phrase, the 'ancient constitution', may unfortunately blur the difference between the argument for consistency with (or corruption from) the past and the continuity in appeals to the past. See gen. J.G.A. Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge: Cambridge Univ. Press, 1986 [A reissue with a retrospect]).

[14] Hume himself claimed to be attacking historical party prejudices. 'There are indeed three events in our history', he had written, 'which may be regarded as touchstones of partymen. An English Whig, who asserts the reality of the popish plot, an Irish Catholic, who denies the massacre in 1641, and a Scotch Jacobite, who maintains the innocence of queen Mary, must be considered as men beyond the reach of argument or reason, and must be left to their prejudices.' *The history of England, from the invasion of Julius Caesar to The Revolutions of 1688* (Indianapolis: Liberty Classics, 1983 [1778 edn, originally 1762]), iv.395.

utterly *unprovoked* but … no History, that I have ever read furnishes an Instance of any that was so *provoked*'.[16] As a result of a rebellion provoked by an oppressive, irregular system of justice and '[b]y the issue of that war ... [and] the total reduction of the kingdom' in the wake of the Glorious Revolution, the 'ruin of the native Irish ... was completely accomplished.'[17] If anything, England's difficult seventeenth-century was even more disastrous for Ireland.

Burke's formal study of history was significant. He was familiar, through working on the *Account*, with 'comparative' histories, which saw contemporary primitive cultures as models through which the European past could be understood. This was particularly true in Scotland, where such histories served as the basis for theories of social progress through a series of historical stages.[18] As with many of the Scots, for whom Highland culture was by no means extinct, for Burke the past was always present. 'Philosophical' or 'conjectural' histories were important for similar reasons. These histories, told in naturalist language, were the attempt 'to account, from the changes in the condition of mankind ... in the different stages of their progress, for the corresponding alterations which their institutions undergo'.[19] Together these could easily provide a broadly progressive vision of history from primitive to civil society. It must have been particularly galling that Hume noted, as Burke knew to be true, that the 'Irish have no philosophical historian'.[20] Hume reserved that title for Sir John Davies' century-old *Discovery of the true causes why Ireland was never entirely subdued [and] brought under obedience of the crown of England until the beginning of his Majesty's happy reign* (1612).[21] He followed closely Davies' argument for the imposition of English law on Ireland. This perspective, more English than Ascendancy of course, applauded the final conquest and 'civilisation' of the native Irish. It was necessary to 'abolish [those] Irish customs which supplied the place of laws and which were calculated to keep that people for ever in a state of barbarism and disorder'.[22] Burke had both a

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[15] Robert Bisset, *Life of Edmund Burke* ((2nd edn) London: George Cawthorn, 1800), ii.425-6

[16] C ii.285.

[17] WS ix.616. 'All the penal laws of that unparalleled code of oppression ... were manifestly the effects of national hatred and scorn towards a conquered people (WS i.616)'. Cf. W ii.438 ('Canada Bill of 1774').

[18] In Smith, there were four-stages (others projected three): hunting, pastoral, farming, and commercial. See Stein, *Legal evolution: the story of an idea* (Cambridge: Cambridge Univ. Press, 1980), 29 *et seq*..

[19] Dugald Stewart, 'Life of Smith' in *The collected works of Dugald Stewart* (Edinburgh: Thomas Constable and Co., 1855 reprinted in Bristol by Thoemmes Press, 1994), William Hamilton (ed.), 5.

[20] Cited in Love, 'Charles O'Conor of Belanagare and Thomas Leland's 'philosophical' history of Ireland', 1.

[21] See Davies, *A discovery of the true causes why Ireland was never entirely subdued [and] brought under obedience of the crown of England until the beginning of his Majesty's happy reign* (Washington: Catholic Univ. of America Press, 1969), James P. Myers, Jr (ed.).

[22] See esp. Hume's *History of England*, vi.58-61.

similar sense of historical development and progress. He might have agreed in some sense with both Hume and Davies about the inhibitive nature of native institutions, especially property and successions, but his admonishment to govern according to the manners of a people was of even greater importance in respect to his own.

While Burke had earlier sought to tell a better English history, he was well aware of the frequently partisan nature of such works and their audiences. Historiographical difficulties were, of course, not limited to these problems. The subject itself presented inherent difficulties. In general, Burke questioned

> whether the history of mankind is yet complete enough, if ever it can be so, to furnish grounds for a sure theory on the internal causes which necessarily affect the fortune of a state. I am far from denying the operation of such causes: but they are infinitely uncertain, and much more obscure, and much more difficult to trace, than the foreign causes that tend to raise, to depress, and sometimes to overwhelm a community.[23]

But these problems were only exacerbated by the interpretive and cultural prejudices. While, in good humanist fashion of history teaching by example, the 'wise and learned look back upon experience and history, and reason from things past about events to come', it remained the source of continuing animosities.[24] During the French revolution, whose radical republicanism resembled earlier English events just as its confiscations resembled those of Ireland, Burke noted that the study of history was

> a great improver of the understanding, by shewing both men and affairs in a great variety of views. From this source much political wisdom may be learned; that is, may be learned as habit, not as precept; and as an exercise to strengthen the mind, as furnishing materials to enlarge and enrich it, not as a repertory of cases and precedents for a lawyer.... This method turns their understanding from the object before them, and from the present exigencies of the world, to comparisons with former times, of which after all, we can know very little and very imperfectly; and our guides, the historians, who are to give us their true interpretation, are often prejudiced, often ignorant, often fonder

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[23] L 63. It follows from this that the historian must resign himself to ascribing a great deal to 'mere chance' or to the 'occasional interposition and the irresistible hand of the Great Disposer (L 154)'. But he was 'not quite of the mind of those spectators who seem assured that necessarily, and by the constitution of things, all states have the same periods of infancy, manhood, and decrepitude that are found in the individuals who compose them. Parallels of this sort rather furnish similitudes to illustrate or to adorn than supply analogies from whence to reason. The objects which are attempted to be forced into an analogy are not found in the same classes of existence (L 62-3).'

[24] WS i.357. It was a 'preceptor of prudence, not of principles (C i.332-3)'. 'The principles of true politics are those of morality enlarged; and I neither now do, nor ever will, admit of any other.... [They] will endure with the sun and moon,– long, very long after whig and tory, Stuart and Brunswick, and all such miserable bubbles and playthings of the hour, are vanished from existence and from memory (C i.332-3)'.

of system than of truth.[25]

In this way, historians, as Burke had written of the revolutionaries, could be seen to 'unplumb the dead for bullets to assassinate the living'.[26]

A NARROW AND INGLORIOUS STUDY:

Many of the most important misunderstandings of Burke result from the neglect of his Irish past. Another fault specific to jurisprudence is the exaggeration of the influence of the common law on his thinking.[27] Many influences, personal and professional, preceded Burke's arrival at the Middle Temple. While Burke may have known something of the law from his father, his initial contact with the law at Trinity would have been that blend of moral and legal theory found in continental jurisprudence. University teaching of the common law was over a decade away for both William Blackstone's Oxford and, a few years later still, Trinity. Burke had a genuine sympathy with Blackstone's views on a liberal legal education, expressed as early as *The analysis of law* (1758). He would also have had, no doubt, considerable respect for the nature of Blackstone's achievement in the *Commentaries on the law of England* (1765-9). But whatever esteem Burke may have felt for the common law, for Coke and Hale, his relationship to English jurisprudence was contentious.[28] This is especially true of the relationship between Burke and Blackstone. While Blackstone's intellectual legacy has sometimes suffered from the same sort of caricaturisation as Burke's, real and considerable differences exist.[29] Indeed, Burkean jurisprudence is helpfully seen as European in scope, as part of what he later called the 'commonwealth of Europe'.[30]

The distinction between English and European jurisprudence must not be pushed too far. From Bracton to Blackstone, the two remained closely related parts of a common Western legal tradition.[31] In his *Commentaries*, Blackstone drew on the 'written reason' of Roman law, specifically its 'institutional' models of organisation, for the cause of English law.[32] And while most European legal systems were much more heavily influenced by Roman law, there continued to exist numerous 'customary' bodies of law similar in method to the common law.[33] In Burke's day, training at the Inns, outside of any university requirements, consisted in little more than attendance at the courts of Westminster and dining with professionals.[34] Coming from Trinity's liberal education, Burke was deeply critical of the narrowness of such training. The study of law had, he said, 'been confined and drawn up into a narrow and inglorious study, and that which should be the leading science in every well-ordered commonwealth, remained in all the barbarism of the rudest times, whilst every other advanced by rapid steps to the highest improvement'.[35] The Scottish example is again helpful. Scottish advocates, like their continental brethren, completed a university education, often on the continent, in preparation for a life in law. In 1791, Burke wrote the Scottish jurist David Dalrymple, Lord Hailes, that 'I never think of some of you Scotch Gentlemen of the robe without being a little ashamed for England. Our Barr does not abound in general Erudition—and I am every day more and more convinced that they are not the better professional men for not being more extensively learned'.[36]

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[25] W viii.498. See WS viii.468.

[26] WS ix.147-8. See David Bromwich, *A choice of inheritance: self and community from Edmund Burke to Robert Frost* (Cambridge, MA: Harvard Univ. Press, 1989).

[27] It has been claimed, for example, that 'Common law patterns of thought were given new political life by Burke'. Postema, 29. See Pocock, *The ancient constitution*, 243.

[28] 'Burke has much in common with Blackstone'. M.D.A. Freeman's *Lloyd's Introduction to jurisprudence* ((6th edn) London: Sweet & Maxwell, 1994), 113. See also Alasdair MacIntyre, *Whose justice? Which rationality?* (Notre Dame: Univ. Notre Dame Press, 1988), 229.

[29] See Albert W. Alschuler, 'Rediscovering Blackstone', (1996) 145 *U Pa L Rev* 1.

[30] L 133.

This was, of course, a sentiment not entirely lost on common lawyers. Just after the period of Burke's legal studies, Blackstone initiated the first university lectures on the common law.[37] He stressed a more liberal, gentlemanly education than the contemporary Inns of Court.:

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[31] Cf. Hans S. Pawlisch, *Sir John Davies and the conquest of Ireland* (Cambridge: Cambridge Univ. Press, 1985), 175.

[32] Blackstone, *Commentaries on the laws of England* (Oxford: Clarendon Press, 1765), 5-6. See esp. Alan Watson, 'The structure of Blackstone's *Commentaries*', (1988) 97 *Yale L J* 795, 811. See also John W. Cairns, 'Blackstone, an English institutist: legal literature and the rise of the nation state', (1984) 4 *Oxford J Legal Studies* 318 and gen. Michael Lobban, *The common law and English jurisprudence 1760-1850* (Oxford: Clarendon Press, 1991).

[33] See Harold J. Berman and Charles J. Reid, Jr., 'Roman law in Europe and the *jus commune*: a historical overview with emphasis on the new legal science of the sixteenth century', (1994) 20 *Syracuse J Int'l L & Com* 1.

[34] For 'if barristers became legal scholars, they did so in spite of their training'. David Lemmings, 'Blackstone and law reform by education: preparation for the Bar and lawyerly culture in eighteenth-century England', (1998) 16 *Law & Hist Rev* 211, 211. See Lemmings, *Professors of the law: barristers and English legal culture in the eighteenth century* (Oxford: Oxford Univ. Press, 2000).

[35] WS i.323. The 'study of our jurisprudence presented to liberal and well-educated minds, even in the best authors, hardly anything but barbarous terms, ill explained, a coarse, but not a plain expression, an indigested method, and a species of reasoning the very refuse of the schools, which deduced the spirit of the law, not from original justice or legal conformity, but from causes foreign to it and altogether whimsical'. See J.G. Wilson, 'Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges', (1986) 40 *U Miami L Rev* 913.

[36] C vi.466. Hailes, was a descendant of James Dalrymple, Lord Stair, the greatest of Scotland's 'institutional' writers. He was much admired by Boswell and Johnson, and a correspondent of Smith and Horace Walpole. In addition to law, Hailes translated and wrote against Gibbon's religious writings. Burke thought him 'one of the first men for erudition in his Age' and the 'pleasantest, the most goodhumourd, the most unaffected, and the most

> If practice is the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him; *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundation of justice.[38]

Burke agreed. He thought Blackstone's *Lectures*, a 'solid judicious and elegant oration ... for putting the study of it under proper regulations, and spirited persuasion to make that study so regulated, a considerable part of academic education, especially for persons of rank'.[39] While the law was 'one of the first and noblest of the human sciences; a science which does more to quicken and invigorate the understanding than all other kinds of learning put together', it could only be so when balanced by an education in both practice and principle.[40] Burke, renowned for his adherence to the particulars of established practice (and to the practical), stressed the importance of *general* (if not abstract) theory. Although a university education in the common law would remain uncommon for decades, Burke's Trinity would, a decade after his graduation, initiate a Professorship in English and Feudal Law.[41] Francis Stoughton Sullivan followed Blackstone's with a more general and historical method in 1760.[42] '[I]t is hard', Sullivan wrote, 'to imagine a study more improving, more agreeable, or better adapted to a liberal mind'.[43]

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communicative Man of Letters I ever conversed with (C vi.466)'.

[37] It is unlikely that Burke reviewed the first and second volumes of Blackstone's *Commentaries* in the *Annual Register*. Burke's involvement was, at best, minimal by 1767. See James E. Tierney, 'Edmund Burke, John Hawkesworth, the *Annual Register*, and the *Gentleman's Magazine*', (1978) 42 *Huntington Library Q'ly* 57. Tierney suggests that the reviewer was Hawkesworth although his repeated misspelling of Blackstone's name in correspondence is peculiar.

[38] Quoted from Blackstone's *Discourse on the study of the law* (1758) in 1958 R 458.

[39] 1958 R 452.

[40] WS ii.427.

[41] As noted in chapter one, Burke's 'Letter to Sir Henry Langriche (1792)', published in support of Catholic emancipation, appears to have been answered by the third Trinity Regius Professor of Feudal and English law, Dr Patrick Duigenan. Duigenan, a convert and strongly anti-Catholic, called Burke's letter 'jesuiticial'. Like Sullivan, he had also been Professor of Civil and Canon Laws prior to his appointment.

[42] Sullivan's whiggish *Historical treatise of the feudal law and the constitutional laws of England* shows evidence of knowledge of both Montesquieu and Scots. The *Treatise* was published posthumously in 1770 and reviewed in 1772 R 235 *bis*. The reviewer notes that the 'historical method ... becomes almost necessary, in treating a science which belongs wholly to political society and civil life. The true reason of all law, is best discovered where the principles of human conduct are found, in the interest and passions of mankind (1777 R 235 *bis*)'.

[43] *Lectures on the constitution and laws of England* ((2nd edn) London: Edward and Charles Dilly and Joseph Johnson, 1776), 17. Edited by a Dr Gilbert Stuart, this is likely, I have not yet been able to confirm it, to be the same

At the same time as he was engaged in his legal studies, Burke was becoming increasingly familiar with other historical sources. As information of the comparatively primitive societies of the new world had influenced contractual thought, especially the 'state of nature' as found in Hobbes and Locke, it also seemed to provide evidence for the cultural progress of Europe.[44] The 'Aborigines of America', the Burkes wrote, 'form a striking picture of the most distant antiquity.'[45] These histories could be seen to provide evidence of 'natural' human dispositions beneath the artifice of custom and the vagaries of culture. They could also suggest, however, how the natural could be corrupted. If the latter is more common in Burke, the former was true as well, a point of some importance in his appeals to the 'general sense of mankind'. The *Account* drew on numerous comparative, and philosophical, histories. Most notably, they cite J.-F. Lafitau's *Moeurs des sauvages ameriquains, comparées aux moeurs des premiers temps* (1724). Lafitau famously appears in both Adam Smith's *Lectures on jurisprudence* (1762-3/66), which remained unpublished, and Adam Ferguson's *Essay on the history of civil society* (1767), typically recognised as the first printed use of the Jesuit's work in English.[46] The Burkes cited him a decade earlier, a point with which both Smith and Ferguson may have been aware. Burke clearly saw these comparative works as the basis of a progressive history.

Another Scot, William Robertson, later acknowledged his use of the *Account* in his own *History of America* (1776). Robertson was President of Edinburgh University and Chief Moderator of the Church of Scotland. He was one of the most noted historians of his age, later becoming Historiographer-Royal of Scotland. Edward Gibbon, for example, ranked himself beneath both Hume and Robertson. There is no evidence that Robertson actually knew of Burke's participation in the anonymous *Account,* but he borrowed from it and called it a 'work of

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Stuart who was among the members of the Scottish Enlightenment and adversary of fellow Scot historian William Robertson. Stuart's best-known, and contemporaneous work, was his *View of society in Europe in its progress from rudeness to refinement or inquiries concerning the history of law, government, and manners* (1778), showing a similar Montesquieuan bent. His whiggish 'Discourse concerning the laws and government of England' is added to Sullivan's *Lectures* and adopts a somewhat schizophrenic attitude towards Hume's histories.

[44] See Hobbes, *Leviathan*, I.13. 'Thus in the beginning, all the World was America.' John Locke, *The second treatise on civil government.* (Amherst: Prometheus Books, 1986 [1690]), 30.

[45] A i.155.

[46] In addition to Lafitau and others, the Burkes cite John Campbell (ed), *A complete collection of voyages and travels* (or *Harris' voyages*) (1744-9), Mark Catesby, *The natural history of Carolina, Florida, and the Bahama islands* (1731-43), William Douglass, *A summary, historical and political, of the first planting, progressive improvements and the present stat of the British settlements in North America* (1749-51), and Amédée-François Frézier, *Relation du voyage de la mer du Sud, aux côtes de Chili et de Perou* (1716). In his *Lectures on jurisprudence* (1762-3/1766), Smith cited both Lafitau and P.-F.-X. de Charlevoix, *Histoire et description générale de la Nouvelle-France, avec le Journal historique d'un voyage ... dans l'Amérique septemtionnale* (1744).

so much merit, that I should think there is hardly any writer in the age who ought to be ashamed of acknowledging himself to be the author of it'.[47] The two men appear to have become close friends. Robertson's historical works are, in general, the closest in spirit to Burke's thought. Among other things, they share a progressive sense of history strengthened by the comparative histories of the day. In a letter to Robertson, Burke later wrote that

> we possess at this time very great advantages towards the knowledge of human Nature. We need no longer go to History to trace it in all its stages and periods.... now the Great Map of Mankind is unrolld at once; and there is no state or Gradation of barbarism, and no mode of refinement which we have not at the same instant under our View.[48]

With this great map before them, Europeans were forced to explain the diversity of the cultures they were discovering around the world.[49] Robertson's works, written for the most part after Burke's aborted history, may usefully be compared. This is especially true of the preliminary volume of Robertson's *History of the reign of the emperor Charles V* (1769), a compressed 'philosophical history' of the 'progress of society in Europe in relation to interior government, laws, and manners' as well as military force, the balance of power, and commerce.[50]

Continuing debates over ancient and modern virtues were thus as much geographical as historical. At one extreme were the 'modern' and 'enlightened' histories of Voltaire which emphasised the ignorance and superstition of the ancients.[51] The younger Burke's most sustained comment on Voltaire is critical, not so much of his noted anti-clericism or rationalism, but his historiography.[52] For

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[47] From Robertson, *The history of America* (London, 1818), ii.437n.cxvii as cited in Michael Fuchs, *Edmund Burke, Ireland, and the fashioning of self* (Oxford: Voltaire foundation, 1996), 108.

[48] C iii.350-1. The review in the *Annual Register*, so close to Burke's letter as to permit attributing it to him, noted: 'We view, at this day, what our ancestors once were. We see the first rudiments of society, and behold nations in every stage of their progress, from infancy to adolescence (1777 R 215 *bis*).' Indeed, '[i]f we find a man without property, and feeding on acorns, we also find him a sullen, suspicious, solitary, and unhappy being (1777 R 215 *bis*)'.

[49] Robertson's *History of Scotland* (1757) was 'admirable for the clearness with which he states all the points relative to politics and manners (1759 R 490)'. Writing to thank Robertson for a gift of his *History of America*, Burke commented 'You have employed Philosophy to judge on Manners; and from manners you have drawn new resources for Philosophy (C iii.350-1)'. In return, he sent his 'Letter to the sheriffs of Bristol (1777)', pointing out that Robertson had the 'merchantile comfort of finding the Balance of trade infinitely in [his] favour; and I console myself with the smugg consideration of uninformed natural acuteness, that I have my Warehouse full of Goods at anothers Expence (C iii.352)'. It was the mercantile comforts Bristol enjoyed that were threatened by the American war and analysed in the 'Letter'.

[50] *The progress of society in Europe: a historical outline from the subversion of the Roman Empire to the beginning of the sixteenth century*, (Chicago: Univ. of Chicago Press, 1972 [1769]), 4. It is doubtful that the review of the original in 1769 R 255 *bis* is Burke's. It is unlikely both because of the late date and because the review is critical of the work because of its neglect of English law and marginalisation of England in continental affairs. If what I am arguing is true, it is precisely these elements that Burke would not have criticised.

[51] See Voltaire, *Siècle de Louis XIV* (1751) and *Essai sur les moeurs* (1752-3). See, e.g., the extract of Voltaire's *Philosophy of history* in 1766 R 131 *bis*. 'Luxury has been declaimed against in verse and in prose for two thousand

> Mr Voltaire doubt[s] of nothing himself, and expects his readers should accept of his assertion for Authority;—but—When Historians give us clearer and more perfect Account of things than could be expected from their means of Information, instead of believing them in those parts, we are apt to suspect they tell us no truth in any points.[53]

In addition, Burke credits, even more than Robertson, the importance of clergy and aristocracy to European progress. If this puts him further in opposition to Voltaire, his belief that these institutions were *progressive* forces makes Burke sharply at odds with the primitivists and advocates of ancient liberty. These could celebrate simply, with Rousseau's *Discourse on the origin of inequality* (1754), 'primitive' cultures.[54] But the primitivism of Bolingbroke and many in Britain was based less on the nobility of primitive societies, than a more narrowly 'whiggish' view of history that emphasised the persistence of the principles of the 'ancient constitution' in that of modern Britain. A deist like Voltaire, Bolingbroke's histories were more conjectural than philosophical.[55] Burke opposes him again on the grounds of historiography as much as politics. As will be discussed in greater detail, Burke was

> Sensible that nothing has been a larger theme of panegyrick with all our writers on politicks and history, than the Anglo-Saxon Government. And it is impossible not to conceive an high opinion of its Laws, if we rather consider what is said of them, than what they visibly are. These monuments of our pristine rudeness still subsist; and they stand out of themselves indisputable evidence to confute the popular declarations of those writers, who would persuade us, that the crude institutions of an unlettered people had reached a perfection, which the united efforts of enquiry, experience, learning and necessity, have not been able to obtain in many ages.[56]

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years past, and it has been always cherished'. Voltaire, extracted in 1765 R 248 *bis*.

[52] Burke was critical of Gibbon's style in comparison to that of Robertson. Dugald Stewart used Burke's remarks on the two to make his own comments on Burke's style in which an 'affection of *cant* words and allusions ... so often debases Mr. Burke's eloquence ...'. Stewart, *The collected works of Dugald Stewart* (Edinburgh: Thomas Constable and Co., 1855 reprinted in Bristol by Thoemmes Press, 1994), William Hamilton (ed.), x.231. See also 1777 R 236 *bis*.

[53] N 120.

[54] Rousseau cites Aristotle in his dedication of the work to the Genevan republic. 'We should consider what is natural not in things depraved but in those which are rightly ordered according to nature'. From *Politics*, Bk I, chp 5. But, of course, what was natural for Burke and Rousseau in the *Account* and the *Discourse* were entirely reversed and indeed no one could be further from Rousseau on this point than Aristotle himself.

[55] See esp. Bolingbroke, *Letters on the Study and Use of History* (1752).

[56] WS i.325.

Burke did, in his later writings, equate Voltaire with Rousseau. But they were united less in their philosophies, than in the confidence and zeal of their contrasting 'enthusiasms'. But Burke takes both seriously and both make frequent appearances in the *Annual Register*. He saw, in Voltaire, Rousseau, and Bolingbroke, an enthusiasm which distorted the veracity of their historical accounts. In his own account, there was neither the primitivism of Rousseau or whiggish history, nor the hostility towards the clergy found in Voltaire. But in each, Burke's real criticism is historical, not merely philosophical or political.

Given this, his decision to attempt an English history in the late 1750s is particularly interesting. The idea may have originally been that of his publisher Robert Dodsley. Such histories were very popular and, after the success of the *Vindication* and *Enquiry*, Dodsley must have seen Burke as a valuable resource. The elements of the *Abridgement* which remain show a dense balance of narrative and analysis and highlight its links to the 'philosophical' histories of the period.[57] But when he turned to write his history, the state of English was little better than that of Irish history. It was a common complaint that English or British historians had 'so ill succeeded ... that it was almost feared that the British genius, which had so happily displayed itself in every other kind of writing, and had gained the prize in most, yet could not enter the list in this'.[58] Again, as Montesquieu himself pointed out, this was true because of party prejudice. Whatever its virtues, for example, Thomas Carte's *A general history of England* (1747-55) was a Tory history. Much to the embarrassment of Englishmen, the best known history of England was the twenty-one volume *History of England* (1725) by the Frenchman Paul de Rapin-Thoyras.[59] Less obvious, though no less important, was the work's historical shortcomings. The work nearly ignores the uniqueness of feudal institutions. Generally speaking, however, it was 'whiggish' histories, found in Bolingbroke and Blackstone, that were orthodoxy for much of the eighteenth century.[60] Burke's objections on Irish affairs notwithstanding, it was the 'historical work Mr.

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[57] Shortly afterwards, Oliver Goldsmith wrote his *Abridgement of the history of England, from the invasion of Julius Caesar to the Death of George the Second* (1774) and a *History of the Earth, and animated nature*, reviewed in 1774 R 242 *bis*.

[58] 1761 R 301 *bis*. Swift had made the same claim as early as 1710, before beginning his (unfinished) *History of England*.

[59] Cf. Laurence Echard, *History of England* (1718).

[60] There is much of value in Robert Willman, 'Blackstone and the 'theoretical perfection' of English law in the reign of Charles II', (1983) 26 *Hist J* 39, esp. as concerns Blackstone's discussion of feudalism and his critique of Locke, and by implication, those later Whigs who found Locke appealing. But Willman's suggestion that Blackstone's analysis was a 'remarkable departure' from a debased version of the ancient constitution seems unpersuasive. Blackstone's occasional comments on the progress of the law are an insufficient defence for what remains, in sum, a claim that the progress of English law is a *restoration* of ancient privileges. It is this that links his 'County' Toryism

Hume ... published, which discharged our country from this opprobrium.[61] In a wider perspective, Burke saw Hume's philosophical histories as undermining party-political histories, taking to task, as he had contractualism, the vulgar whiggish apologetics of the conquest and of Magna Charta. With Hume's 'scientific' whiggism and establishment Whig writers, Burke would see the 'strange chaos of liberty and tyranny, anarchy and order, [that] the constitution, we are now blessed with, has at length arisen'.[62] These stressed, not ancient liberties reclaimed, but modern liberties obtained, especially after the events of 1688-9. The development of a civil society was the very reverse of Saxon liberty. Civilisation was a European legacy and in Britain involved a limited, but substantive, monarchy.[63] Already evident in the *Account*, this creative and progressive chaos was increasingly seen by Burke as precarious.

Burke's historical interest continued, particularly after his return to Dublin in the early 1760s. The 'Whiteboy disturbances' revealed the degree to which the Irish past was present to all parties in Ireland.[64] These and similar disorders inevitably took on deeper cultural and political dimensions. Such '*popular* Tumults ... must necessarily happen amongst those who form the far greater part of Ireland', especially among the 'people of the lowest Class'.[65] Any criminal act, or any act deemed criminal by the penal laws, appeared treasonous, 'any grievance real or imaginary ... was metamorphosed into a conspiracy against the state, and prosecuted as such'.[66] Burke's work on the *Abridgement*, coinciding with his return to Dublin, absorbed considerable energies. It was complete in part, but never published and at some point discontinued. The precise reason for this remains unclear. Certainly the works of Hume might have been seen in many ways to occupy the field. And the demands of William Hamilton, to whom Burke was personal secretary, clearly made his work on the histories difficult. Ending only at the Magna Charta, however, Burke had already disturbed important English legal and political myths. The

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with that of Bolingbroke and makes him considerably less historically sophisticated than Burke.

[61] 1761 R 301 *bis*. Other Scots beside Hume were major elements in the historical writings of the time, whose work was preceded by William Guthrie, whose *History* (1744-51) had elements of an anti-whig historiography, and Tobias Smollet's contemporaneous *Complete history of England* (1757-8). Smollet would also update Hume's *History*.

[62] 1761 R 301 *bis*. The parts of Hume most relevant to the Constitution were the last to be published. Burke's history, prepared for the printer in 1760, would thus have preceded it.

[63] Cf. Duncan Forbes, *Hume's philosophical politics* (Cambridge: Cambridge Univ. Press, 1975), 297. But note the 'Limits of philosophical history', Id., 308-23. See Hume, 'Rise and progress of arts and sciences' in *Selected essays* (Oxford: Oxford Univ. Press, 1998).

[64] Cf. Burke's response to the defeat of the Scottish Jacobites at S 244n1.

[65] C vii.443. See C vii.443.

[66] WS ix.602. '[I]t is not about Popes, but about potatoes that the minds of this unhappy people are agitated (WS

prospect of continuing, and his own links beyond the Pale, must have looked uninviting, particularly as he approached Irish affairs. While these same considerations would have made an Irish history more difficult still, Burke's historical work of the period and the 'Tracts on popery' that followed soon after, reveal that appreciation for Irish history to be both deep and deeply passionate. They have been given far too little attention as their relevance to Irish history and to jurisprudence especially is considerable.[67]

In this confusing area, scientific and vulgar whiggism invariably mixed. If anything, the deficiencies evident in English history were more obvious still in jurisprudence and legal history. In his fragmentary 'Essay towards an history of the Laws of England', probably written as a draft for the English history, Burke singles out the 'persuasion hardly to be eradicated from the minds of our Lawyers, that the English Law has continued very much in the same state from an antiquity, to which they allow hardly any sorts of bound'.[68] This belief in a constitution more eternal than ancient, was 'visionary', the failure to understand 'that such mighty changes in manners, during so many ages, always must produce a considerable change in laws, and in the forms as well as the powers of all governments'.[69] Here the young Burke singles out for criticism the radical republicanism of Nathaniel Bacon, whose *Historical and political discourse of the laws and government of England* (1647-51) remained a work of some importance.[70] The related view that acknowledged change, but only as corruption–the 'Norman yoke'–of the Saxon constitution was equally illusionary. Burke insists on the 'rudeness' and 'simplicity' of the ancient laws and highlights the improvement brought about by European 'communication' and even conquest.[71] Of the party histories, he notes that the Saxon government 'was never supported by any fixed or uniform principle', it was 'no wonder, that the advocates for the several parties among us find something to favour their several notions'.[72]Neither in his early historical works

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ix.648)'.

[67] As noted earlier, some, including Lord Acton, have regretted that it was not Hume, rather than Burke, who discontinued his history.

[68] WS i.323.

[69] WS i.443. See WS i.443 and cf. WS i.444. 'Neither I apprehend will be sufficient to resort to rules of the present practical constitution of the British Empire to our old Laws and Law Books; to resort to contracted Ideas, operating in dark times, on a Limited object; not in the broad daylight of Science, for Governing a Tract of the world, that our Ancestors so far from knowing how to Govern did not know it existed in the Universe (WS ii.47-50).'

[70] The work's full title is *An historical and political discourse of the laws and government of England, from the first times to the end of the reign of Queen Elizabeth: with a vindication of the ancient way of parliaments in England.* It is still quoted approvingly in Stuart's 'Discourse' of 1775.

[71] On the 'conquest' of America, see A i.29-30. See the 'right of original conquest (WS i.452)'.

[72] WS i.435.

nor in his late anti-revolutionary writings does Burke adopt the rhetoric of ancient liberties or the jingoism of vulgar whiggism.[73] His emphasis is always on the contiguity of British *appeals* to, not the content of, the ancient constitution. Especially on the shibboleths of English juries, the Norman conquest, and the Magna Charta, Burke's histories provide a forceful critique of the 'purity of [a] primitive constitution' shared in some measure by both Blackstone and Sullivan.[74] The emphasis, too, on the 'mighty change in manners' points to the importance of Montesquieu on Burke.

Montesquieu's influence on Burke is generally recognised. He was, Burke wrote in the process of criticising him, the 'greatest genius, which has enlightened this age'.[75] Montesquieu had already joined the ancient/modern debates in *The Persian letters* (1721) and *The considerations on the causes of the greatness of the Romans and their decline* (1734).[76] It was the *Spirit of the laws* (1748), however, that was of most importance to Burke and contemporary jurists. Speaking in civic and humanist, as well as jurisprudential voices, Montesquieu's analysis was a far more advanced understanding of historical and legal change than anything in British or European jurisprudence.[77] Montesquieu was critical of the egoism and moral voluntarism of the modern natural law tradition. But he continued to maintain a belief in natural law, combined with a fascination for the historical and cultural diversity of its embodiment in human culture. The social practices and manners of a people, not least their economic structures, influenced the character and content of their laws and institutions.[78] While he placed greater emphasis on the posited nature of positive law, he simultaneous stressed the ultimate reliance on elements beyond positive law. The laws were related

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[73] Cf. T.O. McLoughlin, who argues that the *Abridgement* is a 'decidedly Whig' history. 'Edmund Burke's *Abridgement of English history*', (1990) 5 *Eighteenth-Century Ireland* 45, 57. As McLoughlin characterises it, the 'dividing line among English historians in the decades before Burke wrote was whether the 1688 Revolution marked the end, as Walpole's adherents believed, of monarchical tyranny and the people's servitude, or, as [Bolingbroke's] *Craftsman* argued, it reaffirmed the spirit of liberty which had been evident in the nation's struggles since time immemorial. Burke sided with the latter view which necessarily affected his treatment of many issues, such as the character of various reigns, the emergence of institutions, the Saxons, characters such as William the Conqueror, and the significance of Magna Charta.' Id., 54-5. Particularly in light of Burke's comments in the *Fragment*, which McLoughlin does not discuss, this is untenable. He neglects any third option that both denies the glorification of ancient liberties *and* the belief that liberty was the creation of 1688.

[74] WS i.323. See David Lieberman, *The province of legislation determined: legal theory in eighteenth-century Britain* (Cambridge: Cambridge Univ. Press, 1989), 207, Cairns, 354-6, and Lobban, 3.

[75] WS i.445. See gen. C.P. Courtney, *Montesquieu and Burke* (Oxford: Basil Blackwell, 1963). Cf. David Cameron, *The social thought of Rousseau and Burke: a comparative study* (London: Weidenfield and Nicholson, 1975) and Fuchs, 138-9.

[76] See esp. the 'Troglodyte myth' in *The Persian letters* and the discussion of the 'Causes of Rome's ruin' in *The considerations on the causes of the greatness of the Romans and their decline.*

[77] Charles de Secondat, Baron de Montesquieu, *The Spirit of the laws* (Chicago: William Benton Pub., 1952 -1748]), Thomas Nugent (tr.), *revised by* J.V. Prichard. While Giambattista Vico's *The principles of the new science concerning the common nature of nations* (1725) preceded him, Vico was to remain unrecognised for decades.

[78] 'The laws have a very great relation to the manner in which the several nations procure their subsistence.'

> to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.... all these together constitute … the *Spirit of Laws*.[79]

Montesquieu was crucial to the change from the civic dialectic of public virtues and structures to that of manners and laws. While there is no sharp line between these languages, it was to shift the emphasis from the classical 'Legislator', who could give law to a people, to modern legislators responding to the manners of the people.[80] These modern legislators must be concerned with manners, and the mediating orders and institutions that sustain them, precisely because so little could be done to alter them. In this way, while Montesquieu turns the focus to manners and is far from indifferent to formal institutional structures and laws, his works ultimately remain virtue-centred.

Montesquieu's importance to British jurisprudence was significant. Blackstone, and more clearly Sullivan, incorporated elements of his approach, if few of his reservations about modern Britain.[81] But his influence was nowhere as great or direct as in Scotland. This was more than coincidental. He and Hume were acquainted and Montesquieu sent an early copy of the *Spirit of the laws* to Hume in Edinburgh to assist in its publication.[82] In different ways, Hume, Henry Home (Lord Kames), and Adam Smith each turned this analysis to jurisprudence, combining Hutcheson's naturalism with Montesquieu's historical analysis to create an extremely

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Montesquieu, *The spirit of the laws*, xviii.8.

[79] Montesquieu, *The spirit of the laws*, i.3.

[80] Again, terminology here is confusing. In sociological terms, these may be called 'institutional', where the emphasis is on what I have called corporate *practices*. While the distinction is imprecise, that between manners and laws, I have tried to restrict my use of 'institutions' to more formal systems.

[81] The *Annual Register* reviewer notes of Sullivan's lectures that the 'historical method ... becomes almost necessary, in treating a science which belongs wholly to political society and civil life. The true reason of all law, is best discovered where the principles of all human conduct are only found, in the interest and passions of mankind.' 1772 R 235 *bis*. The extract included is a discussion of the parliaments of England and Ireland.

[82] For a good analysis of Montesquieu's relationship to the Scots, see Richard B. Sher, 'From Troglodytes to Americans: Montesquieu and the Scottish Enlightenment on liberty, virtue, and commerce', in David Wootton (ed.), *Republicanism, liberty, and commercial society, 1649-1776* (Stanford: Stanford Univ. Press, 1994).

sophisticated critique of methodological individualism, rationalism, and egoism. In the words of John Millar, the

> attention of speculative lawyers has been directed to examine the first formation and subsequent advancement of civil society; the rise, the gradual development and cultivation of arts and sciences; the acquisition and extension of property in all its modifications, and the combined influence of these and other political causes, upon the manners and customs, the institutions and the laws of any people.[83]

Of the Scots, it was Kames who linked these studies most closely to jurisprudence in his *Historical law tracts* (1758).[84] Kames explicitly links the historical method with a liberal education. Law was

> only a rational study , when it is traced historically from the first rudiments among savages, through successive changes, to its highest improvements in a civilized society.... Such neglect of the history of law is the more unaccountable, that in place of a dry, intricate and crabbed science, law treated historically becomes an entertaining study ... .[85]

Hume's influence on jurisprudence, he studied law in Edinburgh before turning to philosophy, was more indirect and confusing.[86] It consisted largely from a series of influential 'polite' essays published throughout the 1740s and his *History of England* (1754-62).[87] In the *History*, which cites civilians, Montesquieu, and Hale, natural sociability provided him with the basis of a system of justice, arising naturally, though unintended by human actions.[88] With Montesquieu, all of the Scots sought to reconceptualise luxury and commerce, their own experience since the Union being generally positive in undermining Scotland's more feudal structures. In each of these cases, an anxiety continued for public virtue and a balance was sought between ancient and modern liberty.[89]

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[83] John Millar in William C. Lehrmann (ed.), *John Millar of Glasgow, 1735-1801: his life and thought and his contributions to sociological analysis* (Cambridge: Cambridge Univ. Press, 1960), 347.

[84] Kames, was preceded by another descendent of Lord Stair, John Dalrymple, collateral of Hailes, who employed a Montesquieuan analysis in his *Essay towards a general theory of feudal property in Great Britain* (1757). But the work was limited to real property and dedicated to Kames. Dalrymple later wrote *Memoirs of Great Britain and Ireland* (1771), of which it was noted that the 'truth and weight of history … affect our passions as much as the best-imagined incidents in poetry (1771 R 246 *bis*)'. Kames, a member of the Scottish Court of Session and distant relative of Hume, was also an historian, a moralist, and a critic. Like his fellow Scots, Kames was an advocate of commerce and improvement, and actively sought legal reform which, in the absence of the formalism of the English courts, he could effect more easily than his correspondent in England, William Murray, Lord Mansfield.

[85] From the preface to the *Historical law tracts* quoted in William C. Lehmann, *Henry Home, Lord Kames, and the Scottish enlightenment: a study in national character and in the history of ideas* (The Hague: Martinus Nijhoff, 1971), 314. 'A rational inquirer is not less entertained than instructed, when he traces the gradual progress of manners, of laws, of arts, from their birth to their present maturity.' Id. See also David Lieberman, 'The legal needs of a commercial society: the jurisprudence of Lord Kames' in Itvan Hont and Michael Ignatieff, *Wealth and virtue: the shaping of political economy in the Scottish Enlightenment* (Cambridge: Cambridge Univ. Press, 1983), 206.

[86] Like Hobbes, Hume tended to use 'justice' in the juridical, rather than moral, sense. If his epistemological scepticism makes it difficult sometimes to appreciate, Hume denied both the moral voluntarism and egoism of Hobbes. There is still a sense, following perhaps Hutcheson, in which 'artificial' law comes in where 'natural' love fails, but Hume is convinced it fails much more often than did Hutcheson. A 'natural' virtue proceeded 'without the intervention of thought or reflection' so that a system of justice or legal order was 'artificial', but remained dependent on genuinely natural [virtues]. 'Natural may be opposed, either to what is *unusual, miraculous* or *artificial*. In the two former senses, justice and property are undoubtably natural. But as they suppose reason,

Burke saw history in similar terms.[90] His focus was, by and large, on the wider history of manners, rather than the still fashionable accounts of the exploits of princes. The 'changes, which have happened in the manners, opinions, and sciences of men ... as worthy of regard as the fortune of wars, and the revolutions of kingdoms'.[91] This was a large part of his critique of English jurisprudence. English 'historical jurisprudence' had matured throughout the seventeenth century, the work of Edward Coke, John Selden and Matthew Hale being especially important.[92] Indeed, Hale's *History of the common law of England* (published posthumously 1714) remained in Burke's day the standard English legal history.[93] Hale's work was a great advance on Coke,

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forethought, design, and a social union and confederacy among men, perhaps that epithet cannot strictly, in the last sense, be applied to them.' *An enquiry concerning the principles of morals* ((2nd edn) La Salle: Open Court, 1966 [1751/1777 edn]), 149. See also *Enquiry* 111, 147 *et seq.* and the conclusion of *A treatise of human nature* (1739-40). This parallels the distinction between 'imperfect' and 'perfect' rights and, in the modern natural law vernacular, it might be best thought of as imperfect and perfect 'justice'. See Knud Haakonssen, *The science of a legislator: the natural jurisprudence of David Hume & Adam Smith* (Cambridge: Cambridge Univ. Press, 1981), 24. Generally speaking, 'justice' continued to be used for 'beneficence' as well as for the 'system of justice'.

[87] See Nicholas Phillipson, *Hume* (London: Wedenfeld & Nicholson, 1989), 15. See esp. 'The Anglo-Saxon government and manners' and 'The feudal and Anglo-Norman Government and manners' in *The history of England.* Because they were less explicitly linked to contemporary politics, Hume's *History of England* and political essays, rather than Burke's *Reflections*, were embraced by many French counter-revolutionaries. See Laurence L. Bongie, *David Hume: prophet of the counter-revolution* (Oxford: Clarendon Press, 1965).

[88] 'History, experience, reason, sufficiently instruct us in this natural progress of human sentiments, and in the gradual enlargement of our regards to justice, in proportion as we become acquainted with the extensive utility of that virtue.' Enquiry, 25.

[89] And the 'natural place of virtue is near to liberty; but it is not nearer to excessive liberty than to servitude'. Montesquieu, *Spirit*, viii.3.

[90] L 64.

[91] WS i.358. This is not to deny the importance of individual actions. A 'common soldier, a child, a girl at the door of an inn, have changed the face of fortune, and almost of Nature (L 64)'. The 'girl' is Joan of Arc. 'But history, in the nineteenth century, better understood, and better employed, will, I trust, teach a civilized posterity to abhor the misdeeds of both these barbarous ages (RRF 250).'

[92] Cf. Harold J. Berman, 'The origins of historical jurisprudence: Coke, Selden, Hale', (1994) 103 *Yale L J* 1651.

[93] In an early and influential essay, Pocock suggested that Burke's later praise of Hale was evidence of his reconsideration of this early criticism. See 'Burke and the ancient constitution—a problem in the history of ideas', (1960) 3 *Hist J* 125, 141and WS viii.302-3. Burke, he says, 'reverted to the position he formerly rebuked Hale for adopting'. Id., 142. In general, what Burke stresses is not an inherent unknowability of the facts of history, though this was sometimes the case, but the *complexity* of such inquiries and the importance of expert opinion.

stressing the continuity over the constancy of the law.[94] For Burke, however, Hale's *History*, 'though not without merit, is wholly unworthy of the high reputation of the author'.[95] It failed to 'record the great changes and remarkable revolutions in the law'.[96] This 'historical jurisprudence' was a largely *jurisprudential* history. Indeed, for all the talk of the customary nature of English law, there was little sensitivity to the relationship between manners and law in English jurisprudence.[97] Davies argued, for example, that *English* law was 'nothing else but the *Common Custome* of the Realm ... consisting in use and practice ... [and] recorded and registered no-where but in the memory of the people'.[98] But this 'common custom' had long since ceased, by its rationalisation, to be a *popular*, rather than a merely judicial, custom.[99] And it had never been such, in any sense, in Ireland. If laws relied in some sense on the 'approbation' of the people, their reason and affections, as a whole, it was, and not necessarily inappropriately, the custom of legal elites. While there is no easy metric by which to distinguish manners and laws, as law becomes institutionalised and the province of experts, they become as well the antithesis of social practice. This is especially true where, as in Ireland, the experts and the people were so often of different traditions.

Further, the development of a 'regular, consistent, and stable jurisprudence' was important, but not in itself sufficient. This was particularly true where, as in Ireland, the consistent application of the penal laws could hardly be conceived of as justice.[100] As Coke had attempted to distinguish natural from artificial reason, it might be said that for Burke law was an

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[94] Hale wrote that there existed the 'same English laws now that they were six hundred years [ago]' just as the 'Argonauts Ship was the same when it returned home, as it was when it went out, tho' in the long Voyage it had successive Amendments, and scarce came back with any of its former Materials'. *A history of the common law* ((3rd edn) Chicago: Univ. of Chicago Press, 1971 [1713]), C.M. Gray (ed.). This analogy, Hale did not originate it, is wonderfully ambiguous, but, it seems to me, meaningless. In any event, this was not Burke's view. Not only was the timber of the old ship newly cut, its hull had been strengthened and modern accruements added. It was no longer the *same* vessel at all.

[95] WS i.323.

[96] WS i.323.

[97] Gerald J. Postema has written that, for Hale, the 'identity of the people depends more on the identity of the law than the identity of the law depends on the identity of the people'. *Bentham and the common law tradition* (Oxford: Clarendon Press, 1986), 21. See Id., 26. Admitting this as true, it is a distinction considerably different from that Burke makes. Cf. Id., 67. See also Postema, 'Some roots of our nature of precedent' in Laurence Goldstein (ed.), *Precedence in law* (Oxford: Clarendon Press, 1987).

[98] From Davies's 'Introduction' to his *Irish Reports* (1612) cited by Pocock, *The ancient constitution*, 32-3.

[99] Cf. James Q. Whitman, 'Why did the revolutionary lawyers confuse custom and reason', (1991) 58 *U Chi L Rev* 1321, 1331.

[100] Law was particularly important in eighteenth-century Ireland, both in the litigiousness generated by the Penal laws and in the clash of legalism with custom. These are recurring themes in the works of Maria Edgeworth. See, for example, *Castle Rackrent* (1800), written just before the Union, but set before 1782 (and devolution to the Irish Parliament).

artificial custom. As a consequent of linking the two too closely, and of prioritising the laws, Hale's legal history was insufficiently attentive to the actual relationship between laws and manners.[101] For Burke, law was hardly the defining element of the people.[102] But the 'science of jurisprudence' was important, both a gift of this inheritance and the basis for additional progress. The value of studying its history was both liberal and enlightening. For

> What can be more instructive than to search out the first obscure and scanty fountains of that jurisprudence which now waters and enriches whole nations with so abundant copious a flood—to observe the first principles of RIGHT springing up, involved in superstition and polluted with violence, until at length of time and favourable circumstances it has worked itself into clearness. The Laws sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power; then, victorious over tyranny, growing stronger, clearer, and more decisive by the violence they had suffered; enriched even by those foreign conquests, which threatened their entire destruction; softened and mellowed by peace and Religion; improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenious science?[103]

This is, of course, the reverse of Burke's comments in the contemporaneous *Vindication.* It was these elements, far beyond the focus of Hale's *History* that 'were great encouragements to the study of historical jurisprudence, particular of our own'.[104] And if law was complex, it was not simply because of its artificial reason or mystery, but because it was connected to the whole web of social practices and relationships. It was unavoidably rooted in the past and the community, but not a '*Gemeinshaftlich* conception of community' if by that is meant a static and homogeneous whole.[105] The Burkean model of social and legal change had more to do with the collective, progressive growth of science and similarly combined the general principles of induction with the deductive reasoning of experience.[106]

A RUDE AND BARBAROUS PEOPLE:

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[101] 'If these principles are admitted, the History of the Law must in a great measure to be deemed superfluous (WS i.323).' Cf. Harold J. Berman, 'Origins', 1693, 1727.

[102] I believe this internal/external distinction is the point of J.M. Kelly's assertion that Burke had 'some claim to rank ... as the father of historical jurisprudence', by which he means to associate Burke with the German 'historical school'. J.M. Kelly, *A short history of Western legal theory* (Oxford: Clarendon Press, 1992).

[103] WS i.322.

[104] WS i.322.

[105] Postema, 66.

[106] Cf. Berman and Charles J. Reid, Jr., 'The transformation of English legal science: from Hale to Blackstone', (1996) 43 *Emory L J* 437, 508-9.

The few pages of the *Fragment* provide critical clues with which to understand Burkean jurisprudence. With the *Abridgement*, and his contributions to the *Account*, these serve to show how law was placed in the broader history and progress of manners. They also make clear the degree to which Burke's thoughts were at the forefront of the complex jurisprudential and historiographical context of mid-century Britain. Burke could, of course, draw on his Irish experiences and liberal education. But he was also extraordinarily well read in contemporary history, including both comparative and philosophical histories. And, in addition, those sources closest to his analysis were the most sophisticated of the day. Montesquieu, especially the *Spirit of the laws*, but also the civic critique of the *Considerations*, were important sources. He would have made very clear to Burke the degree to which manners were of more importance than laws. Hume's histories, too, with all their prejudices, were invaluable.[107] These, perhaps supplemented by his philosophical works and polite essays, provided a progressive history that avoided party-political prejudices of the day. There were, of course, differences between these three men. Both were more anti-clerical than Burke, a point of some importance in the events of France. Between these different influences, in some points working on parallel lines, in other drawing from their work, Burke found the materials for his own critique of British history and English jurisprudence. His second major criticism in the *Fragment* was the insularity of English jurisprudence, the belief that English law 'was formed and grew up among ourselves'.[108] This was not a fault of Hale, but was a common ingredient of vulgar whiggism. Burke instead emphasised that the

> present system of our laws, like our language and our learning, is a very mixed and heterogeneous mass, in some respects on our own; in more borrowed from the policy of foreign nations, and compounded, altered, and variously modified, according to the various necessities which the manners, the religion, and the commerce of the people have at different times imposed ...[109]

British civilisation, in addition to the contribution of non-English Britons, the several nations of the British state, was one element of a much wider European inheritance, the 'similitude ... of religion, laws and manners' which made up the 'Commonwealth' of Europe.[110]

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[107] Cf. Hume, 'The Anglo-Saxon government and manners' and 'The feudal and Anglo-Norman Government and manners' in *The history of England* 160-85, 455-88.
[108] WS i.323.
[109] WS i.325.

Unlike the Scots, Burke does not elaborate a specific schematic of historical stages. But they remain important to understanding his 'progressive' history. Migrations make up a large 'part of the first history of almost all nations. For in these ages, men subsisted chiefly by pasturage or hunting.'[111] And if pasturage and hunting are little distinguished, 'agriculture' represents an important technological advance.[112] Commerce, so often disdained by the ancients comes much later. This was, of course, true of ancient Europe. Similarly, among the Amerindians, the 'only occupations are hunting and war. Agriculture is left to the women. Merchandize they contemn'.[113] Burke begins his history with England at the time of Caesar's invasion (c. 57 BC). It was a time 'destitute of all those improvements, which in a succession of ages it has received from ingenuity, from commerce, from riches and luxury'.[114] One element of measuring this improvement, and the happiness of societies, was their population. Burke takes the 'modern' view that ancient nations were less populous than modern.[115] In doing so he opposed not only Robert Wallace, Hume's opponent on this issue, but Machiavelli and Montesquieu.[116] Burke notes:

> Many writers indeed imagine, that these migrations, so common in primitive times, were caused by a prodigious increase of people beyond what their several territories could maintain. But this opinion, far from being supported, is rather contradicted by the general appearance of things in that early time, when in every country vast tracts of land were suffered to lie almost useless in morasses and forests. Nor is it, indeed, more countenanced by the ancient modes of life, no way favourable to population.[117]

These 'first settled countries ... were rather thinly peopled'. [118] The same applied to contemporary Amerindians who could occupy 'an immense extent of country' as a result of 'their hunting life, and their inhuman wars'.[119]

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[110] L 133. See also WS ix.248-9. Burke does occasionally suggest that the constitution is in perfect equilibrium. See, e.g., 'Speech on the representation of the Commons in Parliament (1782)' in Peter J. Stanlis, *Edmund Burke: selected writings and speeches* (Washington, D.C.: Regnery Publishing, Inc., 1963), 396. But this sentiment is far out-numbered by Burke's admission of the necessity of constitutional change.

[111] WS i.346. See WS i.352.

[112] WS i.347-8.

[113] A i.156. See A i.174, PH xix.695.

[114] WS i.348.

[115] Population was thought an essential element in measuring the happiness of a nation, a point of some importance in the *Reflections*.

[116] E.g. Wallace, *Dissertations on the numbers of mankind in antient and modern times* (1753); Machiavelli, *Florentine history* (1525); Montesquieu, *Persian letters* (1721), letter cxii. See also Burke's allusions to the Hume/Wallace debate in the *Vindication of natural society* (1756) at WS i.166-7.

[117] WS i.346.

[118] WS i.346.

Similarly, Burke repeatedly insists on the 'rudeness' and 'simplicity' of Saxon manners and laws.[120] He acknowledges the degree to which the ancient Britons valued liberty, but this was little more than lawlessness. As a result, 'this fierce undisciplined people had no patience' and it was 'hard to compleat a considerable design' of any sort.[121] 'Liberty in its fullest extent' was also the 'darling passion' of the Amerindians.[122] Such 'natural liberty' was, unsurprisingly for the author of the *Vindication*, a problem to be overcome rather than an ideal to pursue.[123] It was true that laws 'could be equally prejudicial to improvement'.[124] Some balance between the desire for liberty and public virtue was necessary. For a 'life of absolute licence tends to turn men into savages. The other extreme of constraint operates much in the same manner; it reduces them to the same ignorance, but leaves them nothing of the savage spirit'.[125] And, in light of the hostility of governments based on simple, rather than mixed, forms, the Saxon Constitution was a thing of 'great simplicity '.[126] It was a 'species of democracy, poised and held together by a degree of monarchical power'.[127] For Burke, it was this vast gulf between the powerful and the masses that combined for the worst sort of tyranny. And

> In all very uncultivated countries, as society is not close nor intricate, nor property very valuable, liberty subsists with few restraints. The natural equality of mankind appears, and is asserted: and therefore there are but obscure lines of any form of government. In every society of this sort, the natural connexions are the same as in others, though the political ties are weak. Among such barbarians therefore, though there is little authority in the magistrate, there is often great power lodged, or rather left in the father: for as among the Gauls, so among the Britains, he had the power of life and death in his own family, over his children and his servants.[128]

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[119] WS i.347.
[120] Cf. WS i.430.
[121] WS i.457.
[122] A i.163. 'To this they sacrifice every thing (A i.163).'
[123] A i.10. See F (M) A.i.39a on law and liberty.
[124] WS i.438.
[125] WS i.438.
[126] WS i.438.
[127] WS i.439.
[128] WS i.349. The close relationship here between familial manners and political authority was soon a point of some importance in John Millar's *Origins of the distinctions of ranks* (1771), the full text of which is included in Lehmann, *John Millar of Glasgow 1735-180*. The Burkes had written that, in America, the women 'are not at all subject to the great subordination in which they are placed in countries where they seem to be more respected (A i.173)'. And in the *Abridgement*, Burke noted that '[a]mong the ancient nations of Germany, the female sex was possessed not only of its natural and common ascendant, but it was believed peculiarly sacred (WS i.394)' and that 'female Druids were in no less esteem for their knowledge and sanctity of the males (WS i.350)'. Cf. Fuchs, 227.

The degree to which such natural equality impedes social progress is an important element in Burkean analysis. Beyond the family, however, '[s]uch a people must necessarily be united to each other by very feeble bonds; their ideas of government will necessarily be imperfect, their freedom and their love of freedom great'.[129]

The distinction and development of laws from primitive manners was critical to this analysis. Here Montesquieu's influence is particularly clear. As with the American colonists, whose 'infant settlements surely demanded a more simple, clear, and determinate legisllation', it was in general necessary that laws were 'suited to the time, to their country, and the nature of their ... way of life'.[130] The laws as they develop are simple. They are '[g]overned ... by manners, not by laws'.[131] Among the Amerindians, the 'council of their elders' handled disputes and these 'suits are few and quickly decided, having neither property nor art enough to render them perplexed or tedious'.[132] Primitive societies were dominated by public opinion and social norms. Positive laws could 'hardly subsist amongst a people, who have not the use of letters. It was a species of arbitrary power, softened by the popularity, from whence it arose. It came from popular opinion, and by popular opinion it was corrected'.[133] In such societies, these 'customs operate amongst them better than laws, ... they become sort of nature to the governours and the governed'.[134] In general, the 'want of laws, and of an universal strong coercive power, is not perceived in a narrow society, where every man has his eye upon his neighbour, and where the whole bent of every thing they do is to strengthen those natural ties by which society is principally cemented'.[135] The importance of this habituation to the familiar was considerable, 'example, education, and the constant practice of their ceremonies, gives them the most tender

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See WS iii.281.

[129] WS i.429.

[130] A ii.304. Burke later wrote, of the American colonies, that: 'Nothing in the history of mankind is like their progress. For my part, I never cast an eye on their flourishing commerce, and their cultivated and commodious life, but they seem to me rather antient nations grown to perfection through a long series of fortunate events, and a train of successful industry, accumulating wealth in many centuries, than the Colonies of yesterday; than a set of miserable out-casts, a few years ago, not so much sent as thrown out, on a bleak and barren shore of a desolate wilderness three thousand miles form all civilised intercourse (WS ii.429)'.

[131] A i.168. Cf. A i.168-9.

[132] A i.167.

[133] WS i.430. 'If opinion supports all government, it not only supported in the general sense, but it directed every minute part, in the Saxon polity (WS i.447).'

[134] WS i.430. 'If people, so barbarous as the Germans, have no laws, they have yet customs, that serve in their room (WS i.430).' And, at the time of King Edward the Confessor, or at least at the time of the collection of laws attributed to him, 'it was ... by traditionary customs that the people were for the most part governed (WS i.328)'.

affection for their country, and inspires them with a most religious regard for their constitution and the customs of their ancestors'.[136]

For all their values, the manners of primitive societies were limited in ensuring public happiness. In early England, there was a 'very imperfect attempt at government … a system for a rude and barbarous people, calculated to maintain them in their barbarity'.[137] Civilised society, and a modern system of jurisprudence, were far removed from these ancient origins. These were but the 'faint and incorrect outlines of our Constitution, which has since been so nobly fashioned and so highly finished. This fine system, says Montesquieu, was invented in the woods but whilst it remained in the woods, and for a long time after, it was far from being a fine one'.[138] This fine system was, in fact, the fruit of European culture, communication, and commerce.[139] The 'Saxon laws, which comfortably to their manners, were rude and simple' and were continually 'improved by foreign communication'.[140] In the *Fragment*, Burke identified the 'three capital sources' of legal influence as the 'ancient traditionary customs of the North' which the

> canons of the Church.... corrected, mitigated, and enriched ...; and the clergy having once bent the stubborn necks of that people to the yoke of religion, they were the more easily susceptible of other changes introduced under the same sanction. These formed the third source—namely, some parts of the Roman civil law, and the customs of other German nations.[141]

Even so, before the Norman conquest, the English 'were extremely imperfect in their ideas of law, the civil institutions of the Romans, who were the legislators of mankind, having never reached them.'[142] Where whiggish histories saw the conquest as the imposition of a 'Norman yoke', Burke saw the English as a 'people without learning, without arts, without industry, solely pleased and occupied with war, neglecting agriculture, abhorring cities, and seeking their

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[135] A i.168-9.
[136] A i.168.
[137] WS i.430. See the 'superstitious ideas of the ancient Northern world (WS i.446)'.
[138] WS i.430. Again, Burke is not adverse to criticizing Montesquieu , who here 'seems to ... have been carried ... into a subtlety hardly to be justified by the way of thinking of that unpolished period (WS i.445)'.
[139] Kames similarly thought of social and economic commerce as closely linked and 'laid down as an universal maxim, that in every society, the advances of government towards perfection, are strictly proportioned to the advances of the society towards intimacy of union.' *Historical law tracts*, ii.77.
[140] C i.330-1. See WS i.399, L 72. After the Glorious Revolution, and '[u]nder the British union, the union of Europe was consolidated (L 119)'.
[141] C i.331.
[142] WS i.448. 'These are the first rude chalkings out of our jurisprudence (WS i.448).'

livelihood only from pasturage and hunting'.[143] They were among the 'most backward in Europe in all improvements, whether in military or in civil life'.[144] Generally speaking, there was 'no appearance of a regular, consistent, and stable jurisprudence. However, it is pleasing to observe something of equity and distinction gradually insinuating itself into these unformed materials; and some transient flashes of light striking across the gloom, which prepared for the full day, that shone afterwards'.[145] This is followed by a claim perhaps even more startling, against the enlightened prejudices of his contemporaries, that the learning of the clergy, in both theology and canon law, made them essential agents in development of European progress. The 'clergy, who kept up a constant communication with Rome, and were in effect the Saxon legislators, could not avoid gathering some informations from a law, which never was perfectly extinguished in that part of the world'.[146]

The Norman invasion thus joined England with the wider progress of society in Europe. 'English law, manners, and maxims were suddenly changed; the scene was enlarged; and the communication with the rest of Europe being thus opened, has been preserved ever since in a continued series of wars and negotiations'.[147] The invasion, like previous conquests, could have the unintended consequence of enlightening the natives. Consistent with whiggish histories, Blackstone had blamed William the Conqueror (and the Normans) for the corruption of English liberty. Indeed, even in assigning blame to William for the introduction of feudalism, he denies that it was imposed.[148] It was rather accepted by the native English.[149] Burke's portrayal is far different, for if he argues that William initially attempted to govern by native laws in the hopes of uniting the conquerors and the conquered, 'he proceeded to execute his plan ... of modelling the state according to his own pleasure'.[150] He did, however, effectively establish feudalism in England. He distributed land to Normans 'to be held by the tenure of knight service' general throughout Europe.[151] In addition,

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[143] WS i.429.

[144] WS i.428.

[145] WS i.330. John Finnis, the leading modern natural lawyer, notes that the 'Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good'. *Natural law and natural rights* (Oxford: Clarendon Press, 1980), 274.

[146] WS i.330.

[147] WS i.453. England had been 'little known or considered in Europe'. WS i.453.

[148] Cf. John Cairns, 'Blackstone, the ancient constitution and the feudal law', (1985) 28 *Hist J* 711; Hume, 'The feudal and Anglo-Norman Government and manners' in *The history of England,* 461, and; McLoughlin, 55-6.

[149] Cf. Molyneaux.

[150] WS i.464. He initially acted 'according to their ancient laws.... [with] no pretences, which arose from absolute conquest (WS i.459). But he 'began to change his maxims of rule to a rigour (WS i.460)' and '[b]y his whole conduct he appeared resolved to reduce his subjects of all orders to the most perfect obedience (WS i.461)'.

> For the same purpose of strengthening his authority, he introduced the Norman Law, not only in substance, but in all its forms; and ordered that all proceedings should be had according to that law in the French language. The change, wrought by the former part of this regulation, could not have been very grievous, and it was partly the necessary consequence of the establishment of the new tenures, and which wanted a new law to regulate them.

In other respects, the Norman institutions were not very different from the English.[152] But the English had 'entirely altered the whole frame of our jurisprudence since the Conquest'.[153]

Burke reveals a common eighteenth-century ambivalence towards 'primitive' peoples in which a respectful awe and condescension are variously intermixed. The primitive virtues, virtues dear to Burke, were an intense loyalty to family and place.[154] And, in an era that modern writers suggest a deepening attachment in the West to family, the Burkes wrote of the Amerindians, that '[f]amily love, rare amongst us, is a national virtue amongst [them], of which they all partake.'[155] Their hospitality to those with which they had chosen to associate was considerable.[156] And, drawing explicitly the parallel to the past, there were '[f]riendships ... amongst them, fit to vie with those of fabulous antiquity'.[157] The 'extremes' to which they 'push their friendship or their enmity ... is the character of all strong and uncultivated minds'.[158] But, this passion may also be directed towards the most 'uncivilised' acts of brutality. The Burkes' detailed discussion of torture

> serves to shew ... in the strongest light, to what an inconceivable degree of barbarity the passions of men let loose will carry them. It will point out to us the advantages of a religion that teaches a compassion to our enemies, which is neither known nor practised in other religions; and it will make us more sensible than some appear to be of the value of commerce, the arts of a civilized life, and the lights of literature; which if they have abated the force of some of the natural virtues by the luxury which attends them, have taken out likewise the sting of natural vices, and

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[151] WS i.464.
[152] WS i.471-2.
[153] WS i.324.
[154] He notes that when the Romans evacuated Britain, 'they left a country, with regard to the arts of war or government, in a manner barbarous, but destitute of that spirit, or those advantages, with which sometimes a state of barbarism is attended (WS i.383).' Cf. WS i.384.
[155] A i.168-9.
[156] A i.158-9.
[157] A i.168-9. In their games, 'they celebrate ... in the spirit of those which the ancient Greeks and Romans celebrated upon similar occasions (A i.172)'. See WS i.342-3.
[158] A i.159.

> softened the ferocity of the human race without enervating their courage.[159]

But such torture, and the 'constancy of the sufferers in this terrible scene shews the wonderful power of an earthly institution, and a ferocious thirst of glory, which makes men imitate and exceed what philosophy, or even religion can effect'.[160] The power of such an 'earthly institution' is considerable. Burke's *Enquiry*, published in the same year, thus finds a special urgency to maintaining the balance between any universal, native dispositions and the 'strange turns of the human mind, fashioned to any thing by custom'.[161]

The European influence in America was complex and not wholly positive.[162] For example, while the 'disorders which a complicated luxury has introduced, and supports in Europe, are strangers here', an 'excess in drinking, which with us is rather immoral than very destructive, amongst this uncivilized people, who have not art enough to guard against the consequences of their vices, is a public calamity.[163] In general, Burke shows an appreciation of these more primitive manners, once they have progressed beyond barbarity, while believing them less likely to effect human happiness. And because Burke makes an appeal, throughout his works, to a genuine common or universal frequently superior to 'enlightened' speculation, the comparative aspects of *Account* are particularly interesting. In discussing hurricanes, for example, the Burkes noted that

> in general one may observe, that ignorant country people and barbarous nations, are better observers of times and seasons, and draw better rules from them, than more civilized and reasoning people, for they rely more upon experience than theories, they are more careful of traditionary observations, and living more in the open air at all times, and not so occupied but they have leisure to observe every change, though minute, in that element, they come to have great treasures of useful matter, though as it might be expected, mixed with many superstitious and idle notions as to the causes. These make their observations to be rejected as chimerical in the gross by many literarti, who are not near so nice and circumspect as they ought to be in distinguishing what this sort of people may be very competent judges of, and what not.[164]

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[159] A i.185. See WS i.447.
[160] A i.185.
[161] A i.181. 'Custom reconciles us to everything (PE 135)'.
[162] See the proof of 'On the employment of savages in the American war' from WWM archives labeled only as Reel 25 of *Politics in the age of revolution, 1715-1848–Part I: The papers of Edmund Burke, 1729-1797, from Sheffield Archives, Sheffield Libraries and Information Services and Northamptonshire Record Office* (Malborough: Adam Matthews Publications, 1994).
[163] A i.157.
[164] A ii.98.

Throughout the *Account*, the Burkes draw particular attention to the degree to which discoveries in the arts, philosophy, and travel were not the conclusions of *a priori* reasoning, but a mix of 'wise design and fortunate accident'.[165]

But Burke's greatest sensitivity to less civilised cultures came in those areas closer to his own past. Given his sympathies with, perhaps estrangement from, a Celtic past, it should hardly be surprising that these observations intersect with the wider ancient-modern debate (and the dilemma posed for Burke by the 'revolution in France'). For the 'most ignorant and barbarous nations have frequently excelled in similitudes, comparisons, metaphors, and allegories, who have been weak and backward in distinguishing and sorting their idea'.[166] This commonplace was skilfully manipulated by James MacPherson, whose *Ossian* (1762-3) presented his compositions as translations of an ancient Gaelic poet.[167] The result was an immediate and great debate about their veracity. The poems were Scots variants of Irish legends (common to both) and Burke was initially quite enthusiastic about the work. His first reaction was that there were 'not sufficient monuments of the arts, customs, and manners, of the times and countries in which these scenes are laid' to confirm them.[168] But the

> stile so consonant to the ideas, the ideas so agreeable to the simple manners of remote ages, and both of a cast so different from the modern modes of expression and thinking; hunting the subsistence, and war the occupation of this pristine people; the savage grossness of their vices, and the wild sublimity of their virtues; the extravagant heroism of the principal characters; that spirit of hospitality which invited the stranger by seven different ways; … their superstitious notions so beautifully poetic; … all these , whilst they give us a striking picture of the manners, the customs, the superstitions of the times … seem utterly beyond the reach of any modern invention.[169]

The writing was 'really Irish in an English dress' and, even in translation, it preserved 'the majestic air, and native simplicity of a sublime original'.[170] Burke only slowly and reluctantly came to accept these 'sublime' works as modern forgeries.[171]

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[165] A i.278.

[166] PE 16.

[167] MacPherson was a political writer with connections with Lord Bute and, in 1771, he 'published a tendentious and controversial *Introduction to the ancient history of Great Britain and Ireland*, asserting the racial and ethnic superiority of the Celts to the English'. John Kenyon, *The history men: the historical profession in England since the Renaissance* ((2nd edn) London: Weidenfeld and Nicolson, 1993 [1983]), 68.

[168] 1760 R 254 *bis*. There was 'far less doubt of the merit, than of the authenticity' of the work. 1760 R 253 *bis*.

[169] 1761 R 278 *bis*. 'Indeed both its defects and excellences speak loudly in favour of its antiquity (1761 R 282 *bis*). Cf. WS i.389-90 for Burke's criticisms of the acceptance of King Arthur's exploits as fact.

[170] 1761 R 279, 276 *bis*. Millar, writing in 1771, still referred to the work as representing a 'degree of tenderness and

Burke was writing the 'Tracts on popery' at approximately the same time as the *Abridgement*. It is difficult not to see parallels to Ireland in his discussions of the repeated conquests of England and their attendant benefits. Conquest, in its most general sense, could have positive consequences in joining a culture to a wider communication of manners and laws. This communication, more than any charter, was the genuine source of law and liberty. For example, speaking of the Roman governor Agricola, Burke notes that he

> reconciled the Britains to the Roman government, by reconciling them to the Roman manners. He moulded that fierce nation by degrees to soft and social customs.... He diffused a grace and dignity over this new luxury by the introduction of literature. He invited instructors in all the arts and sciences from Rome; and he sent the principled youth of Britain to that city to be educated, at his own expense. In short he subdued the Britains by civilizing them; and made them exchange a savage liberty for a polite and easy subjection. His conduct is the most perfect model for those employed in the unhappy, but sometimes necessary task of subduing a rude and free people.[172]

Agricola 'knew that the general must be perfected by the legislator; and that the conquest is neither permanent nor honourable, which is only an introduction to tyranny.'[173] The possibility, the obligation perhaps, of a conqueror acting as a civilising force, is a recurring theme in Burke, particularly in respect to Ireland and India.[174] Burke was later to stress that in Ireland, before any religious divisions and penal laws, there was contempt on the part of the English for the native Irish. Indeed, the 'statutes of Kilkenny shew, that the spirit of the popery laws, and some of their actual provisions, as applied between Englishry and Irishry, had existed in that harassed country

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delicacy of sentiment which can hardly be equalled in the most refined productions of a civilized age'. In Lehmann, 206.

[171] Burke discussed their authenticity with Hume, that most Anglicised Scot. In a letter to the Reverend Hugh Blair, Hume noted, 'I was told by Burke, a very ingenious Irish gentleman, the author of a tract on the Sublime and Beautiful, that on the first publication of Macpherson's book, all the Irish cried out, *we know all these poems, we have always heard them from our infancy*. But when he asked more particular questions, he could never learn, that any one had ever heard, or could repeat the original of any one paragraph of the pretended translation.' (19 Sept. 1763) in J.Y.T. Greig, *The letters of David Hume* (Oxford, 1969), i.303. It is yet another Scotch rumour that during these controversies, Burke was able, through Irish, to converse with a Scots gentleman!

[172] WS i.368. He was a 'man, by whom it was a happiness for the Britains to be conquered (WS i.366)', who 'left them their mountains, their arms, their liberty (WS i.367)'.

[173] WS i.367.

[174] Burke found ironic the treatment of India, a 'people for ages civilized and cultivated—cultivated by all the arts of polished life, whilst we were yet in the woods (WS v.389)'. He goes on to mention in detail India's 'priesthood', 'nobility', 'cities', 'merchants and bankers', 'manufacturers and mechanics', and 'tillers of the earth (WS v.389-90)'. See WWM Bk P 27/46 on conquest and law, citing Blackstone.

before the words Protestant and Papist were heard of in the world.'[175] Burke singled out the works of Baron Patrick Finglass and Edmund Spenser as examples of this 'true genius and policy of the English government'.[176] He cites Davies, jurist and poet of the Spenserian school of pastoral, as well. Davies 'boasts the benefits received by the natives, by extending to them the English law.... [but] the appearance of things alone changed.'[177] Instead there were 'unheard of confiscations' and 'under pretence of tenures, and then of titles in the crown, for the purpose of the total extirpation of the interests of the natives in their own soil'.[178]

The *Abridgement* also contains a brief discussion of the English conquest of Ireland. This came about, Burke emphasised, as he did in his analysis of England, from native 'faction and discontent'.[179] If the invasion of England by the Normans stood 'as a single event in history', it compared significantly to the 'reduction of Ireland some time after by Henry the Second'.[180] As Burke relates it, Henry had designs on Ireland, hoping, after the murder of Beckett, to recover the good graces of the English Pope Hadrian IV by its conquest. Dermot (Diarmuid) McMurrough, involved in a domestic dispute in Ireland, invited Henry's aid and, with Ireland divided, English influence in Irish affairs was assured.[181] It was, however, by no means the voluntary acceptance suggested by Molyneux. 'It was indeed long before they were able entirely to subdue the island to the laws of England: but the continual efforts of the Irish, for more than four hundred years, proved insufficient to dislodge them'.[182] Where Burke does criticise William in England, it is not so much for the substance of the laws as the processes of the legal system. It may be an Irish rather than a British voice that writes

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[175] WS ix.615.

[176] WS ix.615. Finglass wrote a *Breviat of the getting of Ireland and of the decaie of the same*, written in the sixteenth century, was published in *Hibernica: or some ancient pieces relating to Ireland* (1747). The poet Spenser's *View of the present state of Ireland*, similarly written in the sixteenth century, had been first published in 1633.

[177] WS ix.615. The native Irish, Davies wrote, 'were little better than cannibals'. Davies, 163. 'For a barbarous country is not so easily conquered as a civil ...'. Id., 74. In discussing 'juridical strategies' of colonisation in Ireland, Pawlisch notes that 'Davies' formula for Ireland–'to give laws to a conquered people is the principal mark of a perfect conquest'–had established a paradigm for British expansion elsewhere.' Pawlisch, 14. Cf. A ii.17.

[178] WS ix.615, 616.

[179] WS i.511.

[180] WS i.427. Cf. Molyneaux.

[181] See WS i.512. On Beckett, see WS i.500, 503-7.

[182] WS i.514. Note againt that Burke believed that Irish Catholicism solidified in an 'Ultra-montanist' variety as a result of the forceful imposition of Protestantism. Indeed, he believed that Irish Catholicism was 'not very remote from the present Protestant persuasion before the Union of that Kingdom to the Crown of England (WS ix.469 (citing Archbishop James Ussher, author of *A discourse of the religion anciently professed by the Irish and the*

> To force against nature a new language upon a conquered people; to make them strangers in those courts of justice, in which they were still to retain a considerable share; to be reminded every time they had recourse to Government for protection of the slavery, in which it held them ; this is one of those acts of superfluous tyranny, from which very few conquering nations or parties have forborn, though no way necessary, but often prejudicial to their safety.[183]

This would have generally contradicted the Montesquieuan injunction to govern by the manners of the people.[184] But Burke was aware, through Davies and others, of the eclipse of the Brehon laws and the slow decline of the Irish language in public spheres under English control. Throughout his life, Burke, who may have spoken Irish as a result of his time in the Blackwater valley, maintained an interest in the Irish past, including its law. He regretted the

> narrow notions of our lawyers, who abolished the authority of the Brehon law, and at the same time kept no monuments of it; which if they had done, there is not doubt but many things of great value towards determining many questions relative to the laws, antiquities and manners of this and other countries had been preserved.[185]

Burke was far from seeing a conquest as entirely negative. In many places, though not yet in Ireland, '[t]ime has, by degrees, in other places and periods … blended and collated the conquered and the conquerors'.[186] This was a point of some complexity. Burke had objected to Voltaire's suggestion 'that none but well peopled and civilized Nations make conquests on each other'.[187] Instead, the 'very contrary of which is rather true'.[188] The English 'conquest' of Ireland, whenever it actually occurred, did not denote anything more than military superiority. But Burke had his own reservations about native institutions. Before Henry's actions, in a period of 'native simplicity', 'Irish institutions, well enough calculated to preserve good arts and useful discipline, when these arts came to degenerate, were equally well calculated to prevent all improvement, and to perpetuate corruption, by infusing an invincible tenaciousness of ancient

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British (1687))'.

[183] WS i.472. Cf. Fuchs 235.

[184] 'The Legislature of Ireland, like all Legislatures, ought to frame its Laws to suit the people and the circumstances of the Country, and not any longer to make it their business to force the nature, the temper, and the inveterate habits of a Nation to a conformity to speculative systems concerning any kind of Laws. Ireland has an established Government, and a Religion legally established, which are to be preserved. It has a people who are to be preserved too, and to be led by reason, principle, sentiment, and interest to acquiesce in that Government (WS ix.650).'

[185] WS i.433.

[186] WS ix.614. Cf. WS iii.139-40 and see WS ix.636-7 (on Quebec).

[187] N 119.

[188] N 119.

customs'.[189] If he chaffed at the process and legacy of legal change in Ireland, he agreed with much of the substance of Davies' critiques on property and improvement. Burke had deep reservations about the relevance of many Irish practices and institutions to its future and to public happiness. The irony that what was once critiqued in Ireland, manners and laws that distorted motives to improvement, should then become, in the penal laws, the means of maintaining Ireland in submission was striking.

Speaking of contemporary politics, Burke writes that the Saxon government 'was never supported by any fixed or uniform principle', it was 'no wonder, that the advocates for the several parties among us find something to favour their several notions'.[190] His analysis is at pains to show how party histories have so little basis in fact. Especially important is his discussion of Tanistry, a system of elective heirship to an estate or chieftainship, that Burke suggests was universal in the development of modern systems of property and successions.[191] It was 'made up of inheritance and election' thus the 'controversy, which has been managed with such heat, whether in the Saxon times the crown was hereditary or elective, must be determined, in some degree, favourably for the litigants on either side; for it was certainly both hereditary and elective, within the bounds, which we have mentioned'.[192] The Tories and Whigs who held these respective opinions thus told only partial elements of the actual history of these institutions. This developed slowly over time, the 'leader neither knew the extent of the power he received, nor the people of that which they bestowed'.[193] Here Burke is in surprising agreement with Davies. Tanistry had also been one of the elements of Irish manners, or law, that Davies had sought to change.[194] What he referred to as Irish 'gavelkind', by analogy to the system of property division that continued as law in Kent, was similarly regressive. This 'gavelkind', the equal division of property among male heirs (including illegitimates), in comparison to the award of the entire estate to the eldest male in English primogeniture, obstructed the improvement of property. And, where property carried jurisdiction, it dissipated power with property.

As with the conquest, Burke problematises all of the points most dear to whiggish histories—the introduction of juries, the division of shires, the rise of parliament, and the meaning of the Magna Charta. Burke appears to have thought highly of King Alfred, he is said to have begun, but never finished, a play on him. But in discussing Alfred, 'generally honoured as the founder of our Laws and Constitution', he is critical of the belief, consistent with whiggish history, that juries, shires and tything arose in modern form in these times.[195] 'Historians, copying after one another and examining little', he wrote, 'have attributed to this monarch the institution of Juries; an institution, which certainly did never prevail amongst the Saxons'.[196] Burke later noted that '[t]o suppose that Juries are something innate in the constitution of Great Britain that they have jumped like Minerva out of the head of Jove in compleat is a weak fancy supported neither by precedent nor by reason'.[197] Similarly, the division of England into shires was 'never settled on any regular plan, nor are they the result of any single design'.[198] Against authorities like Blackstone, Burke argued that tything was not established by Alfred, but 'prevailed on the continent, wherever the Northern nations had obtained a settlement'.[199] He argues, too, that the Wittenagemote was the precursor of the modern parliament, but only by gradual development. For 'all sorts of people attended ... not to make laws, but to attend at the promulgation of the laws'.[200] Even the Magna Charta was

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[189] WS i.512. See WS i.512.

[190] WS i.435. See WS i.437-8 on the 'Tything Courts'.

[191] 'This order prevailed in Ireland, where the Northern customs were retained some hundreds of years after the rest of Europe had in a great measure receded from them. Tainistry continued in force there, until the beginning of the last century (WS i.433).'

[192] WS i.433.

[193] WS i.434.

[194] Complaining of the 'mischiefs' of tainistry and 'gavelkind', Davies questioned 'who would plant or improve or

> by no means a renewal of the laws of St. Edward, or the ancient Saxon laws; as our historians and law writers generally, though very groundlessly assert.... How should they? The object of Magna Charta is the correction of feudal policy; which was first introduced, at least in any regular form, at the Conquest, and did not subsist before it. It may further be observed, that in the Preamble to the Great Charter, it is stipulated that the barons shall *hold* the liberties there granted *to them and their heirs*; from the *king and his heirs*; which shews that the doctrine of an unalienable tenure was always uppermost in their minds.

—And, what is as great in importance in understanding Burke—

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build upon that land which a stranger whom he knew not should possess after this death?' Davies, 165

[195] WS i.411. 'The Anglo-Saxon laws, by universal consent of all writers, we owe more to the care and sagacity of Alfred than of any of the ancient kings (A i.327).' On confederacy and 'federalism', see WS i.372, i.384.

[196] WS i.411. The use of 'oath of Compurgators' ..., the 'method of taking the sense of the neighbourhood on any dubious fact (WS i.448)'.

[197] WS ii.344. Rather than the work of a great Legislator, it was a 'matter of *institution* brought to its present state by the *joint efforts of Legislative authority and juridical prudence* (WS ii.344)'.

[198] WS i.411.

[199] WS i.437. See WS i.437-8.

[200] WS i.441. Cf. Hume, 'The Anglo-Saxon government and manners' in *The history of England*, 162 *et seq.* and

> Their idea even of liberty was not (if I may use the expression) perfectly free; and they did not claim to possess their privileges upon any natural principles or independent bottom, but just as they hold their lands from the king.... By the feudal law, all landed property is, by a feigned conclusion, supposed to be derived, and therefore to be mediately or immediately held, from the Crown. ... But its consequent rights being once supposed, many real charges and burthens grew from a fiction made only for the preservation of subordination; and in consequence of this, a great power was exercised over the persons and estates of the tenants.[201]

Burke is not here defending such a view, but stressing that it simply was prevalent. The importance of Magna Charta was not in reviving or preserving, but establishing liberties. The Barons 'were able to act only in confederacy; and this common cause made it necessary to consult the common good, and to study popularity by the equity of their proceedings. This was a very happy circumstance to the *growing liberty*'.[202] In such a corporate body, individual interests had to some extent to be transcended and articulated in a more rational, public demand. Here, as elsewhere, Burke is stressing the nature of British claims, rather than their substance. The 'order of our Courts', he wrote, 'the discipline of our jury, ... and the introduction of a scientifick reason in the law have been the work of ages'.[203]

THE SOLID ROCK OF PRESCRIPTION:

In light of these observations, Burke's understanding of custom and prescription, its natural and historical premises, are significantly deepened.[204] First, they illustrate the sense that conventions express, in however distorted a guise, natural human dispositions. Secondly, these confirm that he defended property rights on the basis of their history *and* utility. They are not natural rights, however natural the ownership of property might seem. Here, as elsewhere, Burke complicates vulgar whiggism (though it ought to be noted that Blackstone took a similar view on property).[205] Among the ancient Saxons of the continent, a 'division was made among each tribe

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McLoughlin, 55.

[201] WS i.98-9. Cf. Hume, 'The feudal and Anglo-Norman Government and manners' in *The history of England*, 470, esp. 487 and McLoughlin, 57.

[202] WS i.547. See WS i.543 *et seq.*

[203] WS i.448. Compurgators 'were rather a sort of evidence than judges; and from hence is derived that singularity in our laws, that most of our judgments are given upon verdict, and not upon evidence, contrary to the laws of most other countries. Neither are our juries bound, except by one particular Statute, and in particular cases, to observe any positive testimony, but are at liberty to judge upon presumptions (WS i.448)'.

[204] See WWM Bk P 10/52.

[205] '[A]stounding as it seems, Blackstone does *not* believe that the right to absolute individual ownership of land is a

by its proper chief. But their shares were allotted to the several individuals only for a year'.[206] This changed, as their historical situation changed.:

> This was the very first origin of civil, or rather military government, amongst the ancient people of Europe; and it arose from the connexion, that necessarily was created between the person, who gave the arms or knighted the young man, and him, that received them; which implied that they were to be occupied in his service, who originally gave them. These principles it is necessary strictly to attend to, because they will serve much to explain the whole course both of government and real property, wherever the German nations obtained a settlement ....[207]

This was supported

> for the most part upon two principles in our nature,—ambition, that makes one man desirous, at any hazard or expense, of taking the lead amongst others; and admiration, which makes others equally desirous of following him, from the mere pleasure of admiration, and a sort of secondary ambition, one of the most universal passions among men; these two principles, strong both of them in our nature, create a voluntary inequality and dependence.[208]

This ambition had always to be secured against, but it was essential to the civil economy.[209] As an explanation of the origins of property and rank, this was an unusual Whig analysis. Prescription was, of course, an important element of both Roman and common law, as Burke's citation, in the *Reflections*, of the French jurist Jean Domat makes clear.[210] It was an essential element, too, of the Scottish analysis of Hume, Kames, and Smith.[211] Burke is not claiming that 'ownership' is natural, but that there was a 'natural', i.e. inevitable, attachment over time to things of long-standing connection with an individual. It is in this sense, based on his empiricism, that prescription is 'natural'. As a result, 'there is a sort of presumption against novelty, drawn out of a deep consideration of human nature and human affairs; and the maxim of

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natural right'. Willman, 65.

[206] WS i.450. See WS i.431.

[207] WS i.431.

[208] WS i.431. Cf. e.g., Smith, *Theory*, 61-2 on the 'disposition to admire, and almost to worship, the rich and powerful ...'.

[209] 'Whether it will be right, in a state so popular in its constitution as ours, to leave ambition without popular motives, and to trust all to the operation of pure virtue in the minds of kings, and ministers, and public men, must be submitted to the judgment and good sense of the people of England (WS ii.280).'

[210] Burke criticises the national assembly for 'reprobat[ing] the doctrine of prescription, which one of the greatest of their lawyers [Domat] tells us, with great truth, is a part of the law of nature (RRF 260)'. Domat was the author of *Les lois civiles dans leur ordre naturel* (1689).

[211] In addition to Hume and Smith, Kames had held a similarly broad view of property and prescription as early as *Essays on several subjects of law* (1732).

jurisprudence is well laid down, *Vetustas pro lege semper habetur*'.[212] This attachment may also be recognised by others, explicitly or implicitly, as reasonable. This analysis is, in fact, close to the judgments of situational propriety made by Smith's 'impartial spectator' and to the modern 'reasonable man' standard in law.[213] Similarly, in creating what were in essence 'life estates', the link to property was the 'durable connexion ... created between a certain man, and a certain portion of land, by a possession for his whole life'.[214] This combined the natural and the historical with reasonableness, if not rationalism. Government of a 'royal family; or a 'respected order', he wrote, was a 'title[] to government confirmed by opinion and long use, more efficacious than the wisest schemes for the settlement of the nation'.[215]

The same type of analysis applied to successions, for 'it seemed a natural consequence, that inheritances should immediately supervene', and when 'children have grown up and have been supported on that land, it seems so great a hardship to separate them, and to deprive thereby the family of all means of subsisting, that nothing could be more generally desired, nor more reasonably allowed, than an inheritance'.[216] It was on such 'natural' premises that not only positive laws of property, but political authority itself was built. The 'solid rock of prescription' was a 'title which is not the creature, but the master, of positive law ... and is indeed the original ground of all known property'.[217] It was a title 'not only to property, but, which is to secure that property, to government. They harmonize with each other, and give mutual aid to one another. It is accompanied with another ground of authority in the constitution of the human mind, presumption.'[218] But, if to claim something as one's own was not unnatural, 'almost every Thing concerning Property, and all its Modifications, is of artificial Contrivance'.[219] As a result, 'Men act on them with all the Power of a Creator over his Creature. They make Fictions of Law, and

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[212] L 136. 'Veneration of antiquity is congenial to the human mind (WS ix.467).'

[213] Initially suggested in the *Theory of moral sentiments* (1759), the 'impartial spectator' was also central to Smith's unpublished *Lectures on jurisprudence* (1762-3/1766). Cf. Hume, 'The feudal and Anglo-Norman Government and manners' in *The history of England*, 458.

[214] WS i.451.

[215] WS i.384-5.

[216] WS i.451. See WS i.453. For 'church and state, and human society, too, for which church and state are made, are subverted by such doctrines, joined to such practices, as leave no foundation for property in *long possessions* (C vi.94)'. See Millar in Lehmann, 250

[217] WS ix.657. See WS ix.657-8.

[218] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, 397-8.

[219] WS vii.175. Cf. C vi.42-4, RRF 261, and R.B. McDowell, 'Edmund Burke and the law', in D.S. Greer and N.M. Dawson (eds), *Mysteries and solutions in Irish legal history: Irish Legal History Society and other papers, 1996-1999* (Dublin: Four Courts, 2001), 101-2.

Presumptions of Law ... according to their Ideas of Utility'.[220] They may be recognised as useful, but they were not initially the products of 'choice' or 'policy'. They were found, not made. They were also entirely rational, particularly if, as Burke argues elsewhere, the perpetuation of these connections, of present and continuous possession, serves to promote the improvement of property. Given the limits of reason and the uncertainty of constant appeals to right, prescription established a workable means of balancing stability and change.[221] This was of great importance to interpreting Burke's more well-known remarks in the *Reflections*. 'It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it. It is a better presumption even of the *choice* of a nation.'[222]

This is also closely linked to his use of the model of 'inheritance' to government. In the *Reflections*, Burke wrote that

> We wished at the period of the Revolution, and do now wish, to derive all we possess as *an inheritance from our forefathers*.... All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope, nay I am persuaded, that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example.[223]

It is the *reference to*, not the reality of, antiquity that is essential.

> You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties. They endeavour to prove, that the antient charter, the Magna Charta of King John, was connected with another positive charter from Henry I, and ... were nothing more than a re-affirmance of the still more antient standing law of the kingdom.... if the lawyers mistake the particulars, it proves my position still the more strongly; because it demonstrates the powerful prepossession

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[220] WS vii.175. 'The Rules concerning it become more positive, as connected with positive Institution. The Legislature therefore always, the Jurist frequently, may ordain certain Methods, by which alone they will suffer such Matters to be known and established, because their very Essence, for the greatest Part, depends on the arbitrary Conventions of Men (WS vii.175)'.

[221] 'If prescription be once shaken, no species of property is secure (RRF 260).' Cf. The *Nullum Tempus* Act in WS ii.364-7.

[222] Speech on the representation of the Commons in Parliament (1782)' in Stanlis, 397-8. Indeed, even this presumption is a felt affection, not a conscious judgment.

[223] RRF 117. 'If you are desirous of knowing the spirit of our constitution, and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of parliament, and journals of parliament, and not in the sermons of the Old Jewry, and the after-dinner toasts of the Revolution Society.... The very idea of fabrication of a new government, is enough to fill us with disgust and horror (RRF 117)'. This section of the *Reflections* (117-21) is second in importance only to that of 'society is indeed a contract ... (RRF 194 *et seq.*).

towards antiquity ... .[224]

From the *Abridgement*, it is clear that Burke believed both Coke and Blackstone had mistaken the particulars.[225] Even in employing the vocabulary of the 'ancient constitution', he is emphasising the *continuity*–or the *appearance* of continuity–not the constancy, of the common law and constitution.[226] Prescription did not bar improvement.[227]

This did not exclude reflection on government, but stressed that for such reflection to bear fruit, it had necessarily to look to experience. It was, by looking to those things that had actually worked, that 'practical wisdom ... superseded ... theoretic science'.[228] Burke also observed, however, that social progress was not the result of the purposive rationality of the classical 'Legislator'.[229] 'A prescriptive government, such as ours, never was the work of any legislator, never was made upon any foregone theory.'[230] Such claims also eliminated the need, and the insecurities, of claims of abstract natural right. It was a 'positive, recorded, *hereditary* title', an '*entailed inheritance* .... without any reference whatever to any other more general or prior right'.[231] The progress towards these improvements was real, but tentative and there remains in Burke a sense of the decay so common in the rhetoric earlier cyclical theories of history.[232] In his case, however, if degeneration was possible, it was not necessary.[233] Here again, it was the 'happy effect of following nature'—given the importance of time, he might have said history—or 'wisdom without reflection, and above it'.[234] This

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[224] RRF 117-8. 'Our Constitution is a prescriptive constitution; it is a constitution whose sole authority is, that it has existed time out of mind ('Speech on the representation of the Commons in Parliament (1782)' in Stanlis, 397-8)'. See RRF 118 (on '*inheritance*') and F (M) A.xxxi.25 ('Notes on juries').

[225] Burke notes that '[i]n the matter of fact, for the greater part, these authors appear to be in the right; perhaps not always (RRF 118)'. Given his historical writings, Burke is being rhetorically generous.

[226] Cf. WS ii.426, WS ii. 444 (for the use of 'antient' to refer to a policy dating from 1660).

[227] Cf., e.g., in a debate on the Navy estimates (1772): 'How weak an argument prescription is in this case, they do not seem to feel .... *Stare super vias antiques* is their political creed. What then! is this maxim to preclude every improvement, however obvious and necessary, in the constitution? The first enquiry, before we proceed to walk upon this old road is, whether we can be said *star bene*, and the next is, whether, if this be the case, we cannot *star meglio*. If the latter part of the alternative is beyond our reach, then *sto qui* becomes a necessary, as well as a prudential conclusion.//But, Sir, who will pretend that the footing, upon which this part of the public accounts was left at the Revolution, is good, much less the best that can be devised? All respect is due to the authors of the Revolution: and yet it must be owned that they were but novices in finance (PH xvii.559).'

[228] RRF 118. 'The same policy pervades all the laws which have since been made for the preservation of our liberties (RRF 118).' Burke also refers to common lawyer John Selden (RRF 118). See RRF 107.

[229] Cf. Robert W. Gordon, 'Historicism in legal scholarship', (1981) 90 *Yale L J* 1017.

[230] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, 399. 'It seems to me a preposterous way of reasoning, and a perfect confusion of ideas, to take the theories which learned and speculative men have made from that government, and then, supposing it made on those theories which were made from it, to accuse the government of not corresponding with them ('Speech on the representation of the Commons in Parliament (1782)' in Stanlis, 399-400).' Cf. Robertson. 'No custom, how absurd, soever it may be, if it has subsisted long, or derives its force from the manners and prejudices of the age in which it prevails, was ever abolished by base promulgation of laws and statutes'. *The progress of society in Europe*, 47

[231] RRF 118, 119. By this means our constitution preserves an unity in so great a diversity of its parts (RRF 119)'. See WS vi.94, 106.

> furnishes a sure principle of conservation, and a sure principle of transmission; without at all excluding a principle of improvement. It leaves acquisition free; but it secures what it acquires. Whatever advantages are obtained by a state proceeding on these maxims, are locked fast as in a sort of family settlement; grasped as in a kind of mortmain for ever. By a constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives.... by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of changeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete.[235]

This was to be 'guided not by the superstition of antiquarians, but by the spirit of philosophical analogy.[236] In this way, he contrasted the 'stable prejudice of time against a new opinion founded on mutability'.[237]

While Burke's sense of time, as registered in prejudices of numberless habits and practices, was of great importance to his understanding of prescription, his historical interests reveal, too, the limits of an historical 'veil'. When an Ulster Whig challenged his opposition to the revolutionary confiscations, Burke responded by explaining:

> But these are donations made in 'ages of ignorance and superstition'. Be it so. It proves that these donations were made long ago; and this is *prescription* .... It is possible that many estates about you were originally obtained by arms ... a thing almost as bad as superstition, and not much short of ignorance; but it is *old violence*; and that which might be wrong in the beginning, is consecrated by time, and becomes lawful. This may be superstition in me, and ignorance; but I had rather remain in ignorance and superstition than be enlightened and purified out of the first

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[232] See WS i.92. Cf. Smith. With the Glorious revolution, a 'war was made and supported against fortune itself (W iii.280)'.
[233] See Montesquieu.
[234] RRF 119.
[235] RRF 120.
[236] RRF 120. 'In this choice of inheritance we have given to our frame of polity the image of a relation in blood; binding up the constitution of our country with our dearest domestic ties; adopting our fundamental laws into the bosom of our family affections ... (RRF 120)'.
[237] WS ix.467.

principles of law and natural justice.[238]

Burke's use of the 'veil' is, largely, descriptive of the process by which human convention—prejudice, custom, etc—acts without any necessary link to a 'true' account of events.[239] Indeed, writing about ancient Druidic stone formations, he noted that the 'monuments themselves then came to be venerated; and not the less, because the reason for venerating them was no longer known'.[240] Burke was impressed, even here, by the power of the sublime. This was often fortunate, allowing time to conceal otherwise contentious disagreements, particularly in respect to politics. Indeed, '[t]here is a secret veil to be drawn over the beginnings of all governments…. Time, in the origin of most governments, has thrown this mysterious veil over them; prudence and discretion make it necessary to throw something of the same drapery over more recent foundations'.[241] But this was more problematic in Ireland. He no doubt 'wish[ed] to let Time draw his oblivious veil over the unpleasant modes by which lordships and demesnes have been acquired in theirs, and almost all other countries upon earth'.[242] Burke found it difficult not to insist on 'true' accounts of the Irish past. Here, as elsewhere, however

> We do not draw the moral lessons we might from history. On the contrary, without care it may be used to vitiate our minds and destroy our happiness. In history a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind. It may, in the perversion, serve for a magazine, furnishing offensive and defensive weapons for parties in church and state, and supplying the means of keeping alive, or reviving dissensions and animosities, and adding fuel to civil fury.[243]

The complexities involved in Irish and British history, however, and more practical concerns, seem to have kept him from attempting to pierce the veil and, as a consequence, adding fuel to civil fury.

Burke's historical works end with the Magna Charta and it is easy to imagine that this is true, in part, because of the rough historical waters ahead. The revolution of 1688 is an example of the difficulties facing an Irish Whig.[244] In general, Burke praised the inheritance of the Glorious revolution. Given its limited nature, in comparison to the revolution in France, it was

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[238] C vi.95.

[239] 'Time and custom give authority to all forms of government, and all successions of princes'. Hume, *A Treatise*, 566.

[240] WS i.256.

[241] WS vi.316-7

[242] WS ix.653. See the 'politic, well-wrought veil' in RRF 103 and WS ii.257-8.

[243] RRF 247. See RRF 247-9.

> in truth and substance in a constitutional light, a revolution, not made, but prevented. We took solid securities; we settled doubtful questions; we corrected anomalies in our law. In the stable, fundamental parts of our constitution, we made no revolution; no, nor any alteration at all.... The nation kept the same ranks, the same orders, the same privileges, the same franchises, the same rules for property, the same subordinations, the same order in the law, in the revenue, and in the magistracy; the same lords, the same commons, the same corporations, the same electors.[245]

By focusing on 1688, Burke elides the problems of the previous half-century, though not from ignorance, but from fear of the repetition of England experience with 'republican' government in France. But he was also well aware of the failures of the English Revolution, particularly in respect to Ireland. It 'operated differently' in the two,

> In England it was the struggle of the *great body* of the people for the establishment of their liberties, against the efforts of a very *small faction*, who would have oppressed them. In Ireland it was the establishment of the power of the smaller number, at the expense of the civil liberties and properties of the far greater part, and at the expense of the political liberties of the whole. It was, to say the truth, not a revolution, but a conquest: which is not to say a great deal in its favour.[246]

Burke's historical sense developed along lines parallel to the most advanced of the eighteenth-century, and here again it might be regretted that politics prevented him from returning directly to history. Whatever the true account of English and Irish history, it is clear that he did 'not think that the *deprivation of some millions of people of all the rights of citizens, and all interest in the Constitution, in and to which they were born,* was a thing comfortable to the *declared principles* of the Revolution'.[247]

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[244] It is simply incorrect to suggest that Burke, 'arguing from an ancient constitution perspective, treated the Revolution as an attempt to recover the original form of English government'. James Conniff, *The useful cobbler: Edmund Burke and the politics of progress* (Albany: Stat Univ. of New York Press, 1994). This seems, in fact, to contradict Conniff's own opinion that Burke's views were a 'Whiggish Progressivism'. See Pocock, *The ancient constitution*, 380-3.

[245] In general, Burke insisted that praise of 1688 was combined the 'subversion of the old government [with] the happy settlement which followed.... we mean to comprehend in our calculation both the value of the thing parted with and the value of the thing received in exchange (W iv.406-7)'. W iv.442n1 (from a Speech in Commons (9 Feb 1790).

[246] WS ix.614. For a long time, the 'Protestants settled in Ireland considered themselves in no other light than that of a sort of colonial garrison ... What was done was not in the spirit of a contest between two religious factions, but between two adverse nations (WS ix.615).'

CONCLUSION:

Burke's writings and comments on history are essential to any understanding of his jurisprudence. Indeed, with the naturalism expressed in his early works, this historical sensibility is perhaps its most significant aspect. Particularly in those works written prior to his entry into Parliament, Burke shows himself to be engaged in the most sophisticated of eighteenth-century debates in history and law. Burke agreed, perhaps as a result of his own education, with Blackstone's assessment of the importance of a liberal education to the law, the culture of jurists. But English jurisprudence was by and large inattentive to the relationship of manners to law, a point Burke may have sensed more easily as an Irishman. Common law histories remained both superficially historical and, often as a result of more popular histories, insular. Following Montesquieu and Hume, and in parallel with other Scots, Burke saw jurisprudence in light of the wider European history of manners. This history was progressive. Even events like conquest could bring improvement. This had happened in England, by encouraging its communication with the continent. It might, though it had not yet, happen in Ireland. Burkean historical jurisprudence was also deeply at odds with all varieties of methodological individualism and the rationalism and egoism with which it was associated. The progress of European society was corporate, to which the society of orders was an important contributor. But modern commerce, social and economic, also played a key role. If Burke's support of commerce may be seen as an outgrowth of his engagement with the 'culture of politeness', various civic languages continued to qualify this support. These will prove necessary to understanding other elements, particularly constitutional, of his jurisprudence.

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[247] WS ix.614.

BANK AND CAPITAL OF NATIONS, AND OF AGES

'We are afraid to put men to live and trade each on his own private stock of reason because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages (RRF 183).'

BURKE ON MANNERS AND COMMERCE:

Recent scholarship has made clear that advocates of commerce, not least Adam Smith, acknowledged its vices as well as virtues and continued to have civic concerns about public virtue and even martial spirit.[1] Burke has not been similarly reassessed, but he expressed analogous concerns. Partly as a result of the monopoly of political and social power held by the Irish Ascendancy, Burke could simultaneously defend a modern economic order while employing the ancient civic languages of critique that had been used against Walpole and the establishment Whigs. Burke's defence of the modern civil society remained deeply informed by these, by classical political theory, and by the analytic framework provided by Roman history. This was made all the easier by the fact that, with the Rockingham Whigs, he spent almost the whole of his political career in opposition. These civic languages were central to Burke's analysis of the crown's influence, but they may also be seen in the American war, in Indian affairs, and in France. These also form part of his wider critique of radical politics. His famous (or infamous) defence of 'chivalry', for example, was of those plural institutions of the European inheritance, of corporate aristocracy and clergy, which combined private honour and public interest. Burke shared, with many of his contemporaries, both a belief in the continuing necessity and progressive nature of the traditional, admittedly artificial, orders of Europe and the hope that commerce might make greater human happiness possible. Nevertheless, commerce, like law, continued to be enveloped in manners. In the end, Burke problematises the prioritisation of both the market and the institutions of the state.[2] The civic languages provided an analytical framework that supplemented a more narrowly jurisprudential analysis and would significantly influence his views on the relationship between Parliament and the courts.

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[1] In understanding Smith, the 'main obstacle' is the 'liberal-capitalist perspective'. Donald Winch, *Adam Smith's politics: an essay in historiographic revision* (Cambridge: Cambridge Univ. Press, 1978), 165. But Winch, I believe, makes much the same mistake with Burke with the 'liberal-conservative' perspective. Compared to Burke, Winch writes, 'Smith was offering something more ... than the consolations of religion'. *Riches and poverty: an intellectual history of political economy in Britain, 1750-1834* (Cambridge: Cambridge Univ. Press, 1996), 214. Not for the first time, Burke's rhetoric obstructs the complexity of his thought. It was after all, Burke, not Smith, that served as a legislator for thirty years, offering more than the consolations of philosophy. See also Winch, 'The Burke-Smith problem and late eighteenth-century political and economic thought', (1985) 28 *Hist J* 231.

THE SPIRIT OF A GENTLEMAN, AND THE SPIRIT OF RELIGION:

Burke's defence of Marie Antoinette in the *Reflections* has been the subject of much ridicule and no little misunderstanding. It would be difficult to deny the high strain of Burke's prose. 'It is now sixteen or seventeen years since I saw the queen of France, then the dauphiness, at Versailles; and surely never lighted on this orb, which she hardly seemed to touch, a more delightful vision'.[3] But here, as elsewhere, Burke is quite deliberately drawing on images of knight errantry for rhetorical effect. The scene of the queen's abduction is not unconsciously painted as a ravishing.[4] 'I thought ten thousand swords must have leaped from their scabbards to avenge even a look that threatened her with insult', he wrote, '[b]ut the age of chivalry is gone.'[5] But precisely because the age was gone, or passing, Burke lays himself open to caricature. His defence of the 'age of chivalry' was not a defence of the past, but of his present, of an order more progressive perhaps than any in history as a result, as he saw it, of the success and adaptation of the 'ancient' institutions of European civilisation.[6] For

> Nothing is more certain, than that our manners, our civilization, and all the good things which are connected with manners, and with civilization, have … depended for ages upon two principles; … I mean the spirit of a gentleman, and the spirit of religion. The nobility and the clergy, the one by profession, the other by patronage, kept learning in existence, even in the midst of arms and confusions, and whilst governments were rather in their causes than formed

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[2] The first of these is associated with Smith, the second with Hume, although these assessments, too, may be somewhat exaggerated. These associations are themselves highly questionable.

[3] RRF 169. This is, of course, a recurring line in Brian Friel's *Philadelphia, Here I Come*, where '[i]ts purpose is to offer gratuitously another vision, of grace, beauty, and splendour which has been dashed by a senseless world ...'. Richard Pine, *The diviner: the art of Brian Friel* (2nd edn) Dublin: Univ. College Dublin Press, 1999), 104.

[4] Cf. Robertson's portrayal of Mary, queen of Scots in *The history of Scotland* (1757).

[5] RRF 170. See the draft of the *Reflections* at F (M) A.xxvii.75 discussing chivalry, modern philosophy, positivism, religion, and natural sentiments.

[6] In the analysis of both chivalry and commerce, I am following the work of J.G.A. Pocock. See esp. 'The political economy of Burke's analysis of the French Revolution' in *Virtue, commerce, and history: essays in political thought and history, chiefly in the eighteenth century* (Cambridge: Cambridge Univ. Press, 1985) and 'Edmund Burke and the Redefinition of Enthusiasm' the Context as Counter-Revolution in *The French revolution and the creation of modern political culture: vol. 3, the transformation of political culture 1789-1848* (Oxford: Pergamon Press, 1989), François Furet and Mona Ozouf, (eds). But Pocock does not show that these elements of his anti-revolutionary critique were long a part of his analytical language.

... .[7]

These progressive prejudices '[w]ithout force, or opposition, ... subdued the fierceness of pride and power; it obligated sovereigns to submit to the soft collar of social esteem, compelled stern authority to submit to elegance, and gave a domination vanquisher of laws, to be subdued by manners.'[8] The transparency, or the philosophical presumption of transparency, of the revolution and the radical Enlightenment reduced these to relationships or transactions of power and conflicting interest. The complexity and chiaroscuro of human nature and association was denied, and

> All the pleasing illusions, which made power gentle, and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason. All the decent drapery of life is to be rudely torn off. All the super-added ideas, furnished from the wardrobe of the imagination, which the heart owns, and the understanding ratifies, as necessary to cover the defects of our naked shivering nature, and to raise it to dignity in our own estimation, are to be exploded as a ridiculous, absurd, and antiquated fashion.[9]

If this 'mixed system of opinion and sentiment', at once a matter of reason and emotion, 'should ever be totally extinguished, the loss I fear will be great'.[10] Manners are important in the 'consent' of the affections, and consequently, the flourishing of a civil society.[11]

Burke is attacking any narrow reliance on laws or commerce.[12] Manners, in both the wider sense, and in the narrower one of 'good manners', were often associated with French developments.[13] The very royalty under threat was a spur to the arts and to the culture of politeness that was seen to have tamed the rough, enthusiastic European past. But with the revolution, an age 'of sophisters, oeconomists, and calculators, has succeeded'.[14] In law, positivism, in both in its positive and negative senses was the result. And

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[7] RRF 173. Cf. Garret Barden, 'Discovering a constitution' in Tim Murphy and Patrick Twomey (eds.), *Ireland's evolving constitution, 1937-97: collected essays* (Oxford: Hart Pub., 1998) and David Kettler, 'Ferguson's *Principles*: constitution in permanence', (1978) 19 *Studies in Burke in His Time* 208, 213.

[8] RRF 170-1. And 'nothing extends to so many objects as the publick finances; and consequently nothing puts in a clearer or more decisive light the manners of the people, and the form, as well as the powers, of government at any period (WS i.466)'.

[9] RRF 170-1.

[10] RRF 170. See WS i.456.

[11] Cf. Ian Hampher-Monk, *A history of modern political thought: major political thinkers from Hobbes to Marx* (Oxford: Blackwell, 1992), 276-8.

[12] 'Laws themselves are hardly more the cement of society than money; and societies flourish or decay according to the condition of either of these (A ii.304-5)'. Cf. John Millar's, 'Origins of the distinctions of ranks (1771)' in William C. Lehmann, *John Millar of Glasgow 1735-1801: his life and thought and his contributions to sociological analysis* (Cambridge: Cambridge Univ. Press, 1960), 291

[13] England was 'an imitative country ... depend[ing] on generous emulation with the ornamental society of France .... If France should become a Republic, England would soon follow—England in all times, as it were, is a Moon

> laws are to be supported only by their own terrors, and by the concern, which each individual may find in them, from his own private speculations, or can spare to them from his own private interests. .... These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law....[15]

In such a 'mechanistic philosophy ... institutions can never be embodied ... in persons; so as to create in us love, veneration, admiration, or attachment'.[16] The rule of law, without more, is a rule of force. Legal positivism and economic liberalism are conjoined. Commerce, too, depended on such manners. In the 'shade' of these manners, 'commerce, and trade, and manufacture, the gods of our oeconomical politicians, are themselves perhaps but creatures; are themselves but effects, which, as first causes, we choose to worship. ... They too may decay with their natural protecting principles'.[17] In these

> they all threaten to disappear together. When trade and manufacturers are wanting to a people, and the spirit of nobility and religion remains, sentiment supplies, and not always ill supplies their place; but if commerce and the arts should be lost in an experiment to try how well a state may stand without these old fundamental principles, what sort of thing must be a nation of gross, stupid, ferocious, and at the same time, poor and sordid barbarians, destitute of religion, honour, or manly pride, possessing nothing at present, and hoping for nothing hereafter.[18]

The civil society will not merely be dimmed, but destroyed. While Burke believed there to be natural dispositions to restrain such changes, he also maintained that the diversity of human association made clear the possibility that European civilisation could be 'corrupted' in the

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shone upon by France. France contains all within herself—She has natural Advantages—She can rise after severe Blows. England is an artificial Country: take away here Commerce, what is she possessed of then? (T 23-4)'. See T 26, 47. Cf. WS iii.489.

[14] RRF 170. Cf. Stephan. B. Presser, 'What would Burke think of Law and Economics?" (1997) *Harv J L & Pub Pol'y* 147 ('The answer, I think, is 'not much''.).

[15] RRF 171-2. 'There ought to be a system of manners in every nation which a well-formed mind would be disposed to relish. To make us love our country, our country ought to be lovely.' RRF 172. Cf. Smith, *Theory*, 113.

[16] RRF 172.

[17] RRF 173-4. Cf. Robertson, 67.

[18] RRF 174. See RRF 174-6.

manner of more 'savage' peoples, thereby diminishing human progress and happiness.[19] The foundations of this civilisation were doubly precarious. Rooted in the passions, not in abstract reasoning about the state, modern Europe had grown up in serendipitous, a-rational, actions. The modern legislator could respond to history with law, but he ought not, or more accurately could not, legislate manners.[20]

Burke had already made similar points years earlier in the *Abridgement*. In the spirit of the more radical Enlightenment, many mid-century philosophical histories had, in the name of light and reason, slighted or condemned the influence and 'superstition' of the early Church. This was true not only of Bolingbroke, Voltaire, or Hume, but even Montesquieu.[21] Burke was a much more generous, though not uncritical, judge of the importance of religion to Europe. For him, the 'first openings of civility have been every where made by religion'.[22] This was true even in pre-Christian times, and Burke goes to surprising lengths in his history to praise the corporate priesthood of the Druids.[23] Given its universalism and comparatively generous ethos, it was the 'introduction of christianity, which under whatever form always confers such inestimable benefits in mankind' that made the most 'sensible change in these rude and fierce manners'.[24] 'The zeal of the missionaries was also much assisted by their superiority in the arts of civil life.'[25] Even here, Burke praises those Christians who sought to build Christianity slowly on pagan foundations. In so doing, they displayed a 'perfect understanding of human nature'.[26] The English conversion, beginning with King Ethelbert of Kent, meant 'their ferocity was much abated, they became more mild and sociable, and their laws began to partake of the softness of their manners, every where recommending mercy and a tenderness for Christian blood'.[27] As a corporate institution, the clergy were also custodians of culture and science. If the 'welfare of the people appeared in all their actions', the clergy had not simply a theological, but a practical role.[28] In approximately 840 AD, the monasteries were the 'only bodies corporate in the kingdom' and monks, not least those of Ireland, by possession of property, could influence the other institutions of the community. Property in land 'gave them jurisdiction, which, according to their notions, was inseparable from it' and 'as all the orders had their privileges, the Clergy had theirs, and were no less steady to preserve, and ambitious to extend them'.[29] In this way, the Papal and Imperial powers 'mutually gave birth to each other' and remained as checks on one another.[30] In addition to the corresponding offices and duties of real property, its improvement joined public virtue with private interests.[31] And, as a corporate institution with its own divisions, the clergy could, as the Barons had done in the Magna Charta, protect public interests.[32]

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[19] See Burke's letter 'On a French plan of judicature' at F (M) A.iv.74.

[20] See the work of William Jones, orientalist and magistrate in India, on manners and laws among the Burke materials of F (M) A.xxxv.8a-c.

[21] Hume and Smith were both more sceptical than Burke. Smith's views were more favourable in the unpublished *Lectures on jurisprudence* in the 17602, than later in *The wealth of nations* (1776). The clergy almost never appear in Ferguson's *Essay on the history of civil society* (1767) or Millar's *Origin of the distinctions of rank* (1771). Even Robertson, however, is not immune from insult and insinuation of Catholic clergy in *The progress of society in Europe* (1769). Cf. Hume, 'The feudal and Anglo-Norman Government and manners' in *The history of England, from the invasion of Julius Caesar to The Revolutions of 1688* (Indianapolis: Liberty Classics, 1983 [1778 edn, originally 1762]), 486.

[22] WS i.349. 'What contributed not a little to the stability and power of this order, was the extent of its foundation, and the regularity and proportion of its structure. It took in both sexes; and the female Druids were in no less esteem for their knowledge and sanctity than the males (WS i.350).'

[23] See WS i.392. They 'were eminent above all the philosophick lawgivers of antiquity for their care in impressing the doctrine of the soul's immortality (WS i.352)'.

[24] WS i.393.

[25] WS i.395.

[26] WS i.395. The conversion was made difficult because the pagan superstitions were not based in books, but 'established upon those great objects of nature, which continually solicit the senses (WS i.392)' so that it was prudent where 'not incompatible with christianity, [they] were retained (WS i.395).'

Ireland had been important to the creation of this culture. Without claiming that the Irish saved civilisation, Burke noted that the 'contemplative life' and the 'situation of Ireland, removed from the horrour of those devastations, which shook the rest of Europe, made it a refuge for learning, almost extinguished every where else'.[33] In general, nothing gave the clergy 'greater or juster credit than their cultivation of learning and useful arts'.[34] Their importance continued into the time of the Normans, and

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[27] WS i.404. See WS i.390. Cf. Ferguson, *An essay on the history of civil society* (Cambridge: Cambridge Univ. Press, 1995 [1767]), 93.

[28] WS i.396. This 'general utility' was mixed with ... and '[i]n their transactions with the great ... . they were remarkably indulgent ... . But they always made them purchase the remission of corporal austerity, by acts of beneficence (WS i. 396)'. The 'monks were the sole channel, through which the bounty of the rich could pass in any continued stream to the poor; and the people turned their eyes towards them in all their distresses (WS i.397).' See WS i.394.

[29] WS i.501. See WS i.501.

[30] WS i.455. If the commercial republics of Italy 'disagreed in the choice of master, by contending for a choice in their subjection, they grew imperceptibly into freedom, and passed through the medium of faction and anarchy into regular commonwealths. Thus arose the republicks of Venice, of Genoa, of Florentine, Sienna, and Pisa, and several others (WS i.456)'. See Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650* (Cambridge: Cambridge Univ. Press, 1982).

[31] WS i.397.

[32] 'Corporate bodies are immortal for the good of the members, but not for their punishment (RRF 247).'

[33] WS i.511.

[34] WS i.398.

> The little learning, which then subsisted, remained wholly in their hands. Few among the laity could even read; consequently the clergy alone were proper for publick affairs. They were the statesmen, they were the lawyers; from them were often taken the bailiffs of the seigneurial courts, sometimes the Sheriffs of counties, and almost constantly the Justiciaries of the kingdom. The Norman kings, always jealous of their order, were always forced to employ them.

–Some thirty years before the revolution in France, Burke notes–

> In abbeys the law was studied; abbeys were the palladiums of the publick liberty by the custody of the royal charters and most of the records. Thus, necessary to the great by their knowledge; venerable to the poor by their hospitality; dreadful to all by the power of excommunication; the character of the clergy was exalted above every thing in the State; and it could no more be otherwise in those days, than it is possible it should be so in ours.[35]

Further, a 'revival of learning' resulted from the use of church Latin, driving them 'to the study of the writers of polite antiquity'.[36] Pilgrimages to Rome exposed them to what 'was left in the Western world, of ancient learning and taste'.[37] As a result, the 'seeds of various kinds of knowledge and improvement were at different times imported' and such communication could render a people 'more civilized and better acquainted with the arts of war and of government'.[38] In general, the universal church 'preserved that intercourse amongst mankind, which is now formed by politicks, commerce and learned curiosity'.[39] Like the conflict of the church and state, this communion of the Church with the ancient and the wider European worlds, not to mention the spiritual, was of considerable importance.[40]

Indeed, Burke's Anglicanism and his experience with Catholic Ireland make him an arguably less biased observer than many of his contemporaries, in noting the Church's part in European civilisation and enlightenment. But he does so only by noting, as he had of reason and the passions, the importance of both the literal and the allegorical. Whatever its straightforward truth-value, there was a historically appropriate social utility and theological cogency to more ceremonial forms. It was

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[35] WS i.501-2.

[36] WS i.398, 399.

[37] WS i.399.

[38] WS i.400, 405.

[39] WS i.399.

[40] And '[i]t is not unworthy of observation, that Providence, which strongly appears to have intended the continual intermixture of mankind, never leaves the human mind destitute of a principle to effect it (WS i.399)'.

> From Rome the whole Western world had received its Christianity; she was the asylum of what learning had escaped the general desolation; and even in her ruins she preserved something of the majesty of her ancient greatness. On these accounts she had a respect and a weight, which encreased every day amongst a simple religious people, who looked but a little way into the consequences of their actions. The rudeness of the world was very favourable for the establishment of an empire of opinion. The moderation, with which the Popes at first exceed this empire, made its growth unfelt until it could no longer be opposed. And the policy of later Popes, building on the piety of the first, continually encreased it; and they made use of every instrument but that of force.

—Their motives were not, of course, always pious—

> They employed equally the virtues and the crimes of the great; they favoured the lust of kings for absolute authority, and the desire of subjects for liberty; they provoked war and mediated peace, and took advantage of every turn in the minds of men, whether of a public or private nature, to extend their influence, and push their power, from ecclesiastical to civil; from subjection to independency; from independency to empire.[41]

He even mentions School divinity favourably, noting that, by their labours, the 'allegorical gave way to the literal explication .... But it prevailed by an appearance more solid and philosophical; by an order more scientifick; and by a readiness of application either for the solution or the exciting of doubts and difficulties'.[42] It was of great importance that improvement could result from causes seemingly opposed to it. For 'though men err in assigning the causes of natural operations, the works of nature are ... brought under their consideration, which cannot be done without enlarging the mind. The science may be false, or frivolous; the improvement will be real'.[43]

Even an event, then, like the Crusades could have positive consequences. As 'one of the most extraordinary events ... in the history of mankind', they served to unite Europe as a body.[44] From this, '[a]ll the kingdoms on the Continent of Europe were governed nearly in the same form; from whence arose a great similitude in the manners of their inhabitants'.[45] And this mix of martial and Christian virtues, in an age of lawless banditry, inspired a spirit of gallantry and piety, and the 'adventurous humour, inspired by the Crusade, heightened and extended this spirit; and thus the idea of knight errantry was formed'.[46] 'Chivalry' functioned for Burke, and many of his contemporaries, as a term of art expressing this other-directed union of gallant manners, encouraged by Christian ethics and compassion, but retaining the martial spirit and public virtue of the age.[47] Even in less honourable episodes of European history, like the 'considerable slaughter' of Amerindians by civilised Europeans, the Burkes credit the clergy as acting in general as a check on abuses.[48] It was the common European heritage in such ideals that made the events in France a 'civil War not of England but of Europe'.[49] It endangered the progress made by the ancient orders of Europe. 'If lost for a while, the Balance of power may be recoverd. But the Spirit and principles of Europe, once destroyd in the Stamina of its internal Governments, never will be restored.'[50]

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[41] WS i.454-5.
[42] WS i.401. The 'imagination had less scope; and the affections were less touched (WS i.401)'.
[43] WS i.402.
[44] WS i.481. Drawing 'all inferiour views, sentiments and designs into the vortex of one grand project (WS i.481)'.
[45] WS i.456. See WS i.456 *et seq.* on feudalism. 'When a man travelled or resided for health, pleasure, business, or necessity, from his won country, he never felt himself quite abroad (L 134).'

Burke wrote of himself that he was 'an aristocrate in principle'.[51] But there was little pretence, particularly among Whigs, of the hereditary aristocracy being the reward of personal merit or virtue.[52] However essential one might believe them to be, the 'arbitrary' nature of ranks was clear.[53] As a 'new man', a member at best of the natural aristocracy, Burke was acutely aware of the deficiencies of nobility, a point brought home to the Duke of Bedford when he dared to criticise Burke after his retirement from politics.[54] 'My merits', Burke wrote, 'whatever they are, are original and personal: his are derivative'.[55] In the *Vindication,* Burke had expressed the irony of the aristocrat Bolingbroke's sympathy towards natural society. In his 'Letter to a

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[46] WS i.495. No less did the disposition of the nobility throughout Europe, wholly actuated with devotion and chivalry, contribute to forward an enterprise so suited to the gratification of both these passions (WS i.482)'.

[47] In chivalry, 'Ambition, interest, glory, all concurred ('The rise of chivalry' (anonymous) in 1762 R 135 *bis*)'. See Voltaire, 'Account of the origin of chivalry (1760 R 176-8 *bis*) and Robertson, *The progress of society in Europe*, 59.

[48] A i.286. Cf. the *Vindication* at WS i.150. 'This unfortunate people found their only refuge in the humanity which yet remained in the clergy, and the influence they had on the Spaniards .... of any murders committed by them, or at their instigation, I find little or not proof at all (A i.119-20)'. Indeed, the Jesuits especially were 'distinguishable for their learning, and the decency of their behaviour (A i.222)' and challenged the Spanish court, arguing 'that their want of success ... was owning to the scandal which the immorality of the Spaniards never failed to give (A i.258)'. The 'Indians under their jurisdiction are an innocent people, civilized without being corrupted (A i.263)'.

[49] C viii.345.

[50] C vii.161.

[51] C viii.185. 'In situation, God knows nothing less (Id.)'.

[52] See WS i.451.

[53] Cf. James Boswell, *The life of Samuel Johnson* (Oxford: Oxford Univ. Press, 1998 [1791]), 313.

[54] Elsewhere he criticised the aristocracy for neglecting their duties. See, e.g., T 14, 30.

[55] WS ix.160. 'I have strained every nerve to keep the Duke of Bedford in that situation which alone makes him my superior.... It is little to be doubted, that several of his forefathers in that long series, have degenerated into honour and virtue (WS ix.162, 169)'. See gen. WS ix.145-87.

Noble Lord', Burke expressed his astonishment at the absurdity of the Duke's revolutionary sympathies.[56] It was a

> Singular phenomenon, that, whilst the *sans-culotte* carcass-butchers and the philosophers of the shambles are pricking their dotted lines upon his hide, and, like the print of the poor ox that we see in the shop-windows at Charing Cross, alive as he is, and thinking no harm in the world, he is divided into rumps, and sirloins, and briskets, and into all sorts of pieces for roasting, boiling, and stewing, that, all the while they are measuring *him*, his Grace is measuring *me*—is invidiously comparing the bounty of the crown with the deserts of the defender of his order, and in the same moment fawning on those who have the knife half out of the sheath? Poor innocent![57]

As this passage suggests, Burke was a 'defender' of the aristocratic order, but retained the derisory attitude of a self-made man. 'I have no vulgar admiration nor vulgar antipathy towards [the peers]. I hold their order in cold and decent respect. I hold them to be an absolute necessity to the constitution, but I think they are only good when kept within proper bounds'.[58] Indeed, in attempting to maintain a balance in the constitution, he was critical throughout his career of both monarchy and nobility alike. In their threat to the constitution by excessive influence, it was always a 'question … which is the more imminent'.[59] In his own day, Burke perceived this threat to be largely from the crown and the '*King's friends*'.[60] 'Would to God it were true, that the fault of our peers were too much spirit '[61] These ranks were of great value, but only insofar as they fulfilled their responsibilities, as a corps, to public virtue. For 'all political power ... being wholly artificial, and ... a derogation from the natural equality of mankind at large, ought to be some way or other exercised for their benefit'.[62] But Burke believed that, beyond any claim of right, the utility and attendant responsibilities of these orders, as with the corporate Church, were patent.[63] That he believed these to be in some sense universal, too, is evident in the use of the terms of classical political theory, in the *Account* and the *Abridgement*, to America and ancient

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[56] When 'gentlemen of landed Property argued in favour of [Paine] ... it reminded him of living in the happy Kingdom of Cocogne were [sic] Fowls ready roasted cried out ''Come eat me'' (T 41-2)'. See 'Letter to a noble Lord', esp. WS ix.180.

[57] WS ix.180.

[58] From a fragment on 'Aristocracy' in W ii.439.

[59] WS ii.268.

[60] WS ii.291.

[61] WS ii.268.

[62] WS v.385. After the revolution Burke wrote: 'I could not actively, or with a good heart, and clear conscience, go to the establishment of a monarchical despotism in the place of this system of Anarchy. I should think myself obligd to withdraw myself wholly from such a competition and give repose to my age (C vi.414)'. Cf. WS vi.107.

[63] WS ix.125. Cf. T 59, 14.

Europe.[64]

In this 'civil economy', a hereditary and landed aristocracy were the 'ballast in the vessel of the commonwealth', the 'Corinthian capital of polished society'.[65] This was no simple *noblesse oblige*, but the attempt to join private interest and public duty. Aristocracy was the interested ward of political virtue. Property consequently remained an office, the 'tenure of which is the performance of some duty'.[66] It was thought to provide a security from influence and corruption, with which a public life in the public interest could be pursued. This is particularly true of landed and agricultural property, which 'is in its nature the firm base of every stable government ... so considered, by all the wisest writers of the old philosophy'.[67] These 'great oaks' were, in effect, banks of social capital for the public good and social improvement.[68] As early as in *The Reformer*, Burke had criticised the degree to which the Irish aristocracy, such as it was, had neglected its responsibilities. And

> Our modern Systems hold, that the Riches and Power of Kings are by no means their Property, but a Depositum in their Hands, for the Use of the People; And if we consider the natural Equality of Mankind, we shall believe the same of the Estates of Gentlemen, bestowed on them at the first Distribution of Properties, for promoting the Public Good; And when, by the Use they make of their Fortunes, they thwart that End, they are liable to the same or a greater Reproach than a Prince who abuses his Power'.[69]

A nobility seeking fame and honour, rather than wealth, was essential in the civic economy of classical thought.[70] 'Is it better', Burke could ask in the *Reflections*, 'that estates should be held by those who have no duty than by those who have one?'[71] In the case of Britain this was combined with what was, in contemporary European terms, a fluid, though far from classless, society. In this, 'it was but of little consequence to true Dignity, (in this Country, at least) whether the gentleman was a Nobleman or a Merchant; each had distinct privileges as well as duties to attend to'.[72]

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[64] 'To comprehend the other parts of the government of our ancestors, we must take notice of the orders, into which they were classed (WS i.435).' See A i.164, ii.296, WS i.435. Among American failures was Locke's constitution for Carolina (A ii.237). This may be the only political reference, outside of the *Vindication*, to Locke.

[65] WS i.499, RRF 141, 245. The higher classes were the 'mind that actuates the whole machine (L 269).' Their 'fortitude' was a 'cool, steady, deliberate principle, always present, always equable ...; tempering honour with prudence; incited, invigourated, and sustained by a generous love of fame (L 269)'. See L 138. See also WWM Bk P 27/206 on aristocracy, virtue, and 'storming the closet'.

[66] RRF 274.

[67] L 291-2. 'Commerce increases Luxury, and Merchants support the State; but Kings, Nobles, and Gentry, are nothing without possession (T 37)'.

[68] For Burke, these 'great oaks' were the basis for progress, perpetuating their 'benefits from generation to generation.... if their conduct and example hand down their principles to their successors, then their houses become the public repositories and office of record for the constitution (C ii.372)'. See WWM Bk P 27/205 on 'nobility' and 27/206 on 'country gentleman'.

[69] WS i.98.

[70] 'Wealth the most invidious of all distinctions therefore Nobility brought in ('Between the ancient order of Europe', WWM Bk 10/96).' On the 'honour ethic', see Charles Taylor, *Sources of the self: the making of modern identity* (Cambridge, MA: Harvard Univ. Press, 1989), 152-5.

This belief that landed property joined private and public concerns in a manner in which movable property could not was one firmly grounded in classical political thought. It also had widespread support among Burke's contemporaries, not least Montesquieu. Indeed, in the *Spirit of the laws*, Montesquieu had written that it was in the pursuit of public glory, rather than private interest, that generated an 'invisible hand' of honour and 'sets all the parts of the body politic in motion, and by its very action connects them; thus each individual advances the public good, while he only thinks of promoting his own interests'.[73] Burke maintained a similar vision. In discussing writers, the young Burke contrasted the '*Desire of Lucre*' with the 'Love of Glory', the attempt to join 'Honour and Interest' in the name of '*Publick-Spirit*'.[74] This was especially true of public men. Referring favourably to the Whigs under Queen Anne, he wrote:

> They believed private honour to be the great foundation of public trust; that friendship was no mean step towards patriotism; that he who, in the common intercourse of life, showed he regarded somebody besides himself, when he came to act in a public situation might probably consult some other interest than his own.[75]

Such a system was perhaps the domestic equivalent of mercantilism, a balance of the limited resources of the community, but its pedigree is not without success. In comparison, the economic and political deregulation of the future was unproven. It also expresses the more complex view that 'besides Riches there are many Things necessary to the Prosperity of a Nation'.[76] 'Hospitality and *Public-Spirit* have the same Source, namely, the Love of Mankind', but the belief that these were capable of self-organisation was an unproven idea.[77] As he would stress in the *Reflections*, while '[n]o excess is good ... it does not seem ... of material injury to any commonwealth, that there should exist some estates that have a chance of being acquired by other means than the previous acquisition of money'.[78] This 'honour ethic' would prove critical to Burke's views on the role of legislators.

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[71] RRF 274.

[72] T 40-1. Cf. F (M) A.i.39a on English and continental gentry.

[73] Montesquieu, *The spirit of the laws*, iii.7. But this is pointedly not an acceptance of Mandeville's 'private vices, public virtues'. For similarities to the civic compromises of the American constitution, see Donlan, 'Virtue and vigour: *The federalist* and American civic republicanism', (1999) 21 *DULJ* 90.

[74] WS i.84. 'Incentives to proceed in so honourable a Course; and surely no Country has more need of the Exertion of such a Virtue, whose Men of Fortune are not satisfied with impoverishing, but also despise it (WS i.84)'. '*Desire of Lucre* is become almost the general Spring of Action, and it has never produced any but mean ones; besides the Taste for irrational Pleasures has made the Souls of many so callous, as not to be sensible of any thing delicate. These two Passions naturally destroy the Love of Glory, which is the only Soil proper for producing generous Patrons as well as good Writers (WS i.93).'

[75] WS ii.316. 'I respect virtue .... [but] lament to see qualities, rare and valuable, squandered away without any public utility (WS ii.318)'.

To the stability of a hereditary aristocracy and landed property, Burke recognised the energy and talent, and the more meritorious distinctions, of a natural aristocracy, 'without which there is no nation'.[79] As 'their Interests are with the Public', they were an 'essential integrant part' of the civil society, the 'soul to the body, without which the man does not exist'.[80] It was from this natural aristocracy, that Burke maintained, with many of his contemporaries, artificial distinctions, with their attendant benefits arose. In this way, a 'chain of subordination' was natural. Beyond simple societies, there was a universal tendency to create distinctions of rank and, once begun, a concomitant admiration of the 'great'. This goes to the heart of Burke's thought. The

> state of civil society which necessarily generates this aristocracy is a state of Nature—and much more truly so than a savage and incoherent mode of life. For man is by nature reasonable; and he is never more perfectly in his natural state, but when he is placed where reason may be best cultivated and most predominates. Art is man's nature. We are as much, at least, in a state of Nature in formed manhood as in immature and helpless infancy. Men form in Nature, as she operates in the common modification of society, the leading, guiding, and governing part.[81]

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[76] WS i.85. See WS i.66.

[77] WS i.84. Michael Brown argues that the 'identification of virtue with benevolence, and not glory, supplied the modern subject with a theory of morality as interdependence rather than the moral independence celebrated in the commonwealth paradigm'. 'Francis Hutcheson and the Molesworth connection', (1999) 14 *Eighteenth-Century Ireland* 62, 75. But 'glory' represented an attempt to ensure, in practice, union of private and public interest, whereas the belief in the concord of the two, whether in Hutcheson or Mandeville, provided little guidance and ultimately no more guarantee.

[78] RRF 274.

[79] W iv.466. It was 'formed out of a class of legitimate presumptions, which, taken as generalities, must be admitted for actual truths (W iv.466)'.

[80] T 37, W iv.466, 466. Cf. W iv.465.

[81] W iv.466. See WS viii.60, viii.212.Envy was another element. In Ireland, for example, the 'desire of having some one below them, descends to those who are the very lowest of all,—and a Protestant cobbler, debased by his poverty, but exalted by his share of the ruling church, feels a pride in knowing, it is by his generosity alone, that the peer, whose footman's instep he measures, is able to keep his chaplain from a jail (WS iii.659).'

The natural aristocracy, he believed, was

> bound, with all the activity and energy of Minds, animated and awakened by great hopes and Views, to support those aristocratick principles, and the aristocratick Interests connected with them as essential to the real Benefit of the Body of the people, to which all names of party, all Ranks and orders in the State, and even Government itself ought to be entirely subordinate.[82]

It was in this sense that he saw the Rockingham Whigs as 'an aristocratick Party.... in the true Sense of the word.... constructed upon a Ground plot of stability and independence; a party therefore equally removed from servile court compliances, and from popular levity, presumption, and precipitation'.[83] Neither aristocracy could be suffered to become separate interests.[84] In the language Burke used in the *Abridgement*, one was rooted in the principle of 'admiration', the other in 'ambition'.[85] Between the two a link was provided to the corporate experience of the past as well as to the future. 'Energy' balanced with stability. As he saw it, he defended, not an 'ancient regime', but a modern, progressive, and as he saw it, flourishing regime.[86] Indeed, he noted that if what is meant by 'L'ancien Regime' was the 'system of Court Intrigue miscalled a Government as it stood, at Versailles before the present confusion', then its restoration was 'impossible'.[87]

This is not without its complications, particularly in Ireland. Burke questioned whether the Irish Ascendancy acted on their responsibilities, rather than as a 'master caste'.[88] As a body, they were 'not *alone* sufficiently the people to form a democracy; and ... *too numerous* to answer the ends and purposes of *an aristocracy*'.[89] Burke's critique here joins the Tory opposition rhetoric of Bolingbroke. In this language, the 'stockjobber' was a man of fictions, economic and political. In the first sense, Johnson defined a 'stockjobber' as a 'low wretch who gets money by buying and selling shares in the funds'.[90] It was not uncommon that this sort of activity was condemned by the most passionate supporters of commerce.[91] In the second, stockjobbing was the monopolisation of power based on an equally questionable value and an absence of public virtue. Instead of acting with public spirit, the 'stockjobbing Ascendancy' was a short-sighted faction monopolising power and doling out positions and 'jobbs' to its own.[92] This social and political dominance, always precarious in terms of numbers, prevented any true liberty or virtue. 'In a Country of monopoly there *can* be no patriotism. There may be party spirit–but public spirit there can be none. As to a spirit of liberty, still less can it exist, or any thing like it.'[93] The '[n]ew *ascendancy* is the old mastership.... the resolution of one set of people in Ireland, to consider themselves as the sole citizens in the commonwealth.'[94] While the young Burke had earlier suggested taxing absentees, he came to believe that such an action would further divide the absentees from the interests of Ireland.[95] The solution was not to raze the ascendancy, but 'to raise an aristocratic interest amongst' Irish Catholics.[96] For while 'landed property' was the

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[82] C vii.53.
[83] C vii.52-3. See C vii.53 and cf. the 'newmodelled Whigs (WS vi.452)' who espoused a 'republican, frenchified Whiggism (WS vii.52)'.
[84] Where an hereditary and landed aristocracy was not [permitted] to become 'a separate body', it would 'spontaneously ... lead and direct, and moderate the rest (L 292).'
[85] See WS i.431.
[86] C vi.479.
[87] C vi.479.
[88] In his own visit to Ireland in 1835, Tocqueville remarked that the 'two aristocracies' of England and Ireland '[h]ave the same origin, the same manners, nearly the same laws. The one, however, has for centuries given the English one of the best governments that exists in the world, the other, to the Irish, one of the most detestable that could ever be imagined.... It would not be fair to judge theoretically aristocracy by either the one or the other of these two peoples. The rule lies elsewhere'. Emmet Larkin (ed.), *Alexis de Tocqueville's journey in Ireland: July-August, 1835* (Dublin: Wolfhound Press, 1990), 83.
[89] WS ix.601.

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[90] E.L. McAdam and George Milne (eds), *Johnson's Dictionary: a modern selection* (London: Cassel, 1963 [1755]), 401. He also cites from Swift. 'The *stockjobber* thus from 'Change-alley goes down,/And tips you the freeman a wink;/Let me have but your vote to serve for the town./And here is a guinea to drink.' Cf. John Dwyer, 'Virtue and improvement: the civic world of Adam Smith' in Peter Jones and Andrew S. Skinner, *Adam Smith reviewed* (Edinburgh: Edinburgh Univ. Press, 1992), 202-3.

[91] Hume, who was at his 'least sceptical', on the subject of commerce, wrote of stockholders: 'These are men who have no connection with the state, who can enjoy their revenue in any part of the globe in which they choose to reside, who will naturally bury themselves in the capital, or in great cities, and who will sink into the lethargy of a stupid and pampered luxury, without spirit, ambition, or enjoyment. Adieu to all ideas of nobility, gentry, and family. The stocks can be transferred in an instant; and, being in such a fluctuating state, will seldom be transmitted during three generations from father to son. Or were they to remain ever so long in one family, they convey no hereditary authority or credit to the possessor; and by this means the several ranks of men, which form a kind of independent magistracy in a state, instituted by the hand of nature, are entirely lost; and every man in authority derives his influence from the commission alone of the sovereign. No expedient remains for preventing or suppressing insurrections, but mercenary armies: no expedient at all remains for resisting tyranny: elections are swayed by bribery and corruption alone: and the middle power between king and people being totally removed, a grievous despotism must infallibly prevail.' 'Of Public Credit', *Selected Essays* (Oxford: Oxford Univ. Press, 1998), 209-10.

[92] 'Instead of prating about Protestant ascendancies, Protestant Parliaments ought, in my opinion, to think at last of becoming Patriot Parliaments (WS ix.650)'. See WS ix.642, 654-6.

[93] WS ix.641. They 'teach the persons who administer in that Government, to prefer their own particular, but well understood private interest, to the false and ill calculated private interest of the monopolizing Company they belong to (WS ix.641)'.

[94] WS ix.644.

[95] Cf. S 251-2 and WS i.96-101 (*The Reformer* No. 7). While this change of mind is often explained by his association with Rockingham, Burke seems also to have owned land, by way of the Nagles, in county Cork. See L.M. Cullen, 'The Blackwater Catholics and County Cork society and politics in the eighteenth century', in Patrick O'Flanagan and Cornelius G. Burrimer (eds), *Cork History and society: interdisciplinary essays in the history of an Irish county* (Dublin: Geography Publications, 1993), 553-5.

[96] WS ix.597. 'Lawful enjoyment is the surest measure to prevent unlawful gratification. Where there is property,

'foundation and support of all other kinds', under the penal laws its 'acquisition ... is made as difficult as possible, to Roman Catholicks, and ... the law meets and stops them in every road of industry'.[97]

Again, these social orders were common elements of classical political theory.[98] Even in European republics, the 'spirit of European Monarchy was still left. Those countries still continued countries of States; that is, of classes, orders, and distinctions'.[99] Burke repeatedly insists that he was not, 'in the abstract', 'an enemy to any republic, modern or ancient'.[100] In general, he compared a 'sober and sensible form of a Republick, in which there was no mention of a King, but which held out some reasonable security to property, life, and personal freedom' to that of France.[101] They had, as the French did not, a Senate. 'A monarchy may exist without' a Senate, 'but it seems to be in the very essence of a republican government. It holds a sort of middle place between the supreme power exercised by the people, or immediately delegated from them, and the mere executive'.[102] He spoke favourably of both American and Italian republics. In small commercial republics like Florence, where their 'frugal and ingenious spirit' was turned to 'navigation and traffick', they 'grew to a considerable degree of wealth, power, and civility'.[103] In such republics,

> either by express laws, or by usage more operative, the noble casts are almost universally, in their turn, excluded from commerce, manufacture, farming of land, and in general from all lucrative civil professions. The Nobles have the monopoly of honour. The Plebeians a monopoly of all other means of acquiring wealth. Thus some sort of a balance is formed among conditions; a sort of compensation is furnished to those, who, in a *limited sense*, are excluded from the government of the state.[104]

In the *Account*, too, the Burkes had written of 'very free, bold, and republican spirit' of colonial

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there will be less theft; where there is marriage, there will always be less fornication (WS ix.604).'

[97] WS ix.476, 445. See WS ix.476 and gen. W.N. Osborough, 'Catholics, land and the Popery Acts of Anne' in Osborough, *Studies in Irish legal history* (Dublin: Four Courts Press, 1999). Cf. A ii.231.

[98] Cf. America and property qualifications. See L 133-4.

[99] L 133-4.

[100] W iv.424, iv.424 (both referring to his parliamentary debate with Fox).

[101] WS viii.460.

[102] RRF 316.

[103] WS i.456. At the same time, 'commerce was neglected and despised by the rustick gentry of the martial governments (WS i.456)'. Cf. 'Though a republic should be barbarous, it necessarily, by an infallible operation gives rise to LAW ... . From law arise[s] security; from security curiosity; and from curiosity knowledge ...'. Hume, 'Of the Rise of the Arts and Sciences' in *Selected Essays*, 62.

[104] WS ix.599.

'freeholders'.[105] And '[I]n no part of the world are the ordinary sort so independent, or possess so many of the conveniences of life'.[106] But the circumstances and manners of every country were to decide upon the form of its government. The situations of larger nations was different,

> neither England nor France, without infinite detriment to them, as well in the event as in the experiment, could be brought into republican form; … everything republican which can be introduced with safety into either of them must be built upon a monarchy–built upon a real, not a nominal monarchy, *as its essential basis* ….[107]

In these large, extended states, if monarchy remained 'susceptible' to reform, it had a critical stabilising role to play and 'reformed and balanced, for a great country, it is the best of all governments'.[108] If 'there were many very good republics' there were none so 'calculated as well for the happiness of a nation as our monarchy'.[109] But it was the character of French republicanism that Burke challenged. After the revolution, France, too large for the small republic, chose the 'example of the ancient Romans'.[110] It was 'not a commercial but a martial Republic–a Republick not of simple husbandmen or fishermen, but of intriguers, and of warriors'.[111] It was a 'great military and ambitious republick' built for 'universal empire, by producing universal revolution'.[112] Such a government 'did not at all deserve the respectable name of republic', but 'was a wild attempt to methodize anarchy, to perpetuate and fix disorder'.[113] The commercial republic *cum* monarchy was pitted against the expansive martial republic of France.

Burke's defence of orders must also be seen in light of his attempts to reform or reduce the power and influence of the crown.[114] His critique, laid out most completely in his 'Thoughts on the cause of our present discontents', also suggests the complexity of contemporary British politics. In form, Burke originally considered writing the speech as a letter to John White, a recently retired Whig MP, whose old 'Country' Whig views of fifty years in politics would have put him close to pre-establishment whiggism and to the 'Country' Tory Bolingbroke.[115] In it, he argued that the 'great parties which formerly agitated and divided the kingdom are known to be in a manner entirely dissolved'.[116] In this complex political climate, Burke's efforts at reform attempted the 'reduction of that corrupt influence ... which takes away vigour from our arms, wisdom from our councils, and every shadow of authority and credit from the most venerable parts of our constitution'.[117] He recognised, as Hume was more famously to do, the shocking admission that '[s]ome degree of influence must exist in all Governments.'[118] Again with Hume, if progress in the arts, sciences, and law required, in its nursery, a republican government, its later stages requires the stability of monarchy.[119] If events in France led him to defend monarchy from destruction, through most of his career Burke believed its influence in Britain to be excessive. In his 'Speech on economic reform', for example, he complains that '[n]o revenue, no not a royal revenue, can exist under the accumulated charge of antient establishment; modern luxury; and parliamentary political corruption'.[120] In counterbalancing crown power, the aristocracies and the organised clergy, the intermediate powers of Europe's ancient, evolving constitutions, were essential. Their wealth guaranteed their independence. They insured in this way that the 'prince shall not be able to violate the laws'.[121] If Burke did not go to the extremes of radical Whigs, who suggested that monarchy was in essence elective, it was 'only a trustee for the public'.[122] Had it been truly elective, it would not have been able to effect this trust. It should be clear, too, that this was a social, rather than a narrowly political, separation of powers. The orders, and the plural local communities they nursed, were 'so many deposits and receptacles of justice', providing essential checks on any accumulation of power.[123]

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[105] A ii.167-8.

[106] A ii.167-8. A commercial and yeoman republic of the sort developed in America was unthreatening because of its isolation, the scarcity of its population, and the land available to ambition.

[107] W iv.425.

[108] W iv.423.

[109] PH xxvii.821.

[110] L 342. See Ferguson, 24 and cf. 1767 R 311 *bis*, criticizing Ferguson's admiration for Sparta. 'Let these examples be compared with the spirit which reigns in a commercial state (1767 R 311 *bis*)'.

[111] L 342, L 187. 'They had in their hands the observations of *Machiavel* upon *Livy*. They had *Montesquieu*'s *Grandeur et Decadence des Romains* as a manual (L175)'. Cf. James Livesey, 'Agrarian ideology and commercial republicanism in the French revolution', (1997) 157 *Past and Present* 94, 121.

[112] L 177, L 248.

[113] W v.401. See L 187. 'They made and recorded a sort of *institute* and *digest* of anarchy (W iii.275)'.

[114] But '[n]o correctives which he proposed to the power of the crown could lead him to approve of a plan of a republic (if so may be reputed) which has no correctives, and which he believes to be incapable of admitting any (W iv.423).' See WS ii.292-4.

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[115] Speaking of the part played by many in the House of Commons to the influence of the crown, Burke noted that '[h]owever they may hire out the *usufruct* of their voices, they never will part with the *fee and inheritance* (WS ii.258)'.

[116] WS ii.253. See WS ii.253n2.

[117] WS iii.483.

[118] WS ix.642. Cf. The 'closet' of the crown and the 'clandestine patronage' of the Indian Nabobs (WS v.445).

[119] There was 'more liberty at present, in the most arbitrary government of EUROPE, than ... during the most flourishing period of ancient times.' Hume, 'Of the populousness of ancient nations' in *Selected essays*, 227. 'The more the master is removed from us in place and rank, the greater liberty we enjoy ...'. Id. In a debate with the Scot Presbyterian minister Robert Wallace, Hume argued that 'populousness', a common standard of measuring public happiness, was far greater in modern Europe. See also 'Of Civil Liberty' in *Selected essays*. Hume's 'Idea of a perfect commonwealth' was, however, a republic.

[120] WS iii.511. The 'royal household has lost all that was stately and venerable in the antique manners, without retrenching any thing of the cumbrous charge of a Gothic establishment (WS iii.509)'.

[121] WS ii.277. See L 133, T 47. It was, after all, the 'nature of despotism to abhor power held by any means but its own momentary pleasure', Burke wrote, 'and to annihilate all intermediate situations between boundless strength on it own part, and total debility on the part of the people (WS ii.259-60)'. Cf. Robertson, 131-2.

Like the clergy, the other orders served as storehouses of culture, habituating and socialising individuals, at their best empowering them with the legacy of past experience. This reflected Burke's communitarian view of human nature and association. Individuality was inevitably defined and defended by myriad loyalties, not merely as citizens of the state.[124] Ironically, a state that was 'disconnected into the dust and powder of individuality' undermined the individual.[125] Because revolutionary 'individuality' was defined in a dichotomy between the state and the citizen, any more complex concept was 'left out of their scheme of government. The state is all in all'.[126] Beyond this, for Burke, a 'people' is an inherently problematic idea.[127] Like the other larger nations of Europe, Britain was already a complex, plural entity of many nested local communities, traditional institutions, the wider orders and 'little platoons', all with attendant responsibilities.[128] The 'constructive general will' was, at its best, the 'Sympathetic representation' of the nation.[129] It was in this sense that the 'several orders' of France 'meeting peacefully and constitutionally ... were the *people* of France'.[130] These were the 'Ecclesiastical, the Military, the several Corporate Bodies of Justice, and of Burghership, making under a Monarch (I repeat it again and again) *the French nations, according to its fundamental Constitution*'.[131] The revolutionaries threatened to eliminate all of these, an event unparalleled in previous revolutions in England or on the continent. While '[h]istory is resorted to for other acts of indemnity in other times', in no other 'were the orders of society subverted; religion and moral destroyed on principle, or property totally annihilated'.[132]

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[122] PH xxi.204.

[123] C v.326. It 'existed in the majesty of its throne, in the dignity of its nobility, in the honour of its gentry, in the sanctity of its clergy, in the reverence of its magistracy, in the weight and consideration due to its landed property in the several bailliages, in the respect due to its movable substance represented by the corporations of the kingdom. All these particular *moleculae* united form the great mass of what is truly the body politic in all countries (Id.).'

[124] Collapsing commonwealth and culture, he wrote: 'Individuals pass like shadows; but the commonwealth is fixed and stable. The difference ... of to-day and to-morrow, which to private people is immense, to the state is nothing (WS iii.527)'.

[125] WS iii.358.

[126] WS v.375. If Tocqueville, four decades later, recognised the inevitability of relatively more democratic societies, he continued to underscore this problem of the 'tyranny of the majority'.

[127] In their 'doctrines concerning *the people* ... it is plain enough they mean their own faction (W iv.432)'

[128] See WS v.425-6 (comparing the orders of Bengal and France).

[129] W iv.464.

[130] W iv.473.

Burke saw the events in France establishing a 'democracy' dangerous in both simplicity and scale. Classical political theory, from Aristotle to Cicero to Montesquieu, indeed Madison, branded 'simple' forms of government, those that did not mix monarchy, aristocracy, and democracy.[133] A 'perfect democracy' was the 'most shameless thing in the world.... [and] the most fearless'.[134] Even Rousseau's own favourable views towards such a system were on the scale of Geneva rather than France. Such a 'democracy', a form that is still practiced nowhere, was as certain a despotism as any other.[135] It was not, in this view, a state of independent individuals. On the contrary it was thought to render citizens equally impotent, amenable to the influence of powerful figures. It was the 'foodful nurse of ambition' and was incapable of steady government and direction.[136] As this expressed itself in France, it was a 'very bad species of tyranny', leaving only the 'Oppressors and the Oppressed'.[137] Burke saw the revolutionaries 'exploding' or 'destroying all the balances and counterpoises .... melt[ing] down the whole into one incongruous, ill-connected mass'.[138] In creating this leviathan, they eliminated all checks, internal and external, to power and will.[139] Without mediating forces, 'great multitudes are incapable of acting separately; they usually move under a few leaders; and ... give rise to envy and faction'.[140] It was precisely because opinion was 'electrick' and ultimately independent of

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[131] WS viii.473.

[132] WS viii.497. See W iii.278-9 (comparing the French and the Glorious revolutions) and WS viii.497-8 (on Cromwell and Charles II).

[133] See RRF 153 and the critique in the *Vindication of natural society* (1756) at WS i.161-6.

[134] RRF 191. See RRF 190-1. When someone remarked that 'no persons held together for any long continuance, who called themselves Democrats ... Mr. B answered 'Birds of Prey are not gregarious' (T 27)'.

[135] James Madison wrote, in Federalist No. 10, that 'pure' democracies 'have been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions'. Alexander Hamilton, John Jay, and Madison, *The federalist: a collection of essays written in favor of the new constitution as agreed upon by the federal convention September 17, 1787* (Dubuque: Kendall/Hunt Pub. Co., 1990 [1787-8), George W. Carey and James McClellan (eds.). See gen. No. 46.

[136] W iv.459. The colonies were 'to all purposes a mere democracy.... [contributing] to make those settlements flourish; but ... as much to render their value to their mother country far more precarious (A ii.300)'.

[137] W iii.276, WS viii.462. 'Have these gentlemen never heard ... of any thing between the despotism of the monarch and the despotism of the multitude (RRF 227)?'

[138] L 248, W iii.275. See RRF 300-1. The 'organic and individualistic conceptions struggled with one another and were only fitfully resolved'. James Livesey, 'Agrarian ideology and commercial republicanism in the French revolution', (1997) 157 *Past and Present* 94, 94. See also A ii.292.

[139] In this way, they were the 'enemies of all arts, all sciences, all civilisation, and all commerce'. L 228. 'Necessity, as it has no law, so it has no shame; but moral necessity is not like metaphysical, or even physical (L 254).'

[140] N 99. 'Jealousy of bodies of men separate in Interest and feeling from the body of the people ever looked upon with a jealous Eye in this Country (WS ii.227).'

property, particularly through the press, that the stabilising force of property and orders was so important. The artificial institutions give a 'body to opinion, and permanence to fugitive esteem' and were thus critical elements of progress.[141] Given this view, and subsequent French violence, there was a sense in which revolutionary 'democracy' was a reversion to a primitive, barbarian form, though one accentuated by the contemporary press. Burke abused the revolutionaries as a 'cannibal Republick', who have 'estranged' the French 'from every civil, moral, and social, or even natural and instinctive sentiment, habit, and practice, and have rendered them systematically savages'.[142] Indeed, 'all the ties, which, whether of reason or prejudice, attach mankind to their old, habitual, domestic Governments, are not a little loosened'.[143] Worse, by the logic of such a democracy, a leader able to harness this energy was inevitable. French anarchy, Burke prophetically noted, would continue 'until some popular general ... who possesses the true spirit of command, shall draw the eyes of all men upon himself.... [and] the moment in which that event shall happen, the person who really commands the army is your master'.[144] Less than a decade later, Napoleon commanded France and, soon after, much of Europe.

These dangers were exacerbated by the growing importance of 'opinion', of eighteenth-century mass politics. For Burke, '[a]ll authority, in a great degree, exists in opinion'.[145] This was neither Lockean consent nor democratic representation, but the fluid totality of public sympathies at the core of all politics. Neither was it, as Harrington had suggested, generated in any simple relationship with property. But those without property were conceived of, as a result of having nothing, as having nothing to lose. Because opinion was not strictly rational and could not be regulated, there were dangers.[146] In this sense, the 'world is governed by go-betweens.... [who] assume a new representative character'.[147] The middle classes, of whom Burke and many contemporaries had great hopes, could also, in their success, forget their wider attachments and duties. In France before the revolution, the

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[141] RRF 245.
[142] L 228, WS viii.462, viii.462-3.
[143] L 352.
[144] RRF 342.
[145] See L 346. Its 'only firm seat ... is in the minds, affections, and interests of the people (W v.528)'. See the discussion of 'opinion' in J.A.W. Gunn, 'Opinion in eighteenth-century thought: what did the concept purport to explain?' (1993) 5 *Utilitas* 17.
[146] There remained property requirements in both France and America after their respective revolutions. See Gibbon, iv.384-7.
[147] W iv.475. See W iv.475-6.

> middle classes had swelled far beyond their former proportion. Like whatever is the most effectively rich and great in society, these classes became the seat of all the active politicks; and the preponderating weight to decide on them. There were all the energies by which fortune is acquired; there the consequence of their success. There were all the talents which assert their pretensions, and are impatient of the place which settled society prescribes to them. These descriptions had got between the great and the populace; and the influence on the lower classes was with them. The spirit of ambition had taken possession of this class as violently as ever it had done of any other.[148]

The spirit of ambition was, as in the *Enquiry*, a positive principle that encouraged improvement, but without admiration, here not so much of aristocracy as of civil society itself. Burke feared that a mass of men could became a mob, the middle classes absorbed in self-interest, and that less than virtuous leaders might take advantage of both.[149] It is in this sense that Burke feared the 'dreadful energy of a State, in which the property has nothing to do with the Government'.[150] Given the changes occurring in British society, the 'middling ranks', the Burkes included 'not only all merchants but all farmers and tradesmen', had become an increasingly important subject.[151] In responding to these changes, classical analysis, like the civic critique, was forced to accommodate to new realities. In an observation of some importance to Burke's social theory, the Burkes had written:

> Indubitably the security, as well as the solid wealth of every nation, consists principally in the number of low and middling men of a free condition, and that beautiful gradation form the highest to the lowest, where the transitions all the way are almost imperceptible. To produce this ought to be the aim and mark of every well regulated commonwealth, and none has ever flourished upon other principles.[152]

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[148] L 186. On the 'burghers', see Pocock, *Virtue* 204-5 and in Furet, –. See WS viii.462, 470.

[149] Smith, and Millar after him, had made a similar distinction between the principles of 'authority' and 'utility', associated with Tories and Whigs respectively. See Haakonssen, 128-9. Cf. Millar's *An historical view of the English government* (1787) in Lehmann, 348-57 and Haakonssen, 'John Millar and the science of a legislator', 1985 *Juridical Rvw* 41. In political terms, I believe Burke would have agreed generally with this categorisation, but insisted that the two could not be separated, as with his own distinction between 'admiration' and 'ambition'. Christopher J. Berry has, however, compared Burke and Millar, claiming that, unlike Burke, 'Millar is clear … that mere longevity or 'tradition' must still be assessed by the 'general interest'. *Social theory of the Scottish enlightenment* (Edinburgh: Edinburgh Univ. Press, 1997). Burke's assessment was made in the same terms, but he believed that traditional orders had a greater role, on account of their utility, than did Millar. Authority thus had utility. Burke became acquainted with Millar, Glasgow Professor of Civil Law, while Lord Rector of the University of Glasgow. Although Millar became progressively critical of Burke's views on representation and, later, the revolution in France, in the mid 1780s he could write, '[f]or my own part I must look upon it as one of the most fortunate circumstances of my life that brought me into your acquaintance'. (13 Nov. 1785) in Lehmann, 356.

[150] L 183.

[151] C ix.172.

This 'gradation' and mobility between orders is essential. Among the early English, the 'rigid order deadened by degrees the spirit of the English, and narrowed their conceptions'.[153]

This was also, in some sense, the acceptance of 'modern' liberty as a result of commerce. The increasing importance of small landowners could easily be combined with the civic ideal of the self-sufficient independent yeoman farmer. This transferred the moral status of the large landholder to the small, just as 'gentleman' had developed a more egalitarian usage.[154] But Burke, the master of Beaconsfield, still emphasised, with Smith, agriculture. It was the yeoman agriculture of 'many small Estates .... the first, best, and most frequent results of encouraged and protected industry'.[155] Indeed, it was '[v]ery bad Policy for Gentlemen to keep large Farms in their own hands', for they could not 'give his time & attention to such details as are necessary to minute oeconomy'.[156] Such an observation was part of the wider attempt to diffuse concerns over commerce and luxury, by extolling the virtues (and certainty) of labour. Gold was a 'measure or account, but not the means of trade.... what does not arise from labour ... is never lasting. Such acquisitions extinguish industry, which is alone the parent of riches'.[157] In sum, the 'English' of the colonies, were

> of a reasoning disposition thoughtful and cool, and men of business rather than of great industry, impatient of much fruitless labour, abhorrent of constraint, and lovers of a country life, have a lot which indeed produces neither gold nor silver; but they have a large tract of a fine continent; a noble field for the exercise of agriculture, and sufficient to furnish their trade without laying them under great difficulties. Intolerant as they are of the most useful restraints, their commerce flourishes from the freedom every man has of pursuing it according to his own ideas, and directing his life after his own fashion.[158]

Burke's later thoughts on the details of economy moved in a similar direction. The Dubliner would even criticise the people of the towns and cities, as '*Fruges consumere nati*', born only to

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[152] A ii.118.

[153] WS i.438.

[154] 'A freeholder is as good a gentleman as any in the kingdom (PH xvi.673 quoting from the *Gentleman's Magazine*).

[155] C iii.458. Yeomanry in Britain, Burke noted later in the century, had '[d]ecreased to an alarming degree (T 61)'. Burke himself, as master of Beaconfield, had a deep interest in agriculture and corresponded with Arthur Young, travel writer, agriculturalist, and later politician. He was the intended addressee of Burke's 'Thoughts and details on scarcity'.

[156] T 34.

[157] A ii.293. The 'intercourse' with the colonies was 'an emulation in industry (A ii.293)'. See A ii.106-7.

[158] A ii.58.

consume the fruits of the earth.[159] It was not the merchant, but the agrarian landowner, as he attempted to be at Beaconsfield, that remained the ideal.

PROVIDENCE OFTEN JOINS HONOUR AND INTEREST:

Whereas some scholars have mistaken Burke's use of 'chivalry' as a defence of feudal institutions, others have confused his views on commerce, with its genuine limitations, with a defence of mature capitalism. More curious are those who accuse him of both.[160] While this grossly misrepresents both the complexity of Burke's position and the intellectual possibilities of the late eighteenth century, it must be admitted that his 'Thoughts and details on scarcity (1795)' provides plentiful ammunition for a 'classical liberal' reading.[161] 'To force that market', he wrote, 'or any market, is of all things the most dangerous'.[162] The piece, written to address the possibility of state intervention in the grain market, was not published in his lifetime. It is admittedly cranky, its use of religion out of keeping with Burke's other comments on the subject. It is Burke at his least sceptical. '[W]hereas interest, habit, and tacit convention, that arise from a thousand nameless circumstances, produce a *tact* that regulates without difficulty, what laws and magistrates cannot regulate at all'.[163] The sum of Burke's writings, however, show him supporting both commerce and social orders on the basis of their utility, an argument for which he was not without a considerable body of supporting evidence. His views must also be read in the context of his continuing use of civic language well into the 1790s. As with his comments on the aristocracies, a balance between the economies of glory and interest was essential to progress. In this, his support of agrarian commerce fit rather easily with the society of orders. He maintained a deep distrust of the fictions, the stocks and currencies, of mature capitalism. Even more importantly, the reasons behind Burke's support of comparatively freer trade must be understood. Primarily, it was in the mischief, as he saw it, of economic and political monopoly, and particularly at the expense of Ireland. His comments on Ireland and free trade reveal his concerns to be as much for social as for economic commerce.[164] Burke's commercial humanism is not pre-modern and capitalist, but *modern and pre-capitalist.*[165]

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[159] WS ix.129 (quoting Horace, *Epistles*, I.ii.27). See WS ix.130.

[160] See, e.g., C.B. MacPherson, *Burke* (Oxford: Oxford Univ. Press, 1980). This so-called 'Burke problem' is a problem only for historians who insist on an anachronistic assignment of a liberal-capitalist paradigm to the eighteenth, rather than the nineteenth, century. What is legitimate in this critique is that whereas in his parliamentary vision, conflicting interests may be transcended, but clearly exist, in the 'Thoughts and details on scarcity', Burke seems to deny, in a manner beyond the bounds of rhetoric, any conflict between the farmer and the labourer. See esp. WS ix. 124-5. Furthermore, there is a real sense in which classical liberalism, for all the subjectivism of its economics, does otherwise rely on a communitarian vision, perhaps in an attempt to limit the potential.

[161] WS ix.119-45. For many, the most offensive passage appears to be: 'We, the people, ought to be made sensible, that it is not in breaking the laws of commerce, which are the laws of nature, and consequently the laws of God, that we are to place our hope of softening the divine displeasure to remove any calamity under which we suffer, or which hangs over us (WS ix.137).'

[162] L 257.

Burke was not alone in articulating such a commercial humanism. Montesquieu and the members of the Scottish enlightenment, so important to eighteenth-century jurisprudence, were also essential in reconceptualising commerce. Hume had already argued that 'luxury' could have a positive meaning, turning natural avarice to frugality and bending private energies to the public good.[166] If he was the 'least sceptical' of the Scots in this area, even he still had reservations about stockholders and standing armies. Adam Ferguson, not unimportantly a Highlander, expressed in his *Essay on the history of civil society* (1767) the continuing civic anxiety of the corruption of public virtue, the 'effeminacy', generated by luxury and modern, passive liberty.[167] Ferguson warned that a country whose relationships are merely civil or economic were no longer a people at all. Smith similarly leavened his optimism for commerce with concerns about faction, empire, the fictitious nature of paper credit, and the dependence created by public debt. His analysis of the benefits of specialisation through the 'division of labour', especially, was balanced with a scathing indictment of the effects of a similar fragmentation of human identity. The more integrated (and 'authentic') martial-agrarian ideal was perhaps healthier, but like republican politics, was of limited relevance to the modern world. In this way, commerce was a progressive force for the creation of middle ranks and promoted a political counterweight to

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[163] WS ix.128.

[164] '[N]othing can contribute more', he wrote in notes to a speech, 'to the destruction of that idea of local Patriotism [than] the excessive predominance of *commercial principles* (WWM Bk P 10 (17))'.

[165] See, e.g., the Burkes' criticism of the 'dangerous expedient of a paper currency (A ii.44)' over 'real (A ii.308)'. See also A ii.112 *et seq.*, A ii.304, and WS i.143-4.

[166] Cf. 'So widely different are the effects of opulence and refinement, which, at the same time that they furnish the king with a standing army, the great engine of tyranny and oppression, have also a tendency to inspire the people with notions of liberty and independence.' Millar in Lehmann, 285.

[167] See also, his curious *Institutes of moral philosophy for the use of students in the college of Edinburgh* (London: Routledge/Thoemmes, 1994 [1769]), esp. Part V ('Of jurisprudence'). On Ferguson's ciceronian understanding of progress, see gen. David Kettler, 'History and theory in Ferguson's Essay on the history of civil society: a reconsideration', (1977) 5 *Political Theory* 437, 455 and 'Ferguson's *Principles*', 220. See gen. Kettler, *The social and political thought of Adam Ferguson* (Columbus: Ohio State Univ. Press, 1965). On meeting Johnson, Ferguson suggested that 'luxury corrupts a people, and destroys the spirit of liberty', to which Johnson replied 'Sir, that is all visionary.' Boswell, 477.

power of the monarchy.[168]

Burke was a 'modern'. Indeed, he would defend Horace Walpole as 'an honourable man and a sound Whig', who governed not by 'corruption', but 'by party attachments'.[169] He believed the 'profound repose, the equal liberty, the firm protection of just laws during the long period of his power, were the principal causes of that prosperity which afterwards took such rapid strides towards perfection'.[170] In the 1790s, this belief made up an important part of his critique of radical Whigs. Burke would refer favourably to the trial of Dr Sacheverel, a Tory clergyman, by the Whig establishment as proof of the Rockingham claim to a legitimate succession. But the reappropriation of the opposition, 'ancient' rhetoric used against this Whig establishment by Burke and the Rockinghams was not insignificant. There is, in the *Annual Register*, a suggestive review of the Reverend John Brown's *Estimate of the manners and principles of the times* (1757), the most important of contemporary jeremiads against luxury.[171] The reviewer–Burke?– discusses the 'dispute concerning the preference of ancient and modern times'.[172] Of the two, the modern view 'is much more pernicious ... for spreading vice and corruption, and ... can only induce a dull acquiescence'.[173] In the same issue, the author of the detailed analysis of the *Seven years war* notes, 'we almost despaired of our military virtue ... public spirit appeared utterly extinguished, whilst the rage of faction burned with the utmost violence'.[174] These elements remained an element of Burke's critical language, qualifying his views on commerce, throughout his career.

Although the different periods of Roman government could provide a wide variety of political lessons, Burke applied a Roman schemata, particularly in its expansion and collapse, to contemporary political events.[175] Closely related to this were the opposition languages of British politics.[176] Burke's understanding of civilisation and commerce did not exclude, indeed it demanded, the continuing importance of public-spirit against the dangers of faction.[177] The conquests of Rome, Britain, and Ireland had all resulted from the vulnerability of factional in-fighting. In Rome, it was a commonplace to note, as Montesquieu did, that its corruption was partly the result of the use of foreign mercenaries and the neglect of the participatory liberty of the ancients.[178] In Britain, Saxons invited to quell internal problems ended up conquerors.[179] Similarly in Ireland, Diarmuid's appeal from the incessant civil wars of Ireland to the English king, brought about the 'conquest' of the island by a foreign army. Each was an abandonment of public virtue in both its political and military aspects. In Rome, the certainty, too, of debt and taxes played a role in its decline. For

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[168] See, e.g., Smith's pupil John Millar, *An historical view of the English government* (1789), highlighted the effect of commerce in loosening traditional institutions, including the commerce of the sexes.

[169] W iv.436.

[170] W iv.437.

[171] 1758 R 444. This was the first book reviewed in the *Annual Register*. In the first 'Letter on a regicide peace (1796)' forty years later, he noted that '[n]othing could be more popular than that work (L 67)'.

[172] 1758 R 444.

[173] 1758 R 448. The extract discusses faction, the 'spirit of union', martial virtues, the balance of interests and the public good, and those principles 'which tend to counteract the selfish passions; the principles of religion, honour, and public spirit (1758 R 444)'. See also 'Of the changes in manners and principles in England since the accession of the House of Hanover', extracted from Brown's *Thoughts on civil liberty, licentiousness, and faction* (1765) and criticising Addison, Shaftesbury, Mandeville, Bolingbroke, and Walpole in 1765 R 222 *bis*.

[174] 1758 R 10. See 1758 R 10-11 (on contemporary factions).

[175] In Rome, the rise of a 'few popular men (WS i.341)', the consequence of democracy (WS i.373), became 'more considered than ... the fortune and genius of the Roman people (WS i.341)'.

> No province was free from a most onerous publick debt; and that debt was far from operating like the same engagement contracted in modern states; by which the creditor is thrown into the power of the debtor, they often add considerably to their strength, and the number and attachment of their dependents. The prince in this latter case borrows from the subject or from a stranger. The one becomes more a subject, and the other less a stranger. But in the Roman provinces, the subject borrowed from his master, and he thereby doubled his slavery.[180]

Law and property entered into this analysis as well. The Roman colonies in Britain, because 'lands granted to the soldiers did not pass to their posterity ... were continually falling into decay'.[181] Elsewhere, Burke continued to emphasise the martial virtues, which made up a part of the chivalrous ideal. He distinguished between the warring barbarity of savages and a 'civilized martial nation' like Britain or pre-revolutionary France.[182] This was, of course, an increasingly important distinction given the regicide of France. The British 'must meet a vicious and distempered energy with a manly and rational vigour.... Other times, perhaps other measures. But in this awful hour our politicks ought to be made up of nothing but courage, decision, manliness, and rectitude.'[183] Burke suggested, too, as had Davies about Ireland, that 'civilized' commercial nations were both easier to defeat, given the 'mutual dependence of the several parts', and quicker to recover.[184]

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[176] WS i.512.

[177] 'The test of faction is the resolution to support, or continue the power of some set of men, totally independent of their wisdom or their weakness, of the good or the evil effect of their counsels (W ii.438).' Cf. WWM Bk P 27/206.

[178] WS i.384 (Rome).

[179] WS i.385 (England). See WS i.360.

[180] WS i.375. See WS i.375-6 (on taxes).

[181] WS i.384.

[182] RRF 159. Ferguson wrote that the 'spirit of faction that in republics constituted corruption, in monarchies tends to prevent a greater corruption, servility to those in power'. *Institutes of moral philosophy*, 313. Cf. WS i.360 (on Roman 'martial spirit'). See Smith, *An inquiry into the nature and causes of the wealth of nations* (Oxford: Oxford Univ. Press, 1993 [1776]), 434 and 259-73 and cf. *Lectures on jurisprudence* (Indianapolis: Liberty Fund, 1978

Militias and 'standing armies', which had made up so much a part of the commonwealth critique of the turn of the century, continued to play a role in public debates.[185] In general, Burke 'knew too well ... how difficult it was to accommodate a standing army to a free constitution, or to any constitution'.[186] The English revived a militia in 1757. But this was not the militia of old, it was possible to buy one's way out, a thought unimaginable in earlier times. It may have been around this time that Burke wrote, '[a]n armed people is the true constitutional militia of the kingdom'.[187] But this militia was effectively, and problematically, a reserve of the standing army rather than a people's militia. It was 'brought very nearly to a regular army. As it has approached the true military standard, it has departed from the constitution'.[188] The debate had become increasingly complicated. Burke later opposed, with most of Parliament, a Scottish militia, an institution that many noteworthy Scots thought remained essential to Scottish identity and virtue.[189] Burke's opposition, however, was on the basis that it would throw 'more power into the Hands of the Crown than had hitherto been thought consistent with public Liberty'.[190] Burke also attempted to organise Catholic troops to fight alongside its Catholic ally Portugal, and thereby strengthening the case for their loyalty and virtue.[191]

He complained, too, of foreign, Hanoverian (and Protestant) troops in Ireland and in

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[1762-3/1766]), 540.

[183] WS vii.480-1.

[184] WS i.370. 'A long continued state of war is unnatural to such a nation (WS i.370)'. In the *Account*, published at the beginning of the war with France, the Burkes had noted that '[n]ations like France and England, full of people of spirit, and of industry, easily recover all the losses of war (A ii.16)'. See WS vii.480, T 13 and cf. Browne.

[185] See WWM Bk P 8/179-80 on militia and parliament. Cf. William Burke's 'Considerations on a militia' at WWM Bk P 40.

[186] W iii.277. See the 'Substance of the speech in the debate on the Army estimates' in W iii.269-81.

[187] Recorded as a fragment in W ii.435.

[188] W ii.435. See WWM Bk P 27/206 and F (M) A.v.16 on 'Troops sent to, withdrawn from, Ireland'.

[189] If they had little Lowland support, the Jacobites of 1745 ran unchecked through Scotland, defeated only by the forces of a British standing army. The lessons here were somewhat contradictory, the British force was arguably effective precisely because Scotland had no militia. Smith, Robertson, and Ferguson were all members of the so-called 'Poker Club', founded in Edinburgh in 1762 to campaign for a Scottish militia. Ironically, Hume was particularly troubled by the absence of a militia, whereas Smith, for all his civic concerns, accommodated himself to standing armies. Burke was at Trinity during the rising and wrote Shackleton with Irish sympathy for the effect of confiscations, 'I am sure I share in the general compassion. 'Tis indeed melancholy to consider the state of those unhappy gentlemen who engaged in this affair (as for they rest they lose but their lives) who have thrown away their lives and fortunes, and destroyed their families for ever, in what I believe they thought a just cause (S 244n1).'

[190] WS iii.222.

[191] See F (M) A.xxiv.91a.

America.[192] In America, the civic element of these sentiments is most clear.[193] The Burkes had written that the colonists were 'used from their infancy to the exercise of arms' and if their militia were 'more regularly trained, and in better subordination, it would be impossible to find in any country, or in any time ancient or modern, an army better constituted than that which New England can furnish'.[194] He was critical of the war posturing of those who sent foreign troops, at once a mercenary and a standing army, into America.

> I cannot conceive any existence under heaven ... that is more truly odious and disgusting, than an impotent helpless creature, without civil wisdom or military skill, without a consciousness of any other qualification for power but his servility to it, bloated with pride and arrogance, calling for battles which he is not to fight, contending for a violent dominion which he can never exercise, and satisfied to be himself mean and miserable, in order to render others contemptible and wretched.

—The civic elements of this are notable and unmistakeable—

> The addressers offer their own persons; and they are satisfied with hiring Germans. They promise their private fortunes, and they mortgage their country. They have all the merit of volunteers, without risqué of person of charge of contribution and when the unfeeling arm of a foreign soldiery pours out their kindred blood like water, they exult and triumph, as if they themselves had performed some notable exploit.[195]

This threatened 'an eternal rent and schism in the British nation'.[196] But it threatened even more at home. Such a standing army 'first victorious over Englishmen, in a conflict for English constitutional rights and privileges, and afterwards habituated ... to keep an English people in a state of abject subjection, would prove fatal in the end to the liberties of England itself'.[197]

These apprehensions, this language, remained with Burke into the 1790s.[198] But they were of special importance in Ireland. The militias that were raised in Ireland during the American war were drawn almost exclusively from Ascendancy sources. As such, they represented not merely a faction within Ireland, but Britain as well. Such a situation was a 'permanent slavery' and 'in effect, no more than another name for the tyranny of the strongest faction; and factions in republics have been, and are, full as capable as monarchs, of the most cruel oppression and injustice'.[199] The creation of the Ascendancy 'Irish Volunteers', raised during the American war 'without commission of the crown', outraged him.[200] As Burke saw it, this 'patriotism' had little to do with a military threat against Ireland, but was an armed demand on behalf of the Ascendancy.[201] It resulted, he told the electors of Bristol, in the 'perpetual establishment of a military power ... your liberties are swept away along with your supreme authority'.[202] Indeed, the Gordon riots of the same period were a similar mix of anti-Catholic and 'patriotic' sentiment. In Ireland, the original '*English interest*' had become an '*independent Irish interest*', though one whose hopes of Irish independence were not shared by Burke precisely because it meant the independence of a faction of the country only.[203] In his last years, Burke still saw an Ascendancy monopoly of power in Ireland.[204] The 'English Government has farmed out Ireland, without the reservation of a pepper Corn rent in Power or influence, publick or individual, to the little narrow Faction that Domineers there'.[205]

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[192] See WWM Bk P 8/181-4 on 'Foreign troops in Ireland'.

[193] In the Wilkes affair, he criticised those 'who confound the unhappiness of civil dissention, with the crime of treason (WS iii.295)'.

[194] A ii.167-8.

[195] WS iii.303. Burke remarked on the irony of the defence of British liberty by the 'hireling sword of German boors and vassals (WS iii.300)', the 'German allies of twenty hireling states (WS iii.301)'. Later, after a defeat at the hands of the 'professional armies of Germany', the Americans 'yet afford a dawning hope by the stand they have made, that in some corner of the globe, at some time, or in some circumstances or other, the *citizen* may not be the *slave* of the soldier (W ii.434)'. See WS ix.503.

[196] WS iii.303.

[197] W iv.420. See W v.534-5. See also L 271. Cf. *The federalist*.

[198] See 'Letter to Count Bruhl (6 Dec 1796)' in F.P. Lock, 'Unpublished Burke letters, 1783-96, (1997) 112 *Eng Historical Rev* 119, 140-1. Cf. C vii.442.

Property, especially real property, does have great importance in Burke's thought.[206] This was true in part because it continued to have political implications. Ownership was still, in a sense, conjoined with jurisdiction. Those with property had fewer motives for corruption and a quite literal stake in the public good. Though the late eighteenth century was a period where smaller amounts of property were thought to be more productive, as well as equitable, many saw the opposite lesson. Not only did property have to be amassed to be of use, but the ranks that inevitably followed property were themselves important and positive elements in the progress of a civil society. The development of property was the source of the distinctions of ranks as well as essential to maintaining ranks and the public good.[207] Different systems of property division, whether strictly speaking manners or laws, were of real importance. In the *Abridgement*, Burke had noted that gavelkind, the equal division of property to male heirs (or females if there are no sons), had tended to reduce the power of nobility and encourage faction.[208] It was a 'custom absolutely contrary to the genius of the feudal tenure'.[209] Similar regimes in Ireland, as Davies had written the century before, had similar effect. Where gavelkind was effective in the colonies it was precisely because it made improvement of existing property difficult. In America, 'it made the people more ready to go backward into the uncultivated parts of the country'.[210] Primogeniture had the 'happy tendency, to preserve a character of consequence, weight, and prevalent influence'.[211] This is true, in part, because of the connection among the 'ancient Northern nations' between land and jurisdiction.[212] If this was 'an imperfect notion of political power', still the fact '[t]hat the possessor the land should be the governour of it was a simple idea'.[213] This was essential, for Burke did see it possible to distinguish property and jurisdiction. Indeed, speaking of the 'Greek and Italian commonwealths', he noted that

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[199] WS iii.659. See WS iii.659-60.

[200] WS ix.558. 'Here, to arm and embody would be represented as little less than high treason, if done on private authority (WS ix.558).' See WS ix.559. They 'demand[ed] a freedom of trade with arms in their hands (WS iii.631)'. See PH xx.271.

[201] See 'Memoir to Dundas' at WWM Bk P 27/195 on the Ascendancy and militias.

[202] WS iii.631. '[H]ad the crown pleased to retain the spirit with regard to Ireland, which seems now all directed to America, we should have neglected our own immediate defence, and sent over the last man of our militia, to fight with the last man of your volunteers (WS ix.547)'.

[203] WS ix.616-7. See WS ix.616-9.

[204] Ireland was divided 'into two distinct bodies, without common interest, sympathy, or connection. One ... was to possess *all* the franchises, *all* the property, *all* the education: the other was to be composed of drawers of water and cutters of turf for them (WS ix.597).

[205] C ix.165. The British Parliament was 'render[ed] no better than an instrument in the hands of an Irish faction—This is ascendancy with a Witness (C ix.165-6)'.

[206] See Burke's Middle Temple notes on liberty and property at F (M) A.xxx.6 and WWM Bk P 27/104 on property and wealth. See also comments on property in WWM archives labeled only as Reel 25 of *Politics in the age of revolution, 1715-1848–Part I: The papers of Edmund Burke, 1729-1797, from Sheffield Archives, Sheffield Libraries*

> property of the land was in all respects similar to that of goods, and had nothing of jurisdiction annexed to it; the Government there was a merely political institution. Amongst such a people the custom of distribution could be of no ill consequence, because it only affected property; but Gavelkind amongst the Saxons was very prejudicial; for as

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and Information Services and Northamptonshire Record Office (Malborough: Adam Matthews Publications, 1994).

[207] Cf. John Millar's *Origins of the distinctions of ranks* (1771) in Lehmann, 204. See also 211,292, 299, 316-7. As *history*, Millar's *Origin* is far superior to Ferguson's *Essay* (1967), which is much more a moral than an historical work. Arthur Browne, Professor of Civil Law at Trinity late in the century, wrote that Millar 'has acquired most deserved celebrity, and has attracted many of the youth of this country, as well as of England within the sphere of his instruction'. *A compendium view of the civil law, being the substance of a course of lectures read in the University of Dublin* (Dublin: R.E. Mercier, 1797), i.17.

[208] See WS i.427.

[209] WS i.452.

[210] A ii.167. In South Carolina, 'to prevent the people from becoming wealthy and luxurious... they allowed ... [at the colony's founding] each family but twenty-five acres; and none could ... come to possess more than five hundred. Neither did they give an inheritance in fee simple, or to the heirs general of the settlers, but granted their lands inheritable only by their male issue.... [But] A levelling scheme in a new colony is a thing extremely unadvisable. Men are seldom induced to leave their country, but upon some extraordinary prospects (A ii.265-7)'.

[211] W iv.452. See Smith, *Wealth of nations*, 232-4.

[212] WS i.453.

> government was annexed to a certain possession in land, this possession, which was continually changing, kept the government in a very fluctuating state; so that their civil polity had in it an essential evil, which contributed to the sickly condition, in which the Anglo-Saxon state always remained, as well as to its final dissolution.[214]

But in economic terms, and in political terms where property was 'annexed' to jurisdiction, an equal division of real property rendered it ineffective. Not only was it true that, as he wrote in the 'Thoughts', '[i]n a fair distribution among a vast multitude, none can have much', but he believed such a division also dissipated the productivity of property to impotence.[215] He there made the statement somewhat more forcefully, particularly in light of revolutionary activities, claiming that the

> class of dependent pensioners called the rich, is so extremely small, that if all their throats were cut, and a distribution made of all they consume in a year, it would not give a bit of bread and cheese for one night's supper to those who labour, and who in reality feed both the pensioners and themselves.[216]

But their throats 'ought not to be cut' because '[w]hether they mean it or not, they do, in effect, execute their trust'.[217] Land had to be collected 'in great masses of accumulation, or it is not rightly protected'.[218]

Simple societies, like those of the Amerindians, were thought to more closely resemble the natural equality of men. But the stasis of these societies might also be created by the levelling of artificial ranks, the 'Levelling Principle' of the revolutionaries. They wanted 'to level all ranks, orders, and distinctions in the state; and utterly to destroy property'.[219] But 'Perfect equality' was 'equal want, equal wretchedness, equal beggary'.[220] Inequality was thus an engine for improvement of all rather than the equality of impoverishment.[221] In his political economy, advanced as it may have been in comparison to many of his contemporaries, Burke failed to see the possibility of more general improvement and economic growth. This should not, however, be

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[213] WS i.453.
[214] WS i.453.
[215] WS ix.121.
[216] WS ix.121.
[217] WS ix.121.
[218] RRF 266.
[219] W iv.421-2. Cf. A ii.267 and WWM Bk P 25/58.
[220] WS ix.127. This was a commonplace. See, e.g., Edward Gibbon, *The history of the decline and fall of the Roman empire* (London: Routledge/Thoemmes Press, 1997 [1788 edn]), iv.367-8.
[221] The 'principles' of 'ambition' and 'admiration', he notes, 'create a voluntary inequality and dependence (WS

interpreted as simple hostility or indifference towards the poor.[222] As natural abilities differed, so distinctions could develop naturally as well over time. The Burkes noted as a 'principle' of human nature that the 'generality of mankind very readily slide from what they conceive a fitness for government, to a right of governing; and they do not so readily agree, that those who are superior in endowments should only be equal in condition'.[223] The creation of the more artificial, as a result, is itself not an unreasonable one and, where such distinctions proved of value, it was less surprising that they would be maintained.

It seems fair to summarise Burke's views with the words of the *Account*: 'human nature is such, that as virtues may with proper management be engrafted upon almost all sorts of vicious passions, so vices naturally grow out of the best dispositions, and are the consequences of those regulations that produce and strengthen them'.[224] This is a doctrine of indirection, but it is no embrace of Mandeville's doctrine of 'private vices, public benefits'. It is simply the recognition that we often reap, 'differently from what we have sown'.[225] This is related, of course, to the Burkean critique of rationalism and purposive reasoning. Progress was not the active pursuit of advancement, but an unintended consequence. As 'improvement' in science might arise from the motivation of superstition, common human inclinations and interests could account–as they had for authority and property–for the progress of civil society. For

> It is very rare for any material discovery, whether in the arts, in philosophy, or in navigation, has been owing to efforts made directly for that particular purpose, and determined by the force of reasonings *a priori*. The first hints are owing to accident; and discoveries in one kind present themselves voluntarily to us, whilst we are in search of what flies from us in some other.[226]

Columbus' voyage was a good example of this 'mixture of wise design and fortunate

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i.431)'. Admiration was a natural source of artificial distinctions. Ambition encouraged improvement. Cf. PE 46.

[222] Burke believed both that poverty was part of the 'condition of mankind (L 267)', but also that the poor were better off than in the past, certainly better than their counterparts in Ireland. See WS ix.121-2 and W ii.414-5 (on the poor laws). Cf. the *Vindication*'s claim the 'whole Business of the Poor is to administer to the Idleness, Folly, and Luxury of the Rich (WS i.77)'. For Burke, the point seems directly most clearly at the 'confused distributions of administrative and judicial characters (WS ix.124)' and he acknowledges that wage increases have already occurred (WS ix.123). Cf. Winch, *Riches*, 202 and see Miller in Lehmann, 272. See also WWM Bk P 8/173 on Ireland and poverty.

[223] A i.30. Cf. again Smith and Millar on 'authority' and 'utility'.

[224] A i.160. 'Disorders themselves are a species of remedies; and every new loss not only shews how it may be repaired, but by the vigour it inspires, makes new advantages known' (A ii.17)'. See A i.276.

[225] A i.46

[226] A i.278.

accident'.[227] And 'though this was neither the effect of our wisdom, nor the consequence of our foresight; yet having happened, it may tend to give us more wisdom and a better foresight'.[228] This might be seen, it cannot be linked directly, as related to scientific and legal models. There is also the reminder that it was not reason that motivated, but necessarily required a 'strong active principle to give life and energy to all designs, or they will languish, let them be ever so wisely concerted'.[229] Forty years later, Burke expressed the view that the

> State of the Christian World has grown up to their present magnitude in a great length of time, and by a great variety of accidents. They have been improved to what we see them with greater or less degrees of felicity and skill. Not one of them has been formed upon a regular design. As their Constitutions are not systematical, they have not been directed to any *peculiar* end, eminently distinguished, and superseding ever other. The objects which they embrace are of the greatest possible variety, and have become in a manner infinite. In all these old countries the state has been made to the people, and not the people conformed to the state.[230]

This was of a piece with Burke's observations on manners and the inefficacy of laws when opposed by manners. This need not exclude the making of constitutions and the founding of states, but a constitution must first draw on observations about society so general as nearly to be natural social laws. Secondly, of course, these fundamental laws, like any others, must be rooted in the customs of the people involved. This is not a denial of the efficacy of laws, but the recognition of their spirit. In the *Account,* this is presented as the challenge and opportunity for the legislator:

> Since experience has taught us, that as there is no soil or climate which will not shew itself grateful to culture, so that there is no disposition, no character in mankind, which may not be turned with dextrous management to the public advantage. Those rulers, who make complaints of the temper of their people, in almost any respect, ought rather to lament their own [want] of genius ... .[231]

At its most general, and questionable, in the *Account*, 'Providence, and a great minister who should imitate Providence, often gain their ends by means that seem most contrary to them'.[232]

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[227] A i.278.
[228] A ii.108.
[229] A i.46.
[230] L 180. See A.
[231] A ii.109-10.
[232] A ii.109. This continues: 'for earthquakes, and hurricanes, and floods, are as necessary to the well-being of

Burke sought to make commerce, and even politeness, useful for '*Publick-Spirit*'.[233] There was an ever greater attempt to reconcile interest with the public good. 'It is never wise', he wrote, 'to quarrel with the interested views of men, whilst they are combined with the publick interest and promote it; it is our business to tie the knot, if possible, closer'.[234] It was believed that self-interest, because inevitable, might also be predictable. 'It is not easy to choose men to act in conformity to a public interest against their private: but a sure dependence may be had on those who are chosen to forward their private interest, at the expense of the public.'[235] Relying solely on the better instincts of men was practically naïve and ineffective and could, in fact, encourage the worst. Indeed, the 'state which lays its foundation in rare and heroic virtues, will be sure to have its superstructure in the basest profligacy and corruption. An honourable and fair profit is the best security against avarice and rapacity; as in all things else, a lawful and regulated enjoyment is the best security against debauchery and excess'.[236] This attempt to harness individual interest is especially obvious in the *Account*. For 'when a man knows his labour is for himself', the Burkes wrote, 'and that the more he labours, the more he is to acquire, this consciousness carries him through, and supports him beneath fatigues, under which he otherwise would have sunk'.[237] This extends even to the slaves, where they suggested some slaves could be allowed to acquire property, 'to be the reward of their industry'.[238] And, in addition to their moral critique of slavery, the Burkes stressed its inefficiency and the superiority of free labour.

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things, as calm and sun-shine; life and beauty are drawn from death and corruption; and the most efficacious medicines are often found united with the most deadly poisons. This, as it is well known, is the order of nature, and perhaps it might not unwisely be considered, as an example for government (A ii.109-10).' Given the publication of the *Account* only two years after the Lisbon earthquake in November of 1755, this does bring to mind Voltaire's *Candide* (1764), in which he critiques (a caricatured) Leibnitz for the belief that such earthquakes made up the 'best of all possible worlds'. See A ii.110

[233] See WS i.86. It is typical, however, that in judging a debate on the subject at Trinity, where his colleagues had distinguished between 'Asiatic' and 'Grecian' luxuries, the young Burke responded 'that tho' Luxury shou'd be disallow'd there ought not to be a universal restraint'. S 239-40. 'Grecian' luxury was associated with art and politeness, it was 'virtue in elegance (S 239)'. Cf. F.P. Lock, *Edmund Burke: volume I, 1730-1784* (Oxford: Clarendon Press, 1998), 135.

[234] L 260. 'Resources that are derived from extraordinary virtues, as such virtues are rare, so they must be unproductive (L 260).'

[235] WS v.441.

[236] WS iii.531. 'I know of no mode of preserving the effectual execution of any duty, but to make it the direct interest of the executive officer that it shall be faithfully performed (WS iii.543)'.

[237] A ii.128.

[238] A ii.131. See A ii.52. The 'negroes in our colonies endure a slavery more compleat, and attended with far worse circumstances, than what any people in their condition suffer in any other part of the world, or have suffered in other period of time (A ii.124)'. Comparatively, the French 'Code Noir, and other ordinances relative to these poor creatures, shew a very just and sensible mixture of humanity and steadiness (A ii.47)'. Cf. A ii.127 and Millar in Lehmann, 321

This was a belief that Burke continued to maintain. 'Nothing encourages industry, skill, and invention so much, as to secure to every man the profits of the labour of his own hands and his own mind.'[239]It is important to note, however, that the eighteenth-century's every wider acceptance of interest in politics was never, in Burke or his contemporaries, a politics of interest.[240] In general, interest, like liberty and 'rights', remained subservient to the public good.[241] At Trinity, Burke had sought to distinguish brutish self-love from more dignified public virtue. For

> Love for our country is the Life of every generous breast, and we cannot approve our Excellence above ye Brute Creation, in a nobler instance, than preferring ye Public good to private concerns. Self love is in every animal a strong Biass, [which] Reason only is able to get ye better of. But in a case, where, these interests unite, who can be more than Brute to speak against it?[242]

It was the attempt to unite the inevitable, largely negative self-love and 'ye Public good' that was central to Burke's defence of both orders and commerce.[243]

THE OBEDIENT AND LABORIOUS SLAVE OF VIRTUE AND PUBLICK HONOUR:

In the Account, the Burkes also noted how close modern Europe remained historically, perhaps psychologically, to barbarity. Before the 'spirit of discovery' initiated by Columbus, the 'manners of Europe were wholly barbarous' in terms of statecraft, politeness, and commerce.[244] In affairs of state, Europeans 'did not well comprehend the complicated system of interests, that Europe formed even long before this'.[245] There were 'but very faint marks of cultivation and politeness'.[246] While the 'speculative knowledge of trade' was, in the mid-eighteenth century, reckoned 'amongst the liberal sciences; ... one of the most considerable branches of political knowledge', in the fifteenth it 'made no part of the study of the elevated or thinking part of mankind'.[247] Here again, it was the more unappealing elements of human nature that provided desirable results. European adventurers to America were initially men of 'indigence' and ambition. Gold was the 'spur to all those adventurers, of whatever rank' and 'if it were not for this incentive, which kindled the spirit of discovery and colonization ... America had never been in the state it now is'.[248] Prudent, long-term objectives, the 'remote prospect of commerce, and the improvement of manufactures ... would never have answered the purpose'.[249] This, joined 'with a romantic spirit of chivalry, made the greatest hazards appear but common matter in their eyes'.[250] Neither was it of no consequence that in America, the 'conquest as well as the discovery was owing wholly to private men; the court contributed nothing but pretensions and patents'.[251]

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[239] W ii.412. Once again Burke expresses the belief that 'commerce ... flourishes most when it is left to itself. Interest, the great guide of commerce, is not a blind one. It is very well able to find its own way; and its necessities are its best laws (WS ii.535)'. Cf. WS ii.432.

[240] Interest and the passions had always been a consideration, the source of faction and inherently selfish. But a more neutral use of the language of 'interests' was made possible, in part, by the benevolists rehabilitation of the passions and the suggestion that private and public goods were in balance. See also Albert O. Hirschman, *The passions and the interests: political arguments for capitalism before its triumph* (Princeton: Princeton Univ. Press, 1977). Although Hume was here 'at his least sceptical', the Scots were not uncritical of the aristocracy or the new men.

[241] Cf. Burke's Middle Temple notes at F (M) A.xxx.6.

[242] S 263. See above quotes from *The Reformer.*

[243] It is this distinction that makes his claim, fifty years later, that God 'obliges men, whether they will or not, in pursuing their own selfish interests, to connect the general good with their individual success (WS ix.125)', so surprising.

[244] A i.4.

[245] A i.4.

But the mere wealth of nations should not be confused with public virtue, the danger of luxury, and of its attendant corruption, remain.[252] 'No country in Europe receives such vast treasures as Spain. In no country in Europe is seen so little money. The truth is, from the time that the Indies fell into the hands of Spain, the affairs of that monarchy have been constantly going backward'.[253] The reason for this was the negative effects of colonisation and luxury. The Spanish (and Portuguese) gold mines of South America:

> undoubtedly contribute much to depopulate the country, by turning the inhabitants from agriculture and manufactures, employments that prolong life and provide for it, to the working of metals extremely pernicious to health, and which makes them depend upon others for their necessary substance. The nations which are poor in respect of gold, and industrious from that poverty, have not the least reason to envy the wealth of the Peruvians; who, amidst all that extravagant glare that dazzles the eye, live penuriously and sordidly; and are often in extreme want in a country, which in many places is one of the most fertile in the world.

–And, nearly twenty-five years before Smith's analysis in *The wealth of nations*, the Burkes noted–

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[246] A i.5.
[247] A i.45-6. 'What we call the balance of trade, was far from being well understood (A i.46)'.
[248] A i.62, A i.45. See WS ii.429.
[249] A i.45.
[250] A i.63.
[251] A i.62.
[252] Cf. WS ii.254.
[253] A i.274.

> In fact, the countries which employ their men in arts and in agriculture, and receive their return in gold and silver from the countries which abound in those metals, may be considered as the real proprietors of the mines; the immediate possessors, only as their stewards to manage, or as their slaves to work them; whilst they are employed themselves at an easy labour, friendly to life, and necessary to their well being.[254]

Instead, the 'French think,' the Burkes wrote, 'with reason, that their labour is better bestowed on the culture of the plains ... than in the pursuit of mines, really more precarious in their profits, and which yield a wealth after all, of a less useful kind'.[255] This agricultural emphasis is of great importance in understanding Burke's political economy and the complexities of mid-century European politics and colonialism. It concerned not merely the 'balance of trade', but the 'balance of power', the two linked particularly closely at the time. Compared to the 'indolent Spaniard' of the Americas, the French were 'lively, vigilant, and enterprising' and exceeded the British 'in industry, oeconomy, and the arts of conciliating the affections of mankind'.[256] While the settlement of French territories, extending from Canada to the Gulf of Mexico, was sparse, the Mississippi River might 'contrive a communication ... whilst they entirely confine us between our mountains and the sea, Louisiana in a few years will wear quite another face'.[257]

This also suggested something of the dangers of empire and colonialism. The decline of the Roman Empire had 'originated in the mal-administration of the provinces'.[258] The civic concern appears here is transferred to more narrowly commercial matters. After discovering the new world and its gold, the Burkes write that Spanish 'politics were always more abroad than at home; more employed in weakening their neighbours, than in strengthening themselves'.[259] They 'relied too much upon their riches; and the whole state … [was] moulded into a system of corruption from top to bottom'.[260] Burke's impeachment of Hastings would later be framed in somewhat similar terms. In this, Burke rather consciously modelled himself on Cicero's own prosecution of Verres, the proconsul of Sicily.[261] Preventing oppression in India, as in Ireland and America, was necessary to 'to preserve the British Constitution from its worst corruption'.[262] The India Company had become 'that thing which was supposed by the Roman Law so unsuitable, the same power was a Trader, the same power was a Lord'.[263] And the 'Nabobs' of India, too, with their movable wealth and consequent influence in Britain, threatened politics at home. They were men without any link to public virtue, and 'as long as a system prevails which regards the transmission of great wealth to this country ... as its principal end, so long will it be impossible that those who are the instruments of that scheme should not be actuated by the same spirit for their private purposes'.[264] This aristocracy of wealth, with self-interest rather than public glory their aim, were of far greater concern to Burke than the nobility or, as in France, the clergy.[265] Thus, as Burke put it in his 'Letter to the Sheriffs of Bristol', 'by degrees, that artful softening of all arbitrary power, the alleged infrequency or narrow extent of its operation, will be received as a sort of aphorism'.[266]

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[254] A i.247-8. Cf. Smith, 272-3. See also the *Vindication* at WS i.177-8.

[255] A ii.14.

[256] A ii.23, 28. See A ii.49.

[257] A ii.38-9. Cf. Millar in Lehmann, 189 and Ferguson, *Essay*, 112. After the Seven Years (or French and Indian War) and British gains in Canada, Burke noted that the Acadians were treated 'most inhumanly, and upon preferences that in the eye of the honest man are not worth a farthing, root out this poor innocent deserving people, whom our utter inability to govern, or to reconcile, gave us no sort of right to extirpate (WS iii.538)'. He would later use the example of the loyalty of the Catholic Quebecois as an argument for reform of civil disabilities placed on Irish and British Catholics.

[258] WS vi.63.

[259] A i.276.

This also suggests the 'monied interest' of such importance to Burke's critique of France.[267] These were less merchants than stockholders. These were believed hostile to landed interests, more inclined to novelty, and ultimately more self-interested.[268] Rooted in the fictions of stock and movable property, they were less citizens of a state, than mercenaries (or at least creditors) of suspect public virtue.[269] They had an important role that the legislator had to recognise:

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[260] A i.276.

[261] See WS v.416.

[262] WS v.383. 'Were we to be driven out of India this day, nothing would remain, to tell it had been possessed during the inglorious period of our dominion, by any thing better than the ouran-outang or the tiger (WS v.402).'

[263] WS vi.283. See gen. Bk. IV of Smith, *Wealth of nations*.

[264] WS v.221-2.

[265] The epigraph to the 'Thoughts on the cause of the present discontents' was taken from Cicero's prosecution of Verres: 'this hidden peril, in your own circle and under your own roof, not only does not reveal itself, but overwhelms you before you have time to think how to deal with it'. *Verrine orations*, II.ii.39. Cicero had written that his action against Verres was 'in form ... an act of prosecution: but it may fairly be regarded as equally an act of defence. I am, in fact, defending a number of individuals, and a number of communities; I am defending the entire province of Sicily ... in prosecuting only one single man'. Id. I.7. See Christopher Reid, *Burke and the practice of political writing* (Dublin: Gill and MacMillan, 1985), 209-10.

[266] WS iii.299. 'Mr. *Hume* will not be singular in telling us, that the felicity of mankind is no more disturbed but it, than by earthquakes, or thunder, or the other more unusual accidents of nature (WS iii.299)'. Cf. 'Of civil liberty' in *Selected essays*.

[267] The 'monied interest' was also a concern for Sir James Steuart Denham, whose *Inquiry into the principles of political economy* (1767). See Hirschman, 81-7. One of the last of the mercantilists, Steuart's Aristotelian analysis was much less optimistic than that of Smith nine years later. Perhaps because of his mercantilism, he is rarely listed among the members of the Scottish enlightenment.

[268] See RRF 210-11.

> There must be some impulse beside public spirit, to put private interest into motion along with it. Monied men ought to be allowed to set a value on their money; if they did not, there could be no monied men. This desire of accumulation is a principle without which the means of their service to the State could not exist. The love of lucre, though sometimes carried to a ridiculous excess, is the grand cause of prosperity to all States. In this natural, this reasonable, this powerful, this prolifick principle, it is for the satyrist to expose the ridiculous; it is for the moralist to censure the vicious; it is for the sympathetick heart to reprobate the hard and cruel; it is for the Judge to animadvert on the fraud, the extortion, and the oppression; but it is for the Statesmen to employ it as he finds it, with all its concomitant excellencies, with all its imperfections on its head. It is his part, in this case, as it is in all other cases, where he is to make use of the general energies of nature, to take them as he finds them.[270]

Written at the same period as the 'Thoughts', this may seem unsurprising. But Burke adds that the 'moment a man is exempted from the maintenance of the community, he is in a sort separated from it. He loses the place of a citizen'.[271] More generally, if the monied interest was of great service to the public, for preparing for a war with France, its interests were not the same.[272] For

> If wealth is the obedient and laborious slave of virtue and publick honour, then wealth is in its place, and has its use. But if this order is changed, and honour is to be sacrificed to the conservation of riches... . If we command our wealth, we shall be rich and free. If our wealth commands us, we are poor indeed. We are bought by the enemy with the treasure from our own coffers. Too great a sense of the value of a subordinate interest may be the very source of its danger, as well as the certain ruin of interests of a superior order.... where the essential publick force (of which money is but a part) is in any degree upon a par in a conflict between nations, that state which is resolved to hazard its existence rather than to abandon it's objects, must have an infinite advantage over that which is resolved to yield rather than to carry its resistance beyond a certain point.[273]

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[269] Burke is said to have remarked, 'Do not talk to me of the liberality and patriotism of a merchant; his god is his gold; his country his invoice'. Bisset, *The life of Edmund Burke*, (London: George Cawthone, 1800), 272. Cf. Smith, *Wealth*, 272.

[270] L 258. See F (M) A.v.11 on Ireland, honour, and interest.

[271] L 257. Public contributions, especially on unproductive luxury, were 'truly voluntary; not voluntary according to the irregular, unsteady, capricious will of individuals, but according to the will and wisdom of the whole popular mass, in the only way in which will and wisdom can go together (L 263). See L 260-3, esp. 260.

[272] Against those that thought it would effect British commerce, he argued that there remained 'every indication of increased and increasing wealth (L 275)'. See L 288, 'Observations on the state of the nation', L 298-9, 304-6. Cf. Winch, *Riches*, 217.

[273] L 70.

Commerce was of great value, but the 'artificer may be incumbered by his tools, and that resources may be among impediments'.[274] The individual interests so important to commerce had to be transcended in public, political claims.[275]

Burke use of civic terminology ought not be surprising. Public debt, paper currency, the 'monied interest', stockjobbing, all had already been part of his language of critique.[276] For all his emphasis on the expansive, rather than commercial, nature of the French republic, Burke believed that commercial interests were themselves important elements of the revolution.[277] The roots of the revolution did not lie in economic deprivation, because France in fact prospered most just before it began.[278] It was this prosperity, a 'speculative' Jacobinism which 'arises from Wantonness and fullness of bread', that served to ignite the revolution.[279] Burke distinguishes this from Irish

> Jacobinism which arises from Penury and irritation, from scorned loyalty, and rejected Allegiance, [and] has much deeper roots. They take their nourishment form the bottom of human Nature and the unalterable constitution of things, and not from humour and caprice or the opinions of the Day about privileges and Liberties.[280]

The revolution in France was fuelled by speculative men already prosperous seeking the spoils of the men of property, while they 'pretended to a great zeal for the poor'.[281] From this nouveau riche, '[a]ll the envy against wealth and power, was artificially directed against other descriptions of riches'.[282] This was not helped, however, by a French debt generated by the monarchy's penchant for luxury.[283]

Allied, too, with these financial speculators were others, the 'political Men of Letters....

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[274] L 70.

[275] 'To corrupt family relations is to poison fountains; for the sources of the commonwealth are within the Housholds; and errours there are irretrievable (C iii.457)'. See continuing quote on morality. See also C vi.94-5.

[276] Cf. Keith Michael Baker, 'Transformations of classical republicanism in eighteenth-century France', (20001) 73 *J Mod Hist* 32. See WWM Bk P 6/91 on 'jobs' and 'bribes'.

[277] Cf. Pocock in Furet, 33, 29.

[278] See RRF 220 *et seq.* Much of the *Reflections* is spent analysing France's economic success prior to the revolution. Its population, considered as a sure indicator of a thriving state, was growing

[279] C ix.162. It was a Jacobinism, the '[v]ice of men of Parts'. C viii.272.

[280] C ix.162.

[281] RRF 213. 'Writers, especially when they act in a body, and with one direction, have great influence on the publick mind (RRF 213)'.

[282] RRF 214.

[283] See RRF 209, 264 and L 66.

fond of distinguishing themselves, [and] rarely adverse to innovation'.[284] With their influence greatly accentuated by the press, the 'correspondence of the monied and the mercantile world, the literary intercourse of academies, … made a kind of electrick communication every where.'[285] These men seemed to represent the antithesis of the orders that had generated European progress and improvement. Worse, the hostility of the monied men to landed property and the *philosophes* to Catholicism merged in the seizure of church lands. They were 'sacrificed to the idol of public credit ... the discredited paper securities of impoverished fraud and beggared rapine'.[286] Worse than the problems associated with public debt or paper currency alone, revolutionary *assignats* were not based on public borrowing, but on the confiscation (and desecration) of a third party.[287] For Burke, the precedent for such actions were the confiscations of the property of the monasteries of Henry VIII and, of course, those of Ireland.[288] With his philosophy and Irish experiences, the two not unimportantly connected, Burke could easily believe that such property confiscations, on the basis of membership in a corporate class, were both unwise as policy and the seeds for future historical grievances.[289] In economic terms, a policy of confiscation for debt seemed, once started, a difficult habit for government to break. It was also a policy that seemed to threaten commercial stability and the incentive for improvement.

In general, assuming their goal to be one of establishing a more equitable economy, Burke doubted whether the system that the revolutionaries appeared to be establishing was any better than the system they attacked. 'In all the views of receipt, expenditure, and personal employment', he wrote in the *Reflections*,

> a sober legislator would carefully compare the possessor whom he was recommended to expel, with the stranger who was proposed to fill his place. Before the inconveniences are incurred which *must* attend all violent revolutions

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[284] RRF 211. 'These Atheistical fathers have a bigotry of their own; and they have learnt to talk against monks with the spirit of a monk. (RRF 212).' This 'literary cabal' was 'possessed with a spirit of proselytism in the most fanatical degree' and from thence, by an easy progress, with the spirit of prosecution according to their means (RRF 211-2)'.

[285] L186. Again, as Pocock notes, this 'Electric communication = *transparence*.' Pocock in Furet, 33. See WS viii.480.

[286] RRF 166.

[287] The 'ecclesiastical possessions (RRF 214)' are 'to answer the debt who neither were lenders or borrowers, mortgagers or mortgagees (RRF 215)'. See George Fasel, ''The soul that animated': the role of property in Burke's thought', (1976) 17 *Studies in Burke and His Time* 27.

[288] The tyrants, including Henry the VIIIth, of old could not have done better than the 'short form of incantation – '*Philosophy, Light, Liberality, the Rights of Men*' (RRF 218)'.

> in property through extensive confiscation, we ought to have some rational assurance that the purchasers of the confiscated property will be in a considerable degree more laborious, more sober, less disposed to exhort an unreasonable proportion of the gains of the labourer, or to consume on themselves a larger share than is fit for the measure of an individual, or that they should be qualified to dispense the surplus in a more steady and equal mode, so as to answer the purposes of a politic expenditure, than the old possessors, call those possessors, bishops, or canons, or commendatory abbots, or monks, or what you please.[290]

Several points are interesting in this passage. Burke defends both unproductive property and reveals a sympathy towards labourers that recalls his writings four decades before in *The Reformer*.

> The monks are lazy. Be it so. Suppose them no otherwise employed than by singing in the choir. They are as usefully employed as those who neither sing nor say. As usefully even as those who sing on upon the stage. They are as usefully employed as if thy worked form dawn to dark in the innumerable servile, degrading, unseemly, unmanly, and often most unwholesome and pestiferous occupations, to which by the social oeconomy so many wretches are inevitably doomed.[291]

Given the correspondence to his earlier statements, and others that suggest his contempt for much of the aristocracy he supported, this sympathy appears genuine.[292] While these comments confirm Burke's limited vision in affairs of political or 'social' economy, they serve also to further problematise any simple interpretation of his views.

> If it were not generally pernicious to disturb the natural course of things, and to impede, in any degree, the great wheel of circulation which is turned by the strangely directed labour of these unhappy people, I should be infinitely more inclined forcibly to rescue them from their miserable industry, than violently to disturb the tranquil repose of

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[289] See *The Federalist* No. 54.

[290] RRF 270-1.

[291] RRF 271. 'I fancy, many of our fine Gentlemen's Pageantry would be greatly tarnished, were their gilt Coaches to be preceded and followed by the miserable Wretches, whose Labour supports them. That some should live in a more sumptuous manner than others, is very allowable; but sure it is hard, that those who cultivate the Soil, should have no small a Part of its Fruits; and that among Creatures of the same Kind there should be such a Disproportion in their manner of living; it is a kind of Blasphemy on Providence, and seems to shew, as our Motto finely expresses it, 'the Heavens unjust (WS i.98)'.

[292] Of the Duke of Bedford, he wrote, simultaneously with his 'Thoughts and details on scarcity', 'Poor rich man! He can hardly know any thing of publick industry in it's estimate it's compensations when it's work is done (WS ix.152).' Quoting Ovid, he wrote ''*Nitor in adversum* ['Against this I have to contend']' is the motto for a man like me.' Here as elsewhere, Cicero was model. In his *Edmund Burke, Ireland, and the fashioning of self* (Oxford: Voltaire Foundation, 1996), Michael Fuchs noted, too, that during 'an altercation with Sir William Bagot during the 1770 parliamentary session', that Burke quoted Cicero, applying to himself the phrase 'you hate the industry of self-

> monastic quietude. Humanity, and perhaps, policy, might better justify me in the one than in the other. It is a subject on which I have often reflected, and never without feeling from it. I am sure that no consideration, except the necessity of submitting to the yoke of luxury, and the despotisms of fancy, who in their own imperious way will distribute the surplus product of the soil, can justify the toleration of such trades and employments in a well-regulated state. But, for this purpose of distribution, it seems to me that the idle expences of monks are quite as well directed as the idle expences of us lay-loiterers.[293]

Burke's moralizing is here as civic as it is Christian and the faith suggested here in providence as well as economics, however real, is not so devout as the revolutionary faith in progress.

Prefiguring here as elsewhere the analysis of Tocqueville, Burke saw the demagogic, if democratic, tyranny of the revolutionaries as the consequence of the French monarchy's 'good intention ill-directed.... The hand of authority was seen in every thing, and in every place'.[294] It was the Court's monopoly that eroded all of the mediating institutions that might have given a moderating voice to French concerns. This, with the more radical Enlightenment, was part of the 'silent revolution in the moral world' that 'preceded the political, and prepared it'.[295] The monarchy thus established the basis on which their authority would be undermined. Part of Burke's hostility was that towards any monopoly of power. Such power was demeaning to those beyond it and conducive, in those who practiced it, to avarice contrary to public virtue.[296] In the *Account*, the Burkes had noted the 'spirit' of jealousy in the Spanish monopoly of American wealth and its reflection in the 'avidity' of its' ministers and minions, for whom 'every thing is a jobb'.[297] The work suggested that the problems of new world demanded new solutions, rather than the European pattern: in 'government, tyranny; in religion, bigotry; in trade, monopoly'.[298] The 'principal view' of the *Account* had, of course, been trade.[299] It counselled what in the

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made men' ('novorum hominum industriam odisti' from *In verrem*, III.iv.7).

[293] RRF 271.

[294] WS ix.144. See WS ix.145. Radical republicanism 'was nowhere more prevalent than in the heart of the Court. The palace of Versailles, by it's language, seemed a forum of democracy (L 179-80)'. It was the central premise of Tocqueville's analysis of the revolution that the revolutionaries, *sans* conspirators, 'used the debris of the old order for the building of the new'. *The Old Regime and the French Revolution* (New York: Doubleday, 1983 [1856]), Stuart Gilbert (tr.), vi. See his comments on Burke at 2-4, 21, 75, 79, 88-9, 205-6.

[295] L 185.

[296] See esp. A i.216-7. They forgot 'oeconomy' and 'an ill order in their finances at home, and a devouring usury abroad, swallowed up all their treasure, whilst they multiplied the occasions of it (A i.275)'.

[297] A i.224, i.225. See A i.238-9.

[298] A i.275. Cf. A i.274.

[299] Beyond suggesting an 'emulation' of the French, especially their policy of taxation towards the colonies, the recommendations of the Burkes were mild, amounting to little more than the encouragement of separate trades and the restrictions on manufacturing that would interfere with Britain. 'Preface' A i, A ii.47-8, ii.43. See A ii.181-3.

political context of the American war, Burke called the '[s]alutary neglect' of the colonies. This was less *laissez-faire* than a sort of active subsidiarity.[300] That is, Parliament retained a supervisory role, but one that it practiced in moderation on the basis of policy. In terms of economy, '[l]aws of regulation are not fundamental laws. The publick exigencies are the masters of all such laws. They rule the laws, and are not to be ruled by them. They who exercise the legislative power at the time must judge'.[301] But there were principles involved in Burke's hostility towards social, political, and economic monopoly, not least the affairs of Ireland.

In addition to the 'small monopolising Junto' within the country, Ireland was similarly handicapped in matters of trade without by 'an obstinate adherence to narrow and restrictive plans of government'.[302] Throughout his career, Burke attempted to obtain reform 'gradually, and by parts ... most particularly ... to fix the principle of a free trade in all the parts of these islands, as founded in justice, and beneficial to the whole'.[303] Ireland had suffered under numerous schemes that had limited her ability to improve.[304] In his travels through the country, Arthur Young, another of Burke's correspondents, noted that '[b]eing a dependent country, the British legislature has, upon all occasions, controuled [Ireland's] commerce, sometimes with a very high hand, but universally upon the principles of monopoly, as if the poverty of that country was to form the wealth of Britain'.[305] And in his constituency of Bristol, Britain second trading city, its' merchants were among the least inclined towards free trade, preferring instead to

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The first volume of the *Account* ends by stressing that the British 'have rather advanced than declined in our commerce upon the whole' they had 'comparatively declined (A i.296)' against the other nations of Europe. However, if they were to 'preserve that great superiority in commerce, and that distinguished rank of the first commercial and maritime power in Europe (A i.296)', they must be wary. For 'if any other power of a more extensive and populous territory than ours, should come to rival us in trade and wealth, he must come of necessity to give law to us in whatever relates either to trade or policy (A i.296)'.

[300] Twenty years before that war, the Burkes stressed that the colonists 'should not, by growing into an unbounded liberty, forget that they were subjects, or lying under a base servitude have no reason to think themselves British subjects (A ii.301).' See A ii.262, 292, 295-6.

[301] WS ix.162.

[302] C ix.258, WS ix.508. From 'Two Letters on the Trade of Ireland' (23 Apr 1778/2 May 1778). See PH xxiii.33.

[303] WS ix.550. For the 'closest connexion between Great Britain and Ireland, is essential to the well being, I had almost said, to the very being, of the two Kingdoms(C ix.257)'.

[304] See 'Hints relative to the circulation in Ireland', asserting the widening gap between the gentry and the people from 1685 to the 1760s, at F (M) A.xxiv.24.

[305] Arthur Wollaston Hutton (ed.), *Arthur Young's tour in Ireland* (London: George Bell & Sons, 1892 [1780]), 233. Young and Burke were friends, but unfortunately, and surprisingly, Irish trade makes no part of their surviving correspondence. He was intended recipient of 'Thoughts and details on scarcity'. L.M. Cullen has suggested Young's 'section on religion reflects Burke's outlook time and again, even repeating key phrases from the tracts on the Popery Laws and other writings which were at that time unpublished. It is just possible that Burke wrote this section'. 'Burke's Irish views and writings' in Ian Crowe (ed.), *Edmund Burke: his life and legacy* (Dublin: Four Courts Press, 1997), 71. More startling is Cullen's claim that 'there are passages in Adam Smith's *Wealth of Nations*

maintain privileges they maintained from the mercantilist system. Burke's views on commerce were part of a wider attempt at improving the situation in Ireland and, by increasing the property of all kinds in Ireland, increasing the power of those otherwise excluded from public affairs. While it was 'natural', he noted, 'to see our own *certain* ruin, in the *possible* prosperity of other people.... [and] hard, to persuade us, that every thing which is *got* by another is not *taken* from ourselves', he emphasised repeatedly that 'Trade is not a limited thing'.[306] It was in the 'interest of the commercial world that wealth should be found every where'.[307] Ireland's progress, such that it was, was 'chiefly owing to her own natural advantages, and her own Efforts ... over the Mischievous Systems, which have been adopted', was Britain's gain.[308] At the same time, however, the power of the British Parliament to act against the Ascendancy monopoly was not unimportant, as the actions of the Volunteers indicates.[309] While Burke does not appear to support a Union with Britain, an independent Ireland meant the absence of the supervision of the British 'Senate' that Burke thought necessary to ensure justice.[310]

In an ironic 'English' voice, Burke wrote to a correspondent in Ireland: '[w]e shall be barbarised on both sides of the water, if we do not see one another now and then. *We* shall sink into surly, brutish Johns, and *You* will degenerate into wild Irish'.[311] In making his argument for commerce, the *social* commerce of all Britain was always a central consideration.[312] Burke points especially to the benefits of Scotland's union with England and Wales. Ireland 'pays a great deal more than Scotland; and is perhaps as much, and as effectively united to England'.[313] But even if Scotland,

> paid nothing at all, we should be gainers, not losers by acquiring the hearty co-operation of an active intelligent people, towards the increase of the common stock; instead of our being employed in watching and counteracting

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... that seemed framed in Burkean language, suggesting ... access to a paper by Burke that is now lost'. Id.

[306] WS ix.514-5.

[307] WS ix.512.'England and Ireland may flourish together. The world is large enough for us both. Let it be our care, not to make ourselves too little for it.' WS ix.510.

[308] WS ix.517.

[309] See WS i.543 *et seq*.. Cf. Millar in Lehmann, 176, 180, 218.

[310] In the *Wealth of nations*, Smith had written: 'Without a union with Great Britain, the inhabitants of Ireland are not likely for many ages to consider themselves as one people.' *Wealth of nations*, 461.

[311] WS ix.487.

[312] For Burke, the 'communication of the several parts of the kingdom with each other, and with foreign countries, has always been regard as one of the most certain tests to evince the prosperous or adverse state of our trade in all its branches (L 293)'.

[313] WS ix.511. 'How much,' Burke asked, 'have you lost by the participation of Scotland (WS ix.511)?' See gen. T.M. Devine and David Dickson, *Ireland and Scotland, 1600-1850: parallels and contrasts in economic and social*

them, and their being employed in watching and counteracting us, with the peevish and churlish jealousy of rivals and enemies on both sides.[314]

This goes directly to the humanist source of commerce and its promotion of a polite, tolerant society. It is thus a species of communication, but hardly its source.[315] Commerce, law, and politeness were all mutually reinforcing. They generated only a baseline civility, the negative justice of 'perfect' rights.[316] In a positive light, this was part of 'modern' liberty, the *relatively* greater reserve of government to act in numerous areas, most notably religion and politics. There is little doubt that a restriction of the resources of the state, a product of the concentration of powers in and of the state in the previous century, could lead to a neglect of the deeper needs of the people. But for many, including Burke, the 'imperfect' obligations were no less real.[317] The normative 'sanctions' of honour and shame, remained elements of the most advanced political economists. '[C]ommercial honesty', like politeness, was helpful, but insufficient for genuine liberty and virtue, 'so different is the spirit of commercial honesty from that of justice, as it is an independent virtue, and influences the heart'.[318] Similarly, while the regularity of law brought systemic justice, it too, without flexibility, undermined equity. In both law and commerce there was a two-stage process in which order was created, but becoming rigour, flexibility was required. The same applied for politeness, which was a negative social virtue insofar as it promoted a basic tolerance; it was not, however, sufficient to promote genuine public spirit. In all of these, Burke is supportive of the modern emphasis on institutions, but continues to insist on the importance of public virtue. Here again, the importance of manners, the spirit of the laws, takes precedence over the letter.

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development (Edinburgh: John Donald Pub. Ltd, 1983).

[314] WS ix.511.

[315] See WS vii.163 and the discussion of the 'growing Melioration of the Law (WS vii.168)' in the next chapter.

[316] Like Hume, Smith was to emphasise the necessity, though not the sufficiency, of 'negative' justice, i.e. that traditionally denominated 'commutative'. See Knud Haakonssen, *The science of a legislator: the natural jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge Univ. Press, 1981), 102.

[317] 'Puffendorf, and other casuists do not, I think, denominate it quite properly, when they call it a duty of imperfect obligation. But the manner, mode, time, choice of objects, and proportion, are left to private discretion; and perhaps, for that reason are performed with the greater satisfaction, because the discharge of it has more the appearance of freedom; recommending us besides very specially to the divine favour, as the exercise of a virtue most suitable to a being sensitive of it's own infirmity (WS ix.129).' Burke stands at the transition from what E.P. Thompson called the 'moral economy' to the modern 'market economy'. See Thompson, 'The moral economy of the English crowd in the eighteenth century', (1971) 50 *Past & Present* 76 and, in the Irish context, Thomas Bartlett, 'An end to moral economy: the Irish militia disturbances of 1793' in C.H.E. Philpin (ed.), *Nationalism and popular protest in Ireland* (Cambridge: Cambridge Univ. Press, 1996).

[318] A i.295 (mislabelled 265).

CONCLUSION:

Burke's simultaneous defence of traditional orders *and* commerce, one in which property played a key social and political role, were of great importance. But to defend 'chivalry' was not to defend feudalism. Nor was the defence of commerce, 'capitalism'. To these, the honour ethic, what I have called the civil economy of glory, was of great importance. In this way, an agrarian aristocracy joined private and public concerns, and provided the stability necessary for social improvement. The corporate orders of clergy and aristocracy were essential elements in the progress of society in Europe. Speculators, philosophical or economic, were threats to this progress. For Burke, there was also an increasingly important role for a natural aristocracy of talent. But Ireland, America, and India all provided examples of the danger of corruption possible in colonial rule and in men of wealth without a sense of obligation to the state. Burke's commercial humanism sought to dismantle the economic monopoly of other parts of Britain over Ireland and the economic and political monopoly of the Ascendancy within Ireland. In the spirit of the 'culture of politeness', the economic and social commerce of the peoples of Britain was essential. But commerce, like law, depended on such manners as well. Public virtue and the public good, not the wealth of the nation, remained its end. In general, Burke recognises difference social interests, while stressing the importance of transcending them for the public good. The 'problem' with his political economy is not to be found here, but in the suggested harmony of economic interests, a harmony he elsewhere denies. In the end, however, Burke problematises the prioritisation of either commerce and the institutions of the state.[319] These civic languages provided an analytical framework that supplemented the more narrowly jurisprudential analysis and would significantly influence his views on the relationship between Parliament and the courts.

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[319] The first of these is associated with Smith, the second with Hume, although these assessments, too, may be somewhat exaggerated. These associations are themselves highly questionable.

THE PRIDE OF THE HUMAN INTELLECT

'The science of jurisprudence, the pride of the human intellect ... with all its defects, redundancies, and errors, is the collected reason of ages, combing the principles of original justice with the infinite variety of human concerns (RRF 193)'.

BURKE ON LAW:

In attempting to understand Burkean jurisprudence, it is important to recognise that his critique of the events in France was of its constitutional, or more accurately extra-constitutional, innovation. Throughout his parliamentary career, Burke was noted for his efforts at legislative, if meliorist, reform. This constitutional caution was designed to insure that reforms had practical effect. His defence of the independence of members of Parliament was the result of both a Ciceronian view of the legislator and the often-reactionary views of his constituents on religion, slavery, economics, and crime. Parties, frequently equated in the civic traditions with factions, were defended by Burke as the corporate embodiment of the civil economy of glory. Parliament, attentive to popular sentiment, was the site for public reason. As a result of this honour ethic, he saw 'virtual' representation as both most representative of all and the best at securing stability and progress. While ultimately Burke would deny any sharp dichotomy between institutions and virtue, because many contemporaries seemed to suggest the sufficiency of institutions, Burke chose to highlight virtue. Even in more narrowly legal questions, the virtue of legislators, both their character and public-spiritedness, was an essential concern. This Senatorial view of the legislature also made legal change a parliamentary, rather than a judicial, task. This puts him at odds again with Blackstone, but also with Lord Mansfield, with whom Burke is often compared. Burke does, however, make use of natural law in a manner similar to Mansfield. This was a largely jurisprudential natural law that appealed to aspirational principles rather than rules. In Burke, this resembles closely his early aesthetics and naturalism as much as the various natural law traditions. Much more than Mansfield, he suggests that positive law was the imperfect application of natural principles significantly altered by historical circumstance. For the same reason, while there were limits to positivism, too, the ideological clarity of the 'Rights of Man' was both philosophically flawed and politically dangerous. In articulating his views on this, Burke points out the fundamental dilemma between 'natural' rights and popular sovereignty.

THE WISDOM OF A TIMELY REFORM:

The degree to which Burke's late anti-revolutionary works dominate Burke Studies has unfortunately obscured the meliorist reformism of his parliamentary career. These writings, especially his *Reflections on the revolution in France* (1790) have often been interpreted as jeremiads against social and legal change.[1] Burke's critique was not, however, about the questions of legislative or even 'constitutional' reform, but the course of events in France, 'between the liberty they might have had, and this frantic delusion'.[2] These late writings were directed against the 'practice of making the extreme medicine of the constitution its daily bread'.[3] For Burke, the French were attempting nothing less than the wholesale, rapid, and rationalist change of a society—most famously in the establishment of a civil religion of reason, the creation of a new calendar, the widespread use of revolutionary propaganda—by the institutions of the state. It was a '*compleat* revolution' the 'destruction and decomposition of the whole society'.[4] To '*innovate*' in this way '*is not to reform*'.[5] Instead, the 'honest reformer' was more cautious, for

> A man full of warm speculative benevolence may wish his society otherwise constituted than he finds it; but a good patriot, and a true politician, always considers how he shall make the most of the existing material of his country. A

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[1] I have largely avoided discussion of conservatism, in the belief that, in relation to Burke, it is an anachronistic and consequently inappropriate category. In addition, particularly where it leans towards classical liberalism, modern 'conservatism' is no stranger to innovation or rationalism. It seems important to note that jurists have begun to distinguish Burke from such modern, and particularly American, jurisprudence. 'Indeed, from a Burkean perspective, Borkean originalism does not seem very conservative at all.' T.W. Merrill, 'Bork v. Burke', (1996) 19 *Harv J L & Pub Pol'y* 509, 509. 'Bork and Scalia are not Burkeans ... Burke's philosophy offers a powerful critique of current 'conservative' jurisprudence ...'. Earnest Young, 'Rediscovering conservatism: Burkean political theory and constitutional interpretation', (1993) 72 *NC L Rev* 619, 623. Cf. Stephan. B. Presser, 'What would Burke think of Law and Economics?" (1997) *Harv J L & Pub Pol'y* 147 ('The answer, I think, is 'not much''.). In the American or indeed any modern context, it seems wisest to agree with Mark Tushnet that a 'truly Burkean approach to the Constitution would avoid the search for theory'. Mark Tushnet, 'A note on the revival of textualism in constitutional theory', (1985) *S Cal L Rev* 683n27. See Tushnet, 683.

[2] C vi.97. Cf. W iii.274-5.

[3] RRF 154. 'Tis as if a Man should make Agarike and Rhubarb his Ordinary Dyett, because it is of use when he is Sicke wch may be once in 7 yeares'. Matthew Hale, 'Reflections by the Lrd. Chieife Justice Hale on Mr. Hobbes his dialogue of the lawe', reprinted in William Holdsworth, *A history of English law* (London: Methuen & Co. Ltd., 1938 (14 vols.)), v.512

[4] WS ix.147, L 139.

[5] WS ix.156. The French 'left nothing, no, nothing at all, *unchanged*. The consequences are *before* us— not in

> disposition to preserve, and ability to improve, taken together, would be my standard of a statesman. Everything else is vulgar in the conception, perilous in the execution.[6]

Burke contrasted inevitable ‘change’ with the root and branch ‘innovation’ of social and political revolution.[7] Reform is remedial, it ‘is not a change in the substance or in the primary modification of the object, but a direct application of a remedy to the grievance complained of’.[8] We obey the ‘great law of change’, but, he argued, by doing so in ‘insensible degrees’ it was possible to maintain the contiguity between past and to make progress for the present.[9] A ‘temperate reform is permanent ... because it has a principle of growth’.[10] For Burke, the history that has a claim on us, that constitutes our individual and community identities, is that past present in our *contemporary* institutions and traditions. This did not diminish the ‘innumerable improvements, either for the correction of the original scheme, or for removing corruptions, or for bringing its principles better to suit those changes which have successively happened in the circumstances of the nation or in the manners of the people’.[11] Burkean gradualism is, in this reformist, meliorative sense at least, progressive. Burke was not defending a bucolic English past, but the present, plural, comparatively progressive, though aristocratic and agrarian, communitarianism. And ‘anything which unnecessarily tore to pieces the contexture of the state, not only prevented all real reformation, but introduced evils which would call, but perhaps call in vain, for new reformation’.[12]

One element of Burke’s reluctance was his belief that ‘[e]very age has its own manners; and its politics dependent on them’.[13] Certainly he feared some amount of revolutionary efficacy, but his fears were the result of his belief that the changes sought by the revolutionaries were beyond the reach of the state in a practical, not a philosophical or political, sense. With some account taken for rhetoric, Burke did also have a ‘profound reverence’ for the ‘equipoise’ of the

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remote history, not in future prognostication; they are about us; they are upon us’. See RRF 237.

[6] RRF 266, 266-7. See 266.

[7] See WS vii.142 on the ‘immemorial’ and ‘innovation’.

[8] WS ix.155. ‘Change is novelty; and whether it is to operate any one of the effects of reformation at all, or whether it may not contradict the very principle upon which reformation is desired, cannot be certainly known beforehand (WS ix.155).’

[9] WS ix.634.

[10] WS iii.492.

[11] WS iii.284. ‘It has ever been bettered by such a revision (WS iii.284).’

[12] W iii.274.

[13] WS ii.258.

British constitution.[14] In these feelings, he was far from alone in Europe. But his awareness of the inaccuracies of British history and the inadequacies of Irish politics were critical examples of Burke's distance from an uncritical belief in its virtues. During the revolution in France, he wrote that he was 'not so narrow-minded as to unable to conceive that the same object may be attained in many ways and perhaps in ways very different from those which we have followed in this country'.[15] Indeed, few governments, including the monarchies of Europe, exercised the power of the British parliament and state. Given this power, and as a good Rockingham Whig, Burke stressed the obligation of parliament to reform.[16] The 'legislature must be supreme, and omnipotent with respect to the law, which is its own creature.... Our ancestors were neither so bigoted nor so ill informed as to leave no door open for reformation'.[17] Such reformation could keep pace with manners and the public good and, at its best, perhaps nurse social progress as well.[18]

Burke did not believe, however, that this was to be achieved quickly and he articulated a cautious politics designed to insure that reforms had practical effect.[19] There was a necessary watchfulness where, as in Britain, constitutional change was, formally at least, as easy as legislative change. He believed that constitutional 'faults, when found, ought to be corrected; but, on the whole, that constitution has been our own pride, and an object of admiration to all other nations.'[20] Such reform required that the

> whole constitution ... be viewed together ... [and] compared with the actual state of the people, and the

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[14] See WS iii.135-6, RRF 377, and 'Speech on the representation of the Commons in Parliament (1782)' in Peter J. Stanlis, *Edmund Burke*, 395-6. Cf. WS ix.610-2 (on fundamental and subsidiary laws).

[15] C vi.45. Cf. N 97.

[16] On notes on the 'Whigs', Burke wrote: 'It is possible enough that the Whigs of former times have been guilty of some faults & fallen into some mistakes. If they have, let the Whigs of this day avoid their errors & act more consistently with their own principles. Let the Tories value themselves upon a faithful adherence to every old error, & a steady perseverance in every false maxim. They are universal assertors [?] of hereditary right and will take care to err with their forefathers—they will fight for the error of their forefathers as for their freehold—But let us take the reverse method & instead of following the errors of the Whigs, if there was anything right in the principles of the Tories, let us adopt it'.). WWM Bk P 27/206.

[17] WS ii.360. 'A spirit of reformation is nevermore consistent with itself than when it refuses to be rendered the means of destruction (W iv.426).'

[18] See WWM Bk P 8/181-4 on the British constitution.

[19] Cf. 'To tamper, therefore, in this affair, or try experiments merely upon the credit of supposed argument and philosophy, can never be the part of a wise magistrate, who will bear a reverence to what carries the marks of age; and though he may attempt some improvements for the public good, yet will he adjust his innovations as much as possible to the ancient fabric, and preserve entire the chief pillars and supports the constitution.' Hume, *An enquiry concerning the principles of morals* ((2nd edn) La Salle: Open Court, 1966 [1751]), 499.

[20] C iv.227.

> circumstances of the time. For that which, taken singly and by itself, may appear to be wrong, when considered in relation to other things may be perfectly right; or at least such as ought to be patiently endured, as the means of preventing something that is worse.[21]

This was a point Burke emphasised even when most critical of existing institutions. In the 'Tracts on the popery laws', he notes that 'in the question of the repeal of an old [law], the work is of more difficulty; because laws, like houses, lean on one another, and the operation is delicate, and should be necessary'.[22] It was to

> avoid ... the evils of inconstancy and versatility, ten thousand times worse than those of obstinacy and the blindest prejudice, we have consecrated the state, that no man should approach to look into its defects or corruptions but with due caution; that he should never dream of beginning its reformation by its subversion;

–And, in an analogy drawn from the Plato and the ancients–

> he should approach to the faults of the state as to the wounds of a father, with pious awe and trembling solicitude.[23]

Constitutional caution and stability were necessary elements of 'improvement ... on the patrimony of knowledge' left by those who went before.[24]

Indeed, Burke did not deny that resistance to the state could be permissible–as in England the century before–but 'Governments must be abused and deranged indeed, before it can be thought of; and the prospect of the future must be as bad as the experience of the past'.[25] Assuming the contractual elements of the old Whigs, he posed the question as

> Whether, after the people have discharged themselves of their original power by an habitual delegation, no occasion can possibility occur which may justify ... a resumption of it? This question, in this latitude, is very hard to affirm or

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[21] C iv.227. The 'objection ... ought not to arise from the natural infirmity of human institutions, ... As no legislators can regard the *minima* of equity, a law may in some instances be a just subject of censure without being at all an object of repeal (C iv.227)'.

[22] WS ix.453.

[23] RRF 194. The 'man of public spirit.... will religiously observe what, by Cicero [*Epistulae ad familiares*, I.ix.18], is justly called the divine maxim of Plato [*Crito*, 51c], never to use violence to his country no more than to his parents'. Smith, *Theory of moral sentiments* (Indianapolis: Liberty Fund, 1976 [1790 edn.]), 233. Cf. 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 403-4, WS v.387.

[24] RRF 198-9. Cf. S 289. 'It is the nature of things', Burke once wrote, 'that they who are in the centre of a circle should appear directly opposed to those who view them from any part of the circumference (W iv.424)'.

[25] RRF 116. See Hale in Holdsworth, v.504.

> deny: but I am satisfied that no occasion can justify such a resumption, which would not equally authorize a dispensation with any other moral duty, perhaps with all of them together. However, if in general it be not easy to determine concerning the lawfulness of such devious proceedings, which must be ever on the edge of crimes, it is far from difficult to foresee the perilous consequences of the resuscitation of such a power in the people.[26]

But, the 'speculative line of demarcation, where obedience ought to end, and resistance must begin, is faint, obscure, and not easily definable'.[27] In an earlier and more descriptive moment, he pronounced a predictable pattern:

> When tyranny is extreme, and abuses of government intolerable, men resort to the rights of Nature to shake it off. When they have done so, the very same principle of necessity of human affairs to establish some other authority, which shall preserve the order of this new institution, must be obeyed, until they grow intolerable; and you shall not be suffered to plead original liberty against such an institution.[28]

Much of the *Reflections* is the attempt to express Burke's view that French population and finance reveal that the country was effectively meeting the requirements of the public good. In addition, however, it was his conviction that the revolution was more the work of a self-interested factious intelligentsia and the 'monied interest' rather than the 'people'. Had he believed that revolutionary sentiment was common, these arguments would have had significantly less force.[29]

In Britain especially, what Burke found objectionable was radical inattention to the comparative progress that existed in Britain and the role of existing institutions in that progress. As the American constitution was in the process of ratification, he opined in Parliament that one would imagine 'we were in America, in the midst of a new commonwealth, devising the best means we could to establish a new constitution, not to perfect and preserve inviolate an excellent old one'.[30] Burke emphasised that '[n]ever before did we at any time in this country meet upon the theory of our frame of government', undermining both any historical contract and the concept of actual consent on which it was based.[31] A country's constitution, social and political, 'is the result of the thoughts of many minds in many ages. It is no simple, no superficial thing'.[32] He was astonished that

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[26] W iv.462.

[27] RRF 116.

[28] 'Speech on the Acts of Uniformity (1772)' in Stanlis, *Edmund Burke*, 369. See also 368.

[29] Indeed, much of Burke's response may be seen as the result of taking the philosophical and radical language of the revolutionaries at face value. In many ways this would be vindicated by the Terror. At the same time, however, much of the revolutionary rhetoric was simply the attempt to articulate less rational, or rationalistic, sentiments of the 'people'. It was Burke's conviction of a conspiratorial faction that made it possible for him to fail to acknowledge more general discontent.

[30] PH xxvii.821.

> An ignorant man, who is not fool enough to meddle with his clock, is, however, sufficiently confident to think he can safety take to pieces, and put together at his pleasure, a moral machine of another guise, importance and complexity, composed of farther wheels, and springs, and balances, and counteracting and co-operating powers.[33]

Against enlightened suggestions that politics might be reduced to simple axioms, Burke emphasises instead its complexity, particularly where it intersects with manners. 'Nothing universal can be rationally affirmed on any moral or any political subject.... The lines of morality are not like the ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications.'[34] It was thus not something to 'discuss, like sophisters'.[35] This insistence on consequences was central to Burke and, of course, to much of the common law tradition.[36] While his colleagues were insisting on parliamentary rights in America, his 'limits' were the 'the rules of law; the rules of policy; and the service of the state'.[37] In context after a context, he insisted on a principled pragmatism, that 'in all moral machinery, the moral results are its test'.[38]

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[31] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 403-4.

[32] W iv.487.

[33] WS iv.487. 'We have discovered, it seems, that all, which the boasted wisdom of our ancestors has laboured to bring to perfection for six or seven centuries, is nearly or altogether matched in six or seven days, at the leisure hours and sober intervals of Citizen Thomas Paine (L 351).' See WS ii.97.

[34] W iv.407.

[35] W iv.407. 'This mode of arguing from your having done *any* thing in a certain line to the necessity of doing *every* thing has political consequences of other moment than those of a logical fallacy (W iv.422).'

[36] The 'nature of man is intricate; the objects of society are of the greatest possible complexity: and there fore no single disposition or direction of power can be suitable either to man's nature or to the quality of his affairs (WS iii.312)'. Cf. Hale in Holdsworth. 'In Moralls and Especially with relation to Lawes for a Comunitie ... wee shall rarely find a Comon Consent or agreenmt between men'. v.502-3.

[37] WS iii.530. The 'practical consequences of any political tenet go a great way in deciding upon its value. Political problems do not primarily concern truth or falsehood. They relate to good or evil. What in the result is likely to produce evil is politically false; that which is productive of good, politically true (W iv.462)'.

[38] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 399. See L 352. In notes for a speech in which he was keen to draw attention to a seemingly prudent, but illegal action, he distinguishes between law and rectitude. 'Before any man can be convicted of a Crime an ill intention must appear– that criminal intention could never be known, if the violation of an express preordained and preknown Law had not determined it. Every Breach of a positive Law implies prima fronte a criminal intention. Shew me the breaker of a Law and I will shew you a Criminal. But shew me an act never so ill calculated for use, and you may show me a man only injudicious and mistaken. We judge acts to be justifiable when they are conformable to Law; and not to be conformable to law because justifiable on the principle of Prudence (WS ix.502).' Cf. the draft of the speech at

In general, for Burke, in questions of constitutional, or extra-constitutional, change, the

> burden of proof lies heavily on those who would tear to pieces the whole frame and contexture of their country, that they could find a way of settling a government fit to obtain its rational ends, except that which they have pursued by means unfavourable to all the present happiness of millions of people, and to the utter ruin of several hundreds of thousands. In their political arrangements, men have no right to put the well-being of the present generation wholly out of the question. Perhaps the only moral trust with any certainty in our hands is the care of our own time. With regard to futurity, we are to treat it like a ward. We are not so to attempt an improvement of his fortune as to put the capital of his estate to any hazard.[39]

In their actions, Burke saw the revolutionaries destroying not merely the past and present, but perhaps even the future. The current generation, the 'temporary possessors and life-renters ... should not think it amongst their rights to cut off the entail or commit waste on the inheritance'.[40] His concern that the absence of any responsibility to the future, expressed by a disregard of the past, would sever the progress of manners. For

> By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.[41]

The result was not merely disrupting, but decivilising, threatening the whole of the progress of European civil society.

It is in this sense then that, throughout his career, Burke emphasised the 'wisdom of a timely reform'.[42] His most famous reform effort was the attempt to economise governmental administration and royal influence. In this, he was critical of feudal anomalies, noting 'when the reason of old establishments is gone, it is absurd to preserve nothing but the burthen of them'.[43]

WWM Bk P 8/181-4.

[39] W iv.407. See RRF 104.

[40] RRF 192. See RRF 192.

[41] RRF 192. While this is not the idea that 'honors the past for its own sake', Anthony T. Kronman's 'Precedent and tradition' (1990) 99 *Yale L J* 1029 is an interesting jurist's take on this passage. Cf. Hume's 'silkworms' in 'Of the original contract' in *Selected essays* (Oxford: Oxford Univ. Press, 1993), 284.

[42] WS iii.492. See WS iii.518, 522, ix.155-6, W iv.487. Cf. Francis Canavan, 'Burke as a reformer' (1969) 5 *Burke Newsletter* 300.

[43] WS iii.510. The most famous jurist to comment on his attempt at economic reform called it 'remarkable ... for the light which it shed upon those curious medieval survivals which pervaded very many of the branches of the executive government, in the same way that they pervaded the courts of law and equity'. Holdsworth, x.104. See gen

Institutions, including 'old establishments', could not be defended on the basis of their age or pedigree, but 'by their effects. If the people are happy, united, wealthy, and powerful, we presume the rest'.[44] Similarly, while Burke reserved as essential place for the established church, he also repeatedly sought to establish greater religious tolerance, including efforts to effect the gradual elimination of Catholic disabilities.[45] This was of importance not only to Ireland, but throughout Britain. In 1779, in the context of the American war, when there were anti-Catholic riots in Scotland, he wrote to Boswell,

> A religious war was not exactly the thing I expected in my time. I thought it possible, that even at the other side of the Tweed, a man might be allowed to say his prayers in Latin without any gross violation of the native, inherent, essential privileges and immunities of the broad Scotch. I admit, that the Ears of heaven may be more delighted with these accents; yet as the other Tongue may be as intelligible there (though not so pleasing) I think a little of it might be borne at Edinburgh without making a very serious quarrel of the matter.... the American rebellion is more to my Taste than that which you are cooking in the North. I think it <behoves.> as well to resist an act of Taxation as an act of Toleration; and it would hurt me rather more to have the Excise [tax] in my own house, than the Mass in my Neighbours. I take it for granted, that there are good reasons for every thing you do. But I am apt to be as much puzzled with moral Mysteries as others are with religious.[46]

Beyond this he sought government reimbursement for the destruction that resulted from these riots and harshly criticised the churchmen he thought responsible in inciting the riots. The 'Gordon riots', of similar constitution, erupted shortly afterwards in England, after the passage of the 'Saville Act' granting tolerance to English Catholics. Burke was himself a target of the rioters, though his earlier support of popular unrest in the era of the Wilkes controversy inoculated him to some degree from their wrath. William Murray, Lord Mansfield, fared less well. Similarly critical of religious intolerance and slavery, his house was set alight. This was also roughly the same period as the rise of the 'Irish volunteers', whose organisation without crown approval and near-exclusively Protestant ranks might have suggested a similarly dangerous mix of factionalism.

WS iii.481-551.

[44] RRF 285.

[45] 'The difference here lies not so much in Burke's conception of the established church, but in his broader conception of government.... not that an establishment is desirable, but that it is inescapable'. Michael W. McConnell, 'Establishment and toleration in Edmund Burke's 'Constitution of Freedom'', 1995 *S Ct Rev* 393, 444. See 'gen. Burke' in Ursula Henriques, *Religious toleration in England 1787-1833* (London: Routledge and Kegan Paul, 1967), 99-135. Cf. C ii.309-10 (on 1772-3 legislation).

Burke's views on criminal matters were also reformist, even in the aftermath of the Gordon riots and, later, the French revolution. During the Wilkes era, he insisted on order or, it might be said, on that balance of virtue and liberty that had seemed so important to earlier Whigs. 'Peace is the great End in *all* Governments: Liberty is an End only in the Best.'[47] But he sought this in the context of constant criticism of the government's repressive reaction to Wilkes in which the 'voice of the law is not to be heard'.[48] In these disturbances, and even at the point of his most aggressive anti-revolutionary writings, Burke counselled government restraint on the grounds of justice and policy.[49] Time and again, he insists that '[m]ercy is not a thing opposed to justice'.[50] In general, he was critical of the multiplication of criminal laws by the legislature, a point shared by many conservative common lawyers and progressive reformers.[51] But in remarking on the seemingly unnecessary multiplication of laws, Burke was also critical of the courts, the 'legislature was often called on to punish, by rigorous penalties, the negligence of the magistrates on the inadvertencies of the poor. He recommended a revision of the whole criminal law, which, in its present state, he thought abominable'.[52] With reformers throughout Europe, he lamented the legal inflexibility and harshness.[53] Burke believed, for example, 'that *capital* punishments are not more certain to prevent Crimes than *inferior* penalties'.[54] They were thus 'not necessary' and, further, '[w]e are not at liberty to dispose of the lives of men according to our will and pleasure'.[55] In general, improvement ought to come from 'encouragement ... by countenance, favour, privileges, which are powerful, and are lawful instruments. The coercive

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[46] C iv.45-6. See F (M) A.xxvii on George Gordon and Scotland.

[47] WS ii.225. 'Anarchy predominates without freedom, and servitude without submission or subordination (WS ii.287)'.

[48] WS ii.286.

[49] See WS iii.602-6, 611-8. 'Justice is itself the great standing policy of civil society; and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all (RRF 265)'.

[50] WS viii.496. Christopher Reid has noted that the 'repetition of this idea in unrelated contexts suggests that there may be a language of jurisprudence, a concept of legal an political authority, which binds together the apparently diffuse elements of Burke's career'. *Edmund Burke and the practice of political writing* (Dublin: Gill and MacMillan, 1985), 32. On another perspective on the ideology of 'majesty, justice, and mercy', see Douglas Hay ''Property, authority and the criminal law' in Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow, *Albion's fatal tree: crime and society in eighteenth0century England* (London: Allen Lane, 1975).

[51] See WWM Bk P 27/204.

[52] PH xxviii.146-7.

[53] Cf. Finbar McAuley and J. Paul McCutcheon, *Criminal liability: a grammar* (Dublin: Round hall, Sweet & Maxwell, 2000), 55-6 and the review, by its tone unlikely to be Burke's, of the penal reformer Cesare Beccaria in 1767 R 316. Beccaria's *Dei delitti e delle pene* (1764) was translated into English in 1767.

[54] WS iii.339. See the draft at WWM Bk P 8/200.

[55] From fragments on 'Criminal law' and 'Criminals' in W ii.436, 437.

authority of the state is limited to what is necessary for its existence'.[56]

As noted, Burke was also well-known for his hostility to slavery. He drafted a Slave Code, modelled on the French *Code Noir*, in hopes of moderating its evils and initiating its end. He 'rather rejoiced at its downfall'.[57] Here, as on the elimination of religious disabilities and monopolistic trade restrictions on Ireland, he was opposed by his Bristol constituency. This no doubt confirmed Burke's well-known views on the independence, the mediatory or Senatorial role, of the Member of Parliament. His Bristol constituency and the nature of eighteenth-century populism would not have inspired his faith in the progressive nature of British voters. This awareness was also to a critical element in the hardening of his views towards *constitutional* reform in Britain. Burke's faith in the 'people', deeper than many of his age, was chastened by the reactionary nature of *their* opinion. His gradualism was an attempt to navigate these shoals.[58] 'I wish to be a member of Parliament', he told the electors of Bristol, 'to have my share of doing good, and resisting evil'.[59]

It was not the 'abstract value of the voice of the people' but 'opinion' that was the 'great support of the State'.[60] In his role in Parliament, Burke questioned the wisdom, for political as well as philosophical reasons, of '*authoritative* instructions; *Mandates* issued'.[61] Burke was a conscientious representative for the Bristol electors, but he had constantly to remind them:

> His unbiassed opinion, his mature judgement, his enlightened conscience, he ought not to sacrifice to you; to any man, or to any sett of men living.... Your representative owes you, not his industry only, but his judgment; and he

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[56] WS ix.467.

[57] WS iii.563n1 (citing the reports of Burke's speech on slavery in May 1777). 'I heartily wish it at an end (W v.587)'. See 'Sketch of a Negro Code at WS iii.562-81. Cf. Millar in William C. Lehmann, John Millar of Glasgow 1735-1801: his life and thought and his contributions to sociological analysis (Cambridge: Cambridge Univ. Press, 1960), 315-21. Burke's review of George Wallace's *A system of the principles of the laws of Scotland* (1759) cited heavily from the author's critique of slavery. The work was 'grounded on [the laws] of nature and nations; and the author ... endeavoured to do, what, if it had been done with regard to the law of England, might be considered as an union of lord Coke, with Grotius and Puffendorf (1760 R 263 *bis*)'. Interestingly, only Wallace's first volume was published and the work 'seems to have been a disastrous failure. It is said that only 40 copies were sold and that the author bought up the rest ...'. David M. Walker, *The Scottish jurists* (Edinburgh: W. Green & Son, 1985), 305. Given that many of the materials reviewed, like Smith's *Theory*, were passed to Burke and the editors, it would be interesting to know how the work arrived at the *Annual Register*. Wallace was the son of Robert Wallace, with whom Hume had debated the population of ancient and modern times, and who is cited in his work.

[58] Other areas of reform not discussed included debtor relief, the press gang, and military enlistment for life. See also WWM Bk P 27/206 on transportation.

[59] WS iii.662. Although the phrase was common, it would not have been beyond Burke to be suggesting Aquinas in his defense of his support of religious tolearation.

[60] WS ii.252, 252. And 'although government certainly is an institution of divine authority, yet its forms, and the persons who administer it, all originate from the people (WS ii.292)'. See W iv.467 (on 'the PEOPLE').

betrays, instead of serving you, if he sacrifices it to your opinion.[62]

Discerning the 'sense of the people', he claimed to have '*met it on the way*, while I was pursuing their interest according to my own ideas'.[63] In general, it was his belief that the 'people are the masters', while the members of Parliament were the 'expert artists; … the skilful workmen, to shape their desires into perfect form, and to fit the utensil to the use'.[64] In the 'Tracts on the cause of our present discontents' he claimed that 'in all forms of government the people is the true legislator; ... the remote and efficient cause is the consent of the people, either actual or implied'.[65] Burke, of course, denied that such consent was, or could be, actual.[66] In this, the concept of the 'people' was problematic.[67] But he did not disregard public opinion. 'To govern according to the sense and agreeably to the interests of the people is great and glorious object of government'.[68] This was not so much a theoretical as a practical question. A 'free government' was not a question of form, but of substance, it was 'what the people think it, … [as] the natural, lawful, and competent judges in this matter'.[69]

Parliament was, in some sense for Burke, the reason to popular passions.[70] He sought to distinguish the 'feelings of the multitude from their judgments…. their interests from their opinions'.[71] It was not that the 'people are never in the wrong.... [but] the presumption is at least upon a par in favour of the people'.[72] In general, public opinion was a sensitive, accurate barometer of public problems, but that was not to say that an aristocracy, natural if not

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[61] WS iii.69. See PH xix.1123.

[62] WS iii.69. See W iv.416-8.

[63] WS iii.493.

[64] WS iii.547. See WS iii.549-50.

[65] WS ix.454-5. Note that '[n]o one can imagine, then, an exclusion of a great body of men, not from favours, privileges, and trusts, but from the common advantages of society, can ever be a thing intended for their good, of can ever be ratified by any implied consent of theirs (WS ix.455)'. See WS ix.455.

[66] Even in adopting the language of contract, Burke is quick to stress how small a role actual consent takes. And 'though civil society might be at first a voluntary act, (which in many cases it undoubtably was,) its continuance is under a permanent standing covenant, coexisting with the society; and it attaches upon every individual of the society, without any formal act of his own. This is warranted by the general practice, arising out of the general sense of mankind (W iv.460).'

[67] Many of the problems he highlights are inherent in representative government. See WS viii.457-8.

[68] SDP 386.

[69] WS iii.317. In response to this, Burke's friend (and Tory) Johnson quipped 'I will let the King of France govern me on those conditions, (said he) for it is to be governed just as I please'. James Boswell, *Life of Johnson* (Oxford: Oxford Univ. Press, 1998 [1791]), 865.

[70] In the *Account*, the Burkes note that Portuguese experience was a 'standing lesson' that the 'only things that can support [a nation is] the cultivating the good opinion of the people, and the keeping up a proper force (A i.283)'.

[71] WS ii.225.

[72] WS ii.255. But '[w]hen they do wrong, it is their error, not their crime (WS ii.255).'

hereditary, was unnecessary. 'It is very rare indeed for men to be wrong in their feelings concerning public misconduct; as rare to be right in their speculation upon the cause of it.'[73] Early in his career, Burke seemed to believe, he was a good Whig to so believe, that the contentious, sometimes unruly, nature of British politics was a virtue. He 'like[d] a clamour whenever there is an abuse'.[74] The fact that Parliament was the practical, as well as legal, site of effecting popular will did not mean it could be inattentive to such opinion.

> In a legal, and technical sense of reasoning, the house of Commons is the only representative of the people.... But the people of the city of London, who are not so well instructed as we are in the principles of law, proceed by a sort of rough, vulgar common sense upon this question—to make parliament the only Representatives of the people, they think there should be some agreement with the people: they think there should be some attention to their interests.[75]

But, consistent with the classical tradition, 'no legislator, at any period of the world, has willingly placed the seat of active power in the hands of the multitude; because there it admits of no control, no regulation, no steady direction whatsoever'.[76] Opinion was a 'natural control on authority; but to exercise and to control together is contradictory and impossible'.[77] But it remained the duty of Parliament to attend to opinion, 'to follow, not to force, the public inclination—to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community, is the true end of legislature'.[78] This mediating function was also necessary because Burke did not see the various interests of Britain as harmonious, whatever his suggestions in 'Thoughts and details on scarcity'. He recognised competing interests, but argued that, in the British system at least, that the individual representative ought to transcend the narrower interests of their constituencies.[79] Parliament, he told the people of Bristol, ought to be a

> *deliberative* Assembly of *one* Nation, with *one* Interest, that of the whole; where, not local Purposes, not local Prejudices ought to guide but the general Good, resulting from the general Reason of the whole. You chuse a

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[73] WS iii.256. They 'may err in their choice; but common interest and common sentiment are rarely mistaken (WS ix.629)'. Cf. Hume, 'Idea of a perfect commonwealth' in *Selected essays* (Oxford: Oxford Univ. Press, 1998).

[74] WS ii.349.

[75] WS ii.239.

[76] W iv.459. This remains true, of course.

[77] W iv.459. Cf. WS iii.310.

[78] WS iii.315.

[79] Cf. J.W. Burrow, *Whigs and liberals: continuity and change in English political thought* (Oxford: Clarendon

> Member indeed; but when you have chosen him, he is not Member of Bristol, but he is a Member of *Parliament*.[80]

In Parliament, 'all these wide-spread interests must be considered,—must be compared,—must be reconciled, if possible'.[81] The Parliament's mantra could be summed up, as he wrote in the *Reflections*, as: 'We compensate, we reconcile, we balance.'[82]

The increasingly insistence of Whig radicals for reform of representation was complicated. In this, there were, Burke argued

> two parties, who proceed on two grounds, in my opinion, as they state them, utterly irreconcilable. The one is juridical, the other political. The one is in the nature of a claim of right, on the supposed rights of man as man.... The other ground, as far as I can divine what it directly means, is, that the representation is not so politically framed as to answer the theory of its institution. .... men as men are individuals and nothing else.[83]

Burke believed the first of these a 'confusion of judicial with civil principles', a mistake as philosophical as political.[84] He denied as well that men were 'individuals and nothing else'.[85] Political representation was, and practically had to be, some select number representing the opinion in hopes of achieving a 'communion of interests and sympathy in feelings and desires'.[86] Such a communion had no inherent relationship to the aggregation of votes. Burke is restricting, as did both American and French revolutionaries continued to do *after* their respective

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Press, 1988), 35.

[80] WS iii.97.

[81] WS ii.97.

[82] RRF 281. See WS iii.156-7, RRF 280-3.

[83] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 396. In the 'Appeal', where his use of the language of earlier Whigs sometimes distorts his meaning, he wrote: 'In a state of *rude* nature there is no such thing as a people. A number of men in themselves have no collective capacity. The idea of a people is the idea of a corporation. It is wholly artificial; and made, like all other legal fictions, by common agreement. What the particular nature of that agreement was, is collected from the form into which the particular society has been cast. Any other is not *their* covenant. When men, therefore, break up the original compact or agreement which gives its corporate form and capacity to a state, they are no longer a people–they have no longer a corporate existence–they have no longer a legal coactive force to bind within, nor a claim to be recognized abroad. *They are a number of vague, loose individuals, and nothing more. With them all is to begin again. Alas! They little know how many a weary step is to be taken before they can form themselves into a mass which has a true politic personality* (W iv.463 (*italics added*)).'

[84] W iv.485.

[85] An interesting page among Burke's notes, partially illegible, reads 'Such philosophy [?] considers man always in relation not solitary rights and duties, but as in communion with the universe … not … . They took the origin of laws from the dignity of man & not his … . They therefore produced a philosophy full of goodness, forbearance, & magnanimity. The enlargement of the principles enlarged their minds—notwithstanding their Errors with regard to the identity of God, their … & their fatalism (WWM Bk P 25/58)'. The piece may refer to the Stoics.

[86] WS ix.629.

revolutions, political influence to property because of its traditional association with social stability and political jurisdiction. Indeed,

> By admitting settled permanent substance in lieu of the numbers, you would avoid the great danger of our time, that of setting up number against property. The numbers ought never to be neglected; because (besides what is due them as men) collectively, though not individually, they have great property: they ought to have therefore protection; they ought to have security: they have to have even consideration: but they ought not to predominate.[87]

Britain's recognised stature in Europe was arguably a prima facie case against changes in representation. Representation was inevitably '*virtual*', it was a philosophical mistake to believe otherwise. If a '*Sympathetic* Representation' exists, 'none but those who are heated and intoxicated with Theory will look for any other'.[88] He believed that the balance of popular opinion and professional competence had, in terms of the English franchise and the frequency of elections, achieved some effective balance in his day. 'The constant habit of authority, and the unfrequency of elections, have tended very much to draw the House of Commons towards the character of a standing Senate'.[89] It was true that the 'frame of our commonwealth did not admit of such an actual election: but it provided as well, and (while the spirit of the constitution is preserved) better for all the effects of it than by the method of suffrage in any democratic State whatsoever'.[90] At its best, the 'virtue, spirit, and essence of a House of Commons consists in its being the express image of the feelings of the nation'.[91] While Burke failed to understand the degree to which his contemporaries' theoretical arguments had practical foundations, it must still be admitted that his critical theory was, and remains, sound.

Burke had also early come to terms with parties, which in the civic traditions, with the usual allies of Johnson and Hume, were synonymous with faction.[92] But the '*two securities for the importance of the people*' were the powers '*arising from popularity* [and] *connexion*'.[93] The first was a legacy of the honour ethic, the second the fruit of ancient moralists and the 'culture of politeness'. It was also a practical necessity. It was 'not enough ... that a man means well', for

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[87] WS ix.635.

[88] WS ix.629, C ix.256, C ix.256. It was in this sense that there was a 'natural representative; and on this body, more than on the legal constituent, the artificial representative depends (L 105)'. Cf. WS ii.284, L 138.

[89] WS ii.293.

[90] WS ii.278. See WS ii.320-1, W iv.416.

[91] WS ii.292. See F (M) A.xiv.12a-d on sovereignty and settlement.

[92] Cf. William Burke's essay at WWM Bk P 40.

'[w]hen bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle'.[94] In his 'Thoughts on the causes of the present discontents', Burke had articulated both the place of parties in British politics and, more specifically, of the Rockingham Whigs. A party, Burke maintained, was a

> body of men united for promoting by their joint endeavors the national interest upon some particular principle in which they are all agreed. For my part, I find it impossible to conceive that any one believes in his own politics, or thinks them to be of any weight, who refuses to adopt the means of having them reduced into practice.[95]

In general, of course, Burke believed that men were more effective—for good or evil—when acting in corps. Without a 'patriot king'–or the rule of an 'impartial spectator'–, it was a necessary evil. As in the more general acceptance of interest in politics and economics, this suggested, if it did not yet entirely accept, the incompatibility of interest. As in this general acceptance of self-interest, parties aligned around public principles rather than personal connection seemed to offer potential political regularity. But the spirit of solidarity was another important aspect. Speaking of the Romans, and repeatedly citing Cicero, Burke wrote

> They believed private honour to be the great foundation of public trust; that friendship was no mean step towards patriotism; that he who, in the common intercourse of life, shewed he regarded somebody besides himself, when he came to act in a public situation, might probably consult some other interest than his own.... It was their wish, to see public and private virtues, not dissonant and jarring, and mutually destructive, but harmoniously combined, growing out of one another in a noble and orderly gradation, reciprocally supporting and supported.[96]

Burke suggests in fact, citing Addison, that this was cause of the 'great connexion of Whigs in the reign of Queen Anne'.[97] Unfortunately for Burke, these Whig connections became increasingly frayed after Rockingham's death.

There is a related, though equally complex, relationship in Burke between the public virtue emphasised in the civic and classical traditions and the importance of institutions in later

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[93] WS ii.264.

[94] WS ii.315, 315. See gen. WS ii.314-22 ('Thoughts on the cause of the present discontents'). Otherwise, they would 'lie dispersed, without concert, order, or disciple, communication is uncertain, counsel difficult, and resistance impracticable (WS ii.314)'.

[95] WS ii.317.

[96] WS ii.316.

[97] WS ii.316. He quotes from Addison's 'The Campaign' at WS ii.316-7.

thought. Contrary to the English Jacobins, he 'consider[ed] the moral basis as every thing: the formal arrangements, further than as they promote the moral principles of Government, and the keeping desperately wicked persons as the subjects of laws and not the makers of them, to be of little importance'.[98] This distinction will prove of great importance in the future development of 'liberal' thought. Burke's emphasis on the 'moral', while recognising the importance of institutions, is akin to the continuing importance and possibility of public virtue. In both senses, it may be seen as linked to civic and benevolist sources. Like all great public collections of men', he told parliament, 'you possess a marked love of virtue, and an abhorrence of vice'.[99] In his corporate vision, this made 'virtual' representation possible. Parliament was not simply a site for interest politics. Without the naiveté that his contemporaries repeatedly and perhaps unfairly assigned to thinkers before them, Burke believed that public men must, and could transcend, individual and political interests. In him, the emphasis, common to many civic traditions, on education, from Cicero to Smith and Rousseau, was transferred to manners, though qualified both by more modern limits on private beliefs and a conviction that such formation was not so far-reaching as had often been believed. A distinction between social-political structures and public virtue was real and meaningful, but only when it was not mistaken for a sharp dichotomy. It is the public virtue and discretion of public men, themselves more the outcome of a community's manners than laws, on which the virtue of the laws depend.[100] Positive laws, like the precepts of morality, were insufficient pedagogically and practically. For 'no constitution can defend itself. It must be defended by the wisdom and fortitude of men'.[101] Like manners, it was this 'wisdom ... of government' that was 'of more importance than the laws'.[102] For

> Constitute government how you please, infinitely the greater part of it must depend upon exercise of the powers which are left at large to the prudence and uprightness of ministers of state. Even all the use and potency of the laws depends upon them. Without them, your commonwealth is no better than a scheme upon paper; and not a living, active, effective constitution. .... The due arrangement of men in the active part of the state... ought to be among its

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[98] L 352. Cf. Commonwealths are 'moral essences.... artificial combinations, and, in their proximate efficient cause, the arbitrary productions of the human mind (L 63).'

[99] WS ii.453. 'A conscientious person would rather doubt his own judgment, than condemn his species. He would say, I have observed without attention, or judged upon erroneous maxims; I trusted to profession, when I ought to have attended to conduct. Such a man will grow wise, not malignant, by his acquaintance with the world. But he that accuses all mankind of corruption ought to remember that he is sure to convict only one (WS iii.326);.

[100] See Burke's Middle Temple notebooks on passions and 'enlarged considerations' at F (M) A.xxx.6.

[101] L 384.

[102] W ii.140. 'There is no qualification for government, but virtue and wisdom, actual and presumptive (RRF 139).'

> very first and dearest objects.[103]

Again the distinction between form and substance here is very complex. But in understanding Burke, it was this 'moral and virtuous discretion, and not any abstract theory of right, which keeps governments faithful to their ends'.[104]

Many of these sentiments were combined in the 'Letter to the Sheriffs of Bristol (1777)'. Written as the American war had begun and remained popular in England, he suggests again his earlier defence of party, his views on habit and communication, and the honour ethic.

> The only method which has ever been found effectual to preserve any man against the corruption of nature and example, is an habit of life and communication of councils with the most virtuous and public-spirited men of the age you live in. Such a society cannot be kept without advantage, or deserted without shame. For this rule of conduct I may be called in reproach a *party man*; but I am little affected with such aspersions.

—Listing the great men of the Rockinghams, he notes that they were—

> names, among which, some have extended your fame and empire in arms, and have fought the battle of your liberties in fields not less glorious.—These, and many more like these, grafting public principles on private honour, have redeemed the present age, and would have adorned the most splendid period in your history. Where could such a man, conscious of his inability to act alone, and willing to act as he ought to do, have arranged himself better?[105]

Virtue remained a necessary concern, but political parties were could act as a corporate store of knowledge which, based on a natural sociability and benevolence, could nurse virtue. There remained ancient, too, Ciceronian elements to Burke's vision of the legislator. But, at the same time, it was heavily qualified by the lessons of Montesquieu. Modern legislators, arguably possessed in practice a power that few beyond the fabled 'Legislators' or 'lawgivers' had in the past, but the effect of the laws, for all their importance, were heavily qualified by manners. The 'reason' of law could not always engage the 'sentiment' of manners. Burke's politics are admittedly patrician based on the civil economy of glory, that of 'grafting public principles on private honour'. But this ought not to be taken out of context. It was made that much easier to maintain in light of the very real reactionary tendencies of much of English popular opinion.

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[103] WS ii.277. See C ix.258, WS ii.452.

[104] W vi.102. Public spirit did come 'from above. Government gave the impulse (L 119)'.

[105] WS iii.324-5. Cf. N 108. In the context of the revolution, he was 'persuaded, that the last hopes of preserving the spirit of the English Constitution, or of re-uniting the dissipated members of the English race upon a common plan

LEGISLATIVE AUTHORITY AND JUDICIAL PRUDENCE:

Blackstone excepted, Lord Mansfield was perhaps the most important common law jurist of the eighteenth century. With Blackstone, he is also the jurist most associated with Burke. Mansfield favoured, and very effectively conducted, a vigorous programme of legal change through the English *courts*. What evidence exists suggests that Burke had significant doubts about the ability of the courts to settle difficult legal controversies.[106] In the late 1760s, a dispute, related to the Wilkes controversies, developed around Mansfield's interpretation of the jury powers in cases of libel. Mansfield argued that juries could decide only whether the words complained of were published, whereas his opponents, especially Lord Camden, maintained that

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of tranquilly and liberty, does entirely depend on the firm and lasting union of such men (WS iii.328)'.

[106] The relationship between Burke and Mansfield is another deserving of greater attention. Mansfield, a Scot and a Tory from a family of Jacobite sympathies, had studied Roman law and practiced Scots law before entering the English courts. Burke clearly respected Mansfield's abilities (WS i.160, i.244, i.286) and Mansfield seems to have praised the legal skills of Burke's brother Richard (WS iv.430, vii.596), something few others seem inclined to do. Burke also sent him a copy of the *Reflections*, although his response to it is unclear (WS vi.314n3). Most important perhaps was the fact that the judge was related to Rockingham by marriage and had suffered much more than Burke in the Gordon riots—his home was burned by rioters—for his views on religious tolerance and slavery. There was also some controversy and clear differences between them, too. Mansfield seems to have suspected, with others, that Burke was the author of Junius' *Letters* (1768-72), around which the issue of libel revolved and which ended critiquing Mansfield himself. Mansfield's Tory inclinations also linked him to fellow Scot Lord Bute and the Court 'closet' that Burke spent such energies criticising in the 'Thoughts on the Cause of the Present Discontents' (WS i.328, ii.470). He had refused bail to Wilkes during the controversy surrounding his admission to parliament, an admission accepted by the Rockingham Whigs. It is often noted that Burke quotes Mansfield in the course of the Hastings Impeachment, but even here there seem to be several important qualifications. First, Mansfield is one of numerous sources, British and European, listed. Burke cites him as an advocate, not necessarily as a fellow. Secondly, Burke's somewhat general remarks were actually limited to rules of evidence. Finally, Mansfield was thought to be sympathetic to Hastings, so that Burke's praise may have been more rhetorical than real (C ii.351, WS vii.169). In general, the relationship, such that it was, appears to have been respectful, but cool. 'My situation was ridiculously vexatious', Burke once noted, 'publicly abused on one side for the Civil things which I did say of him; and on the other torn to pieces for attacks which I never made upon him (C iii.256)'. See C ii.203. See also C ii.278, ii.278n2. Given the very different avenues taken to reform, it seems inaccurate to note, as the editors of Burke's *Writings* do, that he 'entirely sympathized with the movement towards reform of the law *from within* of which Mansfield had been the great exponent (WS vii.113 (*italics added*))'. Similarly, it seems incorrect to say, as Lieberman does, that Mansfield's adjudication confirmed Hale's jurisprudence. To emphasise the ability of the law to adapt is far from approving of the sort of end-driven activism Mansfield affected. See Lieberman, 137. There are also two very interesting essays on 'The Conduct of Lord Mansfield' written by 'Messieurs Burkes', probably Edmund, William, and Burke's brother Richard, under the pseudonym 'Valens' John Almon's *Biographical, literary, and political anecdotes* (London: T. N. Longman, and L. B. Seeley, 1797), 3 vols at iii.152-76. The essays are critical of Mansfield on the American war and compare the American situation with both Ireland and Scotland. There is also the suggestion of additional essays.

the jury could also determine if such words constituted libel.[107] Burke, Rockingham, and the opposition largely favoured Camden's interpretation. To end the debate, they sought a legislative solution 'to fix that Mercury by a positive Law'.[108] Burke's role in this debate, early in his career, is instructive. It suggests that, as with the comparisons to Blackstone, those to Mansfield must be heavily qualified. Burkean jurisprudence must be seen as prioritising the legislature, rather than the judiciary.[109]

In the judicial response to the disturbances and the question of libel, Burke argued that instead of being 'Temples of Justice', the courts had become an 'Amphitheatre for Gladiators' and that the 'controversy ought to be quieted, and the law ought to be settled in a manner clear, definitive, and constitutional, by the only authority competent to it,—the authority of the legislature'.[110] This was a strongly held belief.

> I have always understood, that a superintendence over the doctrines as well as the proceedings of the courts of justice, was a principal object of the constitution of this House; that you were to watch at once over the lawyer and the law; that there should be an orthodox faith as well as proper works: and I have always looked with a degree of reverence and admiration on this mode of superintendence. For being totally disengaged from the detail of juridical practice, we come something perhaps the better qualified, and certainly much the better disposed, to assert the genuine principle of the laws; in which we can, as a body, have no other than an enlarged and a public interest.[111]

In controversies of this sort, 'those who leave it to common Law', Burke wrote, 'leave it as it [is]'.[112] In the end,

> Juries ought to take their Law from the Bench only; but it is *our* Business that they should hear nothing from the

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[107] See PH xvi.1313-6 (Mansfield's Opinion in *The King v. Woodfall*). See 'Burke's remarks on the history of the law of libel, see MS at Northampton, A.xxxvi.16D (ii.338n1)'. Cf. WS vii.192, Fox's Libel Act of 1792. With others, Burke 'repeatedly charged [Blackstone] with inconsistency for supporting the incapacitation of Wilkes against the apparent conclusions of his own celebrated *Commentaries* (WS ii.355n3)'. Again, whatever his relationship to Mansfield, that with Camden continued into the 1790s. Burke wrote in 1796 that, in one of his 'last conversations' with Camden, that they 'were struck much in the same manner with the abolition in France of the law, as a science of methodized and artificial equity (L 123)'.
[108] WS ii.346.
[109] See F (M) A.i 39a and WWM Bk P 27/206 on Justices of the Peace.
[110] WS ii.347, C iii.202. See C ii.187. See WS ii. 352-6 and C iii.540 (on copyright).
[111] W ii. 137 (taken from the draft of the 'Speech on the Jury Bill' in W 137-46). Cf. WS ii.343-9, which contains only that part of the speech given, and from which those citations are taken. Note, too, Burke's comment that libel was 'not the crime of an illiterate people (W ii.139)' and that when the English court had to address the issue, '[l]earning of their own upon the subject they had none; and they were obliged to resort to the only emporium where it was to be had, the Roman law (W ii.140)'.
[112] WS ii.349n1.

> Bench but what is agreeable to the principles of the constitution. The Jury are to hear the Judge; the Judge is to hear the Law where it speaks plain, where it does not he is to hear the Legislator.[113]

Neither English courts–including many non-common law courts–nor Parliament were alone responsible for contemporary institutions like the jury. A convention 'so elaborate and artificial as a Jury was ... a matter of *institution* brought to its present state by the *joint efforts of Legislative authority and juridical prudence*'.[114] Each thus had a role in the progressive development of the law. In his day, however, it was the legislature rather than the courts that were the proper agents of law making.

Here as elsewhere, Burke thought it impolitic to make general declarations of supremacy. Nevertheless, his model, perhaps inevitably as a legislator, was less that of Coke than Cicero, in which Parliament would act as a British Senate.[115] 'A court of law very often slips over its Judicial capacity to steal into the Legislature.'[116] That this belief was not limited to the narrow question of juries is made clear in other remarks by Burke in the same period.

> A Legislative Act has no reference to any *rule*; but these two[:] *Original Justice*; and *discretionary application*. Therefore it can give rights [-] where no rights existed before; and it can take away rights where they were before established. For the Law which binds all others does not, and cannot bind the Law-maker. He and he alone is above the Law.
>
> But a Judge, a person exercising a Judicial Capacity—is neither to apply to original Justice alone; nor to a *discretionary* application of it. He gives to justice and discretion only at second hand, and through the medium of some superiors. He is to work neither upon his *opinion* of the one nor of the other. But upon a fixed Rule, of which he has not the making, but singly and solely the *application* to the Case. The very idea of Law is to exclude the discretion in the Judge.[117]

There is little room left here to suggest that Burke favoured legal change or reform through the courts.

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[113] WS ii.347.

[114] WS ii.344. In a letter, Burke wrote, much as had Blackstone, that a 'great part of our Statute Law is lost, and much if not the whole of what we receive as common Law at this day was undoubtedly at first the result of positive constitution by the Legislative Authority; though the Record being, lost by the injury of time, the practice remains, as the only Evidence as well as the best interpreter of the Law (C ii.217)'. This sounds suspiciously whiggish, suggesting an ancient parliament promulgating law, but given Burke's other comments on the origins of Parliament, the 'injury of time' would have been a relatively recent occurrence.

[115] See WS ix.542.

[116] WS ii.101. 'What a libel is, and what the publishing of a libel is, Holt has told you (WS ii.101).' As the editors of Burke's *Writings and Speeches* note: 'Lord Chief Justice Holt (1642-1710) in *R. v. Tutchin* (1704) had effectively declared that any reflection of government was libelous … (WS ii.101)'.

This intersects, too, with the issue of authoritative priority between Parliament and natural law, one of the more problematic aspects of Blackstone's *Commentaries*. The relationship between the two was problematic because Blackstone seemed to give priority to *both* natural law and to parliament.[118] However, what was denied by both Burke and Blackstone was the transparency of knowledge of the natural law. This was, of course, an important point of the seventeenth century debate and common law jurisprudence. Hobbes critiqued the obscurism of Coke's 'artificial reason'. Hale critiqued Hobbes' deductive reasoning and positivism, though not without appreciating the importance of interpretive authorities. Blackstone and Burke largely followed Hale, underscoring the complex and corporate nature of reasoning, here as elsewhere. Both suggested that a broad, liberal university training would produce lawyers and gentlemen better prepared to make such interpretations. Where Blackstone emphasised parliamentary supremacy in the *Commentaries*, he ultimately saw common law judges as the proper authorities. Parliament's duty was largely to effect a return to the purity of a common law that it had previously corrupted.[119] Burke, given his general views on theory and practice, might seem to favour the same approach. Instead, precisely because of the general view permitted from Parliament, it, not the courts, was the most appropriate and workable site for such decisions.[120]Indeed, 'Statesmen are placed on an eminence, that they may have a large horizon than we can possibly command. They have a whole before them, which we can contemplate only in the parts, and even with the necessary relations'.[121] It was this that made the legislator a 'philosopher in action'.[122]Contrasting England and the continent, the 'sure Foundation' of

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[117] WS ii.235. See also the draft at F (M) A.i.29b.

[118] See Lobban, 'Blackstone and the science of law', (1987) 30 *Hist J* 311, 326. Cf. David Lieberman, *The providence of legislation determined: legal theory in eighteenth-century Britain* (Cambridge: Cambridge Univ. Press, 1989), esp. 50-5 and Harold J. Berman and Charles J. Reid, Jr, 'The transformation of English legal science: from Hale to Blackstone', (1996) 45 *Emory L J* 437, 490n107.

[119] On Blackstone's general hostility to legislation, see gen. Lieberman, *The province of legislation*. Lieberman has also pointed out that, in hopes of correcting previous legislative errors and the corruption of the common law, the *Commentaries* were intended as part of the Europe-wide development of a 'science of legislation'. Sullivan shared this view of legislative clumsiness. See Lieberman, 'Blackstone's science of legislation', (1988) 27 *J British Studies* 117.

[120] This is a complicated area. Blackstone, perhaps because of his own Tory politics, supported Parliament against Wilkes. See C ii.22 for a reference to Blackstone in these debates and the consequent 'confusion of the Ideas of a supreme Judicature and a Legislature'.

[121] L 148.

[122] WS ii.317-8. Here again, government was a 'practical thing, made for the happiness of mankind, … not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. Our business was to rule, not to wrangle (WS ii.317)'. In regards to America, the question was 'not, whether their spirit deserves praise or blame ... [but]

'*English* Jurisprudence', was the 'Maxims, Rules and Principles and juridical traditionary Line of Decisions contained in the Notes taken, and from Time to Time published (mostly under the Sanction of the Judges) called Reports'.[123] As in the classical natural law, where judgments spoke the law, i.e. '*jurisdiction*', these reports were evidence of the application of the law as promulgated or accepted by Parliament. This is not yet positivism, however, and 'no Doctrine or Rule of Law, much less the Practice of any Court, ought to have Weight or Authority in Parliament, further than ... is agreeable to the Proceedings in Parliament, or hath received the sanction of approved Precedent there; or is founded on the immutable Principles of substantial justice'.[124]

Burke's view of parliamentary discretion was considerable. 'That discretion, which in judicature is well said by Lord Coke to be a crooked cord, in legislature is a golden rule.'[125]In this, he seems equally critical of the whiggish 'originalism' of Blackstone and the general hostility to legislation of both Blackstone and Mansfield.

> Miserable would be the rescources, poor and unfurnished the Stores and Magazines of Legislation, if we were bound up to a little narrow form and not able to frame our acts of Parliament according to every possible emergency of the Commonwealth, to make them declaratory, enforcing, explanatory, repealing, just in what mode or in what degree we please.[126]

And, in questions of 'policy and prudence', a 'court of law is not competent; and indeed an attempt at the least intermixture of such ideas with the matter of law could have no other effect, than wholly to corrupt the judicial character of the court'.[127] It is difficult not to see as a rebuke of the beliefs of both Blackstone and Mansfield, Burke's comment that a 'timid Jury will give

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what, in the name of God, shall we do with it (WS iii.125)'.

[123] WS vii.140-1. Lobban claims that this was, for Burke and others, the 'simple application of rules derived from precedents to the facts of new cases'. *The common law*, 83. But Burke's point is juridical not epistemological. Having just presented, in a question of '*constitutional*' law, numerous civilian–he even mentions canon law–authorities to buttress his argument, before moving on to the common law. Burke was merely comparing common law and civilian authorities. '*English* Jurisprudence', he says, does 'not rest on the Authority of the supreme Power, like the Books called the Institute, Digest, code, and authentic Collations in the Roman law. With us, Doctrinal Books of that Description have little or no Authority, other than as they are supported by the adjudged Cases and Reasons given at One Time or other from the Bench; and to these they constantly refer (WS vii.141).' See gen. WS vii.110-213, esp. 162.

[124] WS vii.152-3.

[125] WS ix.628.

[126] WS ii.348.

[127] W iii.167.

way to an awful judge, delivering oracularly the Law'.[128] As a result in the case of libel, 'you can have no public discussion of a public measure'.[129] Burke, in fact, seems to have thought the courts, if anything, too particularised, its 'artificial custom' perhaps too far removed from public opinion.[130] The organicism so often associated with Burke was not limited to the courts. Indeed,

> Nothing is more beautiful in the theory of parliaments than that principle of renovation, and union of permanence and change, that are happily mixed in their constitutions:—that in all our changes we are never wholly old or wholly new:—that there are enough of the old to preserve unbroken the traditionary chain of the maxims and policy of our ancestors, and the law and custom of parliament; and enough of the new to invigorate us and bring us to our true character, by being taken fresh from the mass of the people; and the whole, though mostly composed of the old members, have, notwithstanding, a new character, and may have the advantage of change without the imputation of inconstancy.[131]

The narrowness and particularity of the courts was their shortcoming. The 'properties of Law' were '[t]hat it should be known.... [and] it should be fixed and not occasional'.[132] More specifically, a law was a 'general principle regulating conduct' made to check debate over the 'utility of *each* act, taken separately'.[133] This was systemic justice, an essential element of the 'methodized and artificial equity' of the law, without which specific instances were not possible.[134]

The courts were, by no means, unimportant. 'All the ancient, honest, juridical principles and institutions of England are so many clogs to check and retard the headlong course of violence and oppression.'[135] This is true in general as well, for the 'whole scheme of our mixed

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[128] WS ii.346.
[129] W ii.141.
[130] Gerald J. Postema cites Burke as maintaining that 'Statute law was seen to operate on and within the principles of Common law ...'. *Bentham and the common law tradition* (Oxford: Clarendon Press, 1986), 17. But Burke's point is directed at the 'hereditary succession by law; in the old line it was a succession by the common law; in the new by the statute law, operating on the principles of the common law, not changing the substance, but regulating the mode, and describing the persons (RRF 105)'. Statutory interpretation according to common law principles was an historical and practical necessity, given the long habituation of lawyers to it. It is a question of habit, rather than authority.
[131] 'Notes for Speech (30 Nov 1774)'. Cited in Gerard W. Chapman, 'The organic premise' in Daniel E. Ritchie (ed.), *Edmund Burke: appraisals and applications* (New Brunswick: Transaction, 1990), 247, 250n24.
[132] WS ii.235.
[133] WS ix.502. 'To be legal must conform to that *general* principle (WS ix.502).' See WWM Bk P 8/181-4 on 'Foreign troops in Ireland'.
[134] L 123. Burke's comment is here about the entire legal order, including both general legality and specific equity. See also F (M) A.i.39b and A.xxvii.5.
[135] WS iii.293. The government was 'complicated ... with external circumstances still more complicated (WS

Constitution is to prevent any one of its principles from being carried as far as, taken by itself, and theoretically, it would go'.[136] The 'perpetual treaty and compromise', the 'sacred fire of an eternal constitutional jealousy ... [was] the guardian of liberty, law and justice'.[137] It was a system of 'mutual limitation'.[138] Parliament 'ought to have, as much as possible, its judicial authority so constituted as not only not to depend on it, but in some sort to balance it. It ought to give a security to its justice against its power'.[139] As the 'public justice ... holds the community together', the independence of the judiciary from the political world was joined by the independence of the political world from the judiciary.[140] Judges

> ought to be the very last to feel the necessities of the state, or to be obliged either to court or bully a minister for their right: They ought to be as *weak solicitors on their own demands*, as strenuous assertors of the rights and liberties of other. The judges, are, or ought to be, of a *reserved* and retired character, and wholly unconnected with the political world.[141]

In general, the courts were to follow the law as dictated by parliament. For Burke, the parliament was a Senatorial assembly looking to the wider view, the systemic justice of the legal order. They were to act above competing private interests to insure the public good. The judges, a judicial priesthood trained in the artificial custom of law, were largely to follow the lead of parliament and the common law where parliament had not acted to change it. If they did not have authoritative priority, they had the responsibility both to ensure that legality was maintained and that equity was done in individual cases.

Burke similarly emphasised Parliament's supremacy over the lesser legislatures of the kingdom.[142] In her '*imperial character* ... as from the throne of heaven, she superintends all the several inferior legislatures, and guides, and controls them all without annihilating any.... they ought all to be subordinate to her; else they can neither preserve mutual peace, nor hope for

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ii.311)'.

[136] W iv.486. All of the 'members' of the constitution were supported 'on grounds that are totally different, though practically they may be, and happily with us they are, brought into one harmonious body (W iv.415)'.

[137] W iv.486, W ii.141.

[138] W iv.486.

[139] WS ii.278. And '*every sort of Government ought to have its Administration correspondent to its Legislature.* If it should be otherwise, things would fall into a hideous disorder (WS ii.278)'.

[140] WS iii.543.

[141] WS iii.543.

[142] Haakonssen writes, 'Smith did not see sovereignty as a matter of Burkean precedents and conventions'. *The science of a legislator: the natural jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge Univ.

mutual justice, nor effectively afford mutual assistance.'[143] Nevertheless, if this was generally true, as elsewhere, it was not to be insisted on as a right if such an assertion would undermine politically prudent and publicly beneficial actions.[144] Such was the case in America. It was clearer still in the relationship to Ireland. The demands of parliamentary independence on the part of the Ascendancy put Burke in something of an awkward position given his own hopes of Irish reformation. His position was plain. As the 'fountain of constitutional Law', Parliament 'should ... have notice of what regards the *general policy* of the Empire, before it is committed to the Parliament of Ireland which however respectable, is not competent to this.[145] This suggests a sort of subsidiarity, but Burke did not deny parliamentary sovereignty–more theoretical than practical–and the content of such powers is unclear.[146]

The discussion of popular sovereignty is closely connected with that of legality, the so-called 'rule of law'. Burke viewed the stability of law as a real virtue, a historical development of genuine progress. 'I would have the Law the same', he wrote, 'whether he was born in domo regnatrice and sucked from his infancy the milk of Courts or was nurtured in the rugged discipline of a popular opposition.... [Britain was] a Country whose being depends upon the certainty, clearness, and stability of Institutions'.[147] An irregular 'system of justice' could hardly be called just. But the faith in such a formal or procedural legality, where it neglects the substantive content of the law, was naïve and dangerous. Among 'all kinds of public injustice and opposition, the worst species ... are those which being corrupted into maxims of state, and blending themselves with law and jurisprudence, corrupt the very fountains of all equity, and subvert all the purposes of Government'.[148] Burke could see all too clearly in the Irish penal laws, the limits of procedural or formal justice. The equal application of unjust laws (to classes viewed as unequal for reasons of state policy) was hardly just. 'Bad laws are the worst sort of tyranny'.[149] To avoid this practically, Burke with many of his contemporaries emphasised a secondary system of equity. But this, too, is not unproblematic, particularly as courts of 'equity', in becoming modern Equity courts, themselves increasingly adopted the formalities and rigidity

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Press, 1981), 132. Neither, in this sense, did Burke.

[143] WS ii.460. See WS ii.459-60.

[144] See WS ix.502.

[145] WS ix.499n4.

[146] Cf. WS ix.143-4.

[147] WS ii.346.

[148] C iv.118.

[149] WS iii.643. See WS iii.643, 649.

of common law courts. This process was at the heart of much eighteenth-century legal argument, for this formality increased, it was argued, their general utility and systemic justice, but reduced the actual equity or justice of specific cases.

As noted, Burke's hostility towards formalism, including legalism, permeates his thought. There is something in this as well, of the distinction between the organic, inherent complexity and plurality of manners and the clarity, but limits, of law. The virtues of a legal system, particularly positive forms or rights, require a precision that all too easily makes its language a hostage to fortune.[150] 'When any construction of law goes against the spirit of the privilege it was meant to support, it is a vicious construction. It is material to us to be represented really and *bona fide*, and not in forms, in types, and shadows, and fictions of law'.[151] This was true both in general, as he saw the necessity, *beyond* the 'rule of law', of mechanisms to ensure justice in individual cases. In 'ancient times', though presumably not as ancient as the Saxons,

> as the Minds of the Judges were in general less conversant in the Affairs of the World, as the Sphere of their Jurisdiction was less extensive, and as the Matters which came before them were of less Variety and Complexity, the Rule being in general right, not so much Inconvenience on the Whole was found from a literal Adherence to it ... .[152]

But this 'punctilious Exactness' and 'rigour' gave way to 'an Endeavour towards a more liberal and equitable Departure' on the basis of 'Experience, and a more continued Cultivation of Equity as a Science'.[153] This was intimately related to wider developments in manners (as well as legal experience outside of the common law). For

> As the Business of Courts of Equity became more enlarged, and more methodical; as Magistrates, for a long Series of Years, presided in the Court of Chancery, who were not bred to the Common Law; as Commerce with its Advantages and its Necessities opened a Communication more largely with other Countries, as the Law of Nature and Nations (always a Part of the Law of *England*) came to be cultivated; as an increasing Empire; as new Views and Combination of Things were opened, this antique Rigour and over-done Severity gave Way to the

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[150] 'The concept of a right is basically a legal concept; so-called moral rights depend on analogy with legal rights. The rules of positive law apply universally, to all cases that fall under them. Legal rights, functioning as they do within the context of legal rules, likewise fun apply universally.' D.D. Raphael, *Justice and liberty* (London: The Athlone Press, 1980), 174.
[151] WS ii.301.
[152] WS vii.162-3.
[153] WS vii.163. See F (M) A.i.39d.

> Accommodation of Human Concerns, for which Rules were made, and not Human Concerns to bend to them.[154]

Burke seems to have seen in the increasing equity of the rules of evidence, a 'growing Melioration of the Law' that sought justice beyond legal formalism.[155] This was a relevant concern in constitutional debates as well.

Burke's point here was polemical, an attempt to persuade the Lords in the context of the Impeachment of Hastings that they were not bound by strict and 'secondary' rules of evidence, of the courts. Those courts were themselves making the rules of evidence more 'equitable'. But, in any event, as the common law courts were primarily concerned with questions of '*meum & tuum*', their 'rules of Law ... could not be easily applicable to a People separated from *Great Britain* by a very great part of the Globe; separated by Manners, by Principles of Religion, and of inveterate Habits as strong as Nature itself, still more than by the circumstances of local Distance'.[156] It was, he said, 'a little painful to me to observe the intrusion into this important debate of such company as *quo warranto*, and *mandamus*, and *certiorari*: as if we were on a trial about mayors and alderman and capital burgesses'.[157] In a constitutional issue of this sort, concerning 'Abuses of Civil and Political Authority, common law courts were simply not competent judges.[158] Interestingly, in terms of its procedure and equitable powers, the 'High Court of Parliament bears in its Modes of Proceeding a much greater Resemblance to the Course of the Court of Chancery, the Admiralty, and Ecclesiastical Courts ... than to those of the Common Law'.[159] It should be noted, however, that this approach might be appropriate to a constitutional issue of this sort, but it was to be distinguished from other issues. In the actions of the crown and its parliamentary allies in the Wilkes era, Burke had seen a

> habit ... of *going beyond the law* ... and carrying offences, real or supposed, into the legislative bodies, who shall establish themselves into *courts of criminal equity* (so the *Star Chamber* has been called by Lord Bacon), all the

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[154] WS vii.163. Note the distinction between the equity of Chancery courts and the formality of common law courts.

[155] WS vii.168. In the 'Tracts', Burke quoted Cicero's *De officii*: '*Summa jus summa injuria* (The extremity of the law is the extremity of injustice) at WS iii.521.

[156] WS vii.153.

[157] WS v.381.

[158] WS vii. 154. Burke was no doubt both referring to legal reality and the early Mansfield-related disputes on the power of the jury, when he noted that the 'Lords in the High Court of Parliament are not, either actually or virtually, a Jury. No legal power is interposed between them and Evidence; they are themselves by Law fully and exclusively equal to it (WS vii.192)'. The 'Lords are, and of Right ought to be, Judges of Law and Fact (WS vii.157)'.

[159] WS vii.185, 184. It was not a 'Civil Cause[] of *meum & tuum* ... . [and it] would be dreadful indeed if Causes of such Importance should be sacrificed to petty Regulations, of mere secondary Convenience (WS vii.185-6)'.

> evils of the *Star Chamber* are revived. A large and liberal construction in ascertaining offences, and a discretionary power in punishing them, is the idea of *criminal equity*; which is in truth a monster in Jurisprudence.[160]

Generally, Parliament had great power in establishing law, but once it was established, it ought not to act, in the name of equity, to narrow its interpretation. The 'circumstance of having no *appeal* from their jurisdiction is made to imply that they have no *rule* in the exercise of it'.[161]

This antagonism towards narrow legalism, including his critique of the 'Rights of Man', was of a piece with Burkean epistemology and ethics.[162] It was evident in much of his legislative and constitutional writing. The two were, again, intimately related in the British system. In the American war, he chastised Parliament insistence on theoretical privileges while, in practice, losing its grip on the colonies. The Regency crisis saw a similar critique. Indeed, '[w]hen all the heterogeneous mass of cases, and all the farrago of nonsense under the title of legal distinctions were considered, every man of common understanding must see the necessity of governing the whole of them by the genuine spirit and fair principles of the constitution'.[163] There was both a point at which theory must bend to constitutional practice, and where 'necessity' operated. It was this necessity, rather than strict legality, that had priority. But this was true, in part, simply because the stability of a legal order was only one component of a just social order. The 'genuine spirit and fair principles' of the constitution was of more complexity than the law reports. Past decisions were persuasive, as evidence of learned opinion of the law and a valuable source of legal stability, but it was not authoritative. '*Precedents*', he had written elsewhere, 'merely as such cannot make Law—because then the very frequency of Crimes would become an Argument of innocence'.[164] This was not, of course, anything like *stare decisis*, more properly a product of the positivism of the nineteenth century.

As his opinions on the questions of libel indicate, it ought not to be assumed that Burke, on the basis of his views on commerce and equity, was in complete concord with Mansfield's adjudication. But there was a similarity that is of great importance to Burkean scholarship. In the report Burke would present to the Lords in the Impeachment, he wrote that his long list of judicial authorities, 'Precedents' and 'Doctrines' from a wide variety of sources, were

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[160] WS ii.297.

[161] WS ii.300. The 'judgement does not derive its validity from its conformity to the law; but preposterously the law is made to attend on the judgement; and the rule of the judgement is no other than the *occasional will of the House* (WS ii.300-1)'.

[162] In 'A plan of arguing', Burke uses 'Right' for 'Propriety'. See N 47.

[163] PH xxvii.822-3. This is a point brought home repeatedly in Burke's papers on the Regency crisis. Indeed, 'we ought in matters so various and contradictory as *acts*, of *State conveniency* and State necessity, to be very cautious how we take every *event* in constitutional history as a *precedent of Law*'. In John W. Derry, *The regency crisis and the Whigs 1788-9* (Cambridge: Cambridge Univ. Press, 1963), 158 (quoting the *Wentworth Woodhouse MSS*). See esp. 160-1.

[164] WS ix.502. See Postema, 'Some roots of our nature of precedent' in Laurence Goldstein (ed.), *Precedence in law* (Oxford: Clarendon Press, 1987. Cf. the draft at WWM Bk P 8/181-4. See also F (M) A.xxvii.5.

> brought to shew the general Temper of the Courts, their growing Liberality, and the general Tendency of all their Reasonings and all their Determination to set aside all such technical Subtleties, or formal Rules, which might stand in the Way of the Discovery of Truth, and the Attainment of Justice.—*The Cases are adduced for the Principles they contain.*[165]

In suggesting a principle-centred jurisprudence, a comparison to Mansfield may be apt.[166] Such 'principles', by no means unknown to English jurisprudence, were essential elements in European (and Scottish) jurisprudence.[167] Indeed, it was Mansfield's civilian training that impressed in him the importance of such principles, a view shared by, for example, Kames and Smith.[168] These principles were broader, though less formal, than rules. They combined moral and legal demands. It was admitted, too, that while they were often in conflict with one another, they remained meaningful. Indeed, this is scepticism of a mild sort, in that such principles are either not capable of being reduced to simple, inflexible rules or that a variety of different rules are capable of instantiating the principles. This scepticism has more to do with a belief in the complexity of human association than relativism. Even 'our best general constitutions ... cannot provide beneficially for every particular case'.[169]

Generally speaking, the common law developed deductively and casuistically, remedying individual problems before the court and generating wider principles, a process common to European customary systems of law. Provided specific procedures and pleadings were met, a variety of legal and extra-legal sources of law were permissible.[170] But the more inductive, principle-based schemata of the contemporary Romanist systems—early Roman law had developed in much the same way—was also important to English jurisprudence.[171] This is particularly true in the non common law courts of England, and in the Equity courts, where the spirit, rather than the letter of the law, had played an important role. Many common law jurists continued to draw inspiration from the wider European tradition, both as inductive 'written reason' and the deductive 'wisdom of the ages'.[172] In his *Commentaries*, even Blackstone adapted the 'Institutional' forms developed around the model of Justinian's *Institutes*. By doing so he gave the common law greater organisation on a model not wholly unfamiliar to English lawyers. There were, however, numerous problems as well in such a move, as the common law was much procedure- and form-oriented than was the rights-based Roman law.[173] Whatever their ultimate source, various principles and maxims acted as both explicit and implicit guides for judicial-decision making. These did not develop spontaneously, but were generated both by inductive and 'real-world' deduction, the various moral and theological systems of the European past. Burke's appeals to such principles suggest not only the breadth of his jurisprudential erudition, but a rejection of any sharp division between reason and history. As reason limits the passions, so such principles (generated themselves as much by practical as philosophical reasoning) were limits to the development of the rules of law, without which they would be merely conventional. This was an integrated jurisprudence that recognised the complex relationship of natural and positive law in history without thereby collapsing into scepticism.

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[165] WS vii. 172. Cf. Burke's blurring of these points in the debates on representation. '[H]ow do you know the principles, but from the construction? and if that remains the same, the principles remain the same ('Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 399)'.

[166] By referring to general principles, Mansfield was able to effect change 'more skilfully than it could have been done by any of his contemporaries because he had mastered the learning of the continental lawyers'. William Holdsworth, *Some makers of English law: the Tagore lectures 1937-38* (Cambridge: Cambridge Univ. Press, 1938), 168.

[167] See the discussion in Neil McCormick, ''Principles' of law', 1974 *Juridical Rvw* 217 and in David M. Walker, 'Principle and authority as sources of norms', 1982 *Juridical Rvw* 198.

[168] As early as 1759, Smith suggests a future project in which he would 'endeavour to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and period of society ...'. *Theory of moral sentiments* (Indianapolis: Liberty Fund, 1976 [1790 edn.]), 341-2. It was a project he was never to complete. See *Lectures on Jurisprudence* (Indianapolis: Liberty Fund, 1978 [1762-3/1766]), 397, and, discussing the 'science of a legislator', *An inquiry into the nature and causes of the wealth of nations* (Oxford: Oxford Univ. Press, 1993 [1776]), 296.

[169] WS ix.454.

In Burke's day, this principle-centred jurisprudence was perhaps less fashionable in Europe than the more purely deductive (or precept-centred) methods of 'modern' natural law. This would be increasing true as the revolution approached. But the use of these principles suggested that Burke was employing a jurisprudential and humanist 'natural law' that was arguably more sensitive and sophisticated than either common law deduction or Romanist induction. In the early 1750s, in the context of philosophical essays that centred around humanist (and theological) themes, Burke had written:

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[170] Michael Lobban has recently stressed the plurality of legal sources available to eighteenth-century jurists. See gen. *The common law and English jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991). As a result, he is critical of historians and jurists who have seen the common law 'as a body of principles and rules that can be distinctly articulated and defined'. Lobban also attributes such a view to Burke. For the law to 'move[] and grow ... in a Burkean way' ended with 'judges finding the single solution to legal problems'. Id.,1-2. But this is to misread Burke precisely as he claims others have misunderstood the common law.

[171] See Alan Watson, 'The structure of Blackstone's *Commentaries*', (1988) 97 *Yale L J* 795, 811 and Cairns, 'Blackstone', 318.

[172] See gen. Peter Stein, *Roman law in European history* (Cambridge: Cambridge Univ. Press, 1999).

[173] Lobban, *The common law*, 40.

> A man who considers his nature rightly will be diffident of any reasonings that carry him out of the ordinary roads of Life; Custom is to be regarded with great deference especially if it be an universal Custom; even popular notions are not always to be laughed at. There is some general principle operating to produce Customs, that is a more sure guide than our Theories. They are followed indeed often on odd motives, but that does not make them less reasonable or useful.[174]

This was again his appeal to 'Common sense and common justice'.[175] It is also very close to the understanding of progressively 'universal' and general customs that made up the law of nations (though here, too, contract and will theories had made inroads).[176] There were, the older Burke said, 'certain great principles, certain fundamental maxims, to which public conduct is directed; which when known and recorded, prove a sort of rule to those who govern, and become a security which gives great ease and comfort to those who are in subjection'.[177] And

> Lawyers, I know, cannot make the distinction, for which I contend; because they have their strict rule to go by. But legislators ought to do what lawyers cannot; for they have no other rules to bind them, but the great principles of reason and equity, and the general sense of mankind. These they are bound to obey and follow; and rather to enlarge and enlighten law by their legislative reason, than to fetter and bind their higher capacity by the narrow construction of artificial justice.[178]

It was precisely this balance of the natural and artificial, of theory and practice, that Burke always insisted on. 'Circumstances perpetually variable, directing a moral prudence and discretion, the *general* principles of which never vary, must alone prescribe a conduct fitting on such occasions'.[179] Again, the degree to which such principles were evident differed greatly. If these principles 'never vary', Burke's epistemological scepticism makes the possibility of principles much more difficult than it appeared to be for Mansfield and many natural lawyers.[180] But they remained essential elements of British constitutionalism. In praise of the British 'inheritance of so happy a Constitution and so flourishing an empire', Burke noted that what was 'a thousand times more valuable, [was] the treasury of the maxims and principles which formed the one and obtained the other'.[181]

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[174] N 90.

[175] WS ix.569.

[176] Burke cited the Swiss civilian jurist Emmerich von Vattel as early as the Hastings Impeachment. As the events in France heated up, Burke repeated cited his *Le droit des gens ou principles de la loi naturelle* (1758). Indeed, though it was of a 'Republican cast', whole sections were attached in an appendix to the *Remarks on the policy of the allies* (1793). WS viii.474. The Appendix is printed in W iii.458-66. see also F (M) A.xxvii.5 on the law of nations and on war.

[177] W ii.438. See WWM Bk P 27/206.

[178] WS iii.395.

If principles, as with any rules or rights, are not merely the product of inductive reasoning, neither are they simply the remedial, 'artificial reason' of common law courts.[182] In law as in science, the 'wisdom of the ages' was the product of principles ill-formed and falsifiable in experience, what Burke in the *Enquiry* called a 'more perfect and extensive induction'.[183] These principles were inherently moral, conceived of broadly, as instantiated in positive law. In this, they were also inherently corporate and historical and expressed, however inexpertly, in conventions, both tacit and formal.[184] Here legal analogy is not from case to case holdings, but from principles to circumstances, with past cases as evidence of expert application in similar situations.[185] Particularly as expressed in legal maxims, these principles acted both positively as aspirations and negatively as limits. Embodied in existing practices and institutions, in manners of a people, they were the conventional, artificial expression of the natural. While this easily suggests an appeal to transcendental authority, in many of the ancients and benevolists, if God was the ultimate guarantor of law, its source was somewhat more complex. Such a principle-based system, expressed and known in the *sensus communis*, explain Burke's belief in natural law and his scepticism towards epistemological transparency. It explains, too, his insistence on circumstances, which 'give … to every political principle its distinguishing colour, and discriminating effect'.[186] The 'statesman's duty', the manner in which he practiced public virtue, was 'never losing sight of principles, … to be guided by circumstances'.[187]

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[179] WS viii.474. See WS vii.291 PH xxii.231, WS iv.402-3n7, and C vi.317n6.

[180] Cf. Lobban's claim that the 'Burkean response to Hobbes's positivism' was the acceptance of the 'view that the law provided rules and tangible solutions within itself'. Lobban, *The common law*, 4-5.

[181] WS iii.139.

[182] See the discussion in Postema, *Bentham and the common law tradition*, 31-8.

[183] PE 4.

[184] Burke's jurisprudence fuses, as would be increasingly difficult to do, especially in Anglo-American jurisprudence, elements of natural, positive, and historical law. This is what legal historian Berman calls an 'integrative jurisprudence'. See Berman, 'Toward an integrative jurisprudence: politics, morality, history', (1988) 76 *Cal L J* 779, esp. 789. Berman, however, denies this to Burke, claiming he collapses reason into history. Burke 'provided a basis for ... 'the historical school' ... in which the historical jurisprudence that had originated with Coke and Selden and Hale (among others) became separated from the political and moral theories–positivism and natural law–with which they had originally been integrated'. 'The origins of historical jurisprudence', 1736. See also 1737. I think Berman fails to appreciate the vast differences between Burke and the 'historical school' and the comparative primitive historical jurisprudence of Hale et al., in comparison with much of British, i.e., Scottish, eighteenth-century jurisprudence.

[185] But Burke knew very well that 'precedent was ... no clear-cut thing', but 'remained firmly subservient to principles'. Lobban, *The common law*, 85, Lieberman, 94 (discussing Burke's use of Mansfield in the Hastings Impeachment). Cf. J.P. Dawson, *The oracles of the law* (Ann Arbor: Univ. of Michigan Law School, 1968), 78. This is also curiously like modern civilian codal interpretation, though the codes express legal concepts far narrower than principles.

A POWER OUT OF THEMSELVES:

In different, but related ways, many of the ancient moralists (especially Aristotle and the Stoics) as well as 'classical' natural lawyers and benevolists saw 'law' as rooted in the *ontic logos*, or rational order, of nature. In both, this was accessible to human nature either through reason or sentiment. These were also fundamentally communitarian and frequently linked to beliefs in natural benevolence and sociability. In each of these ways, they were opposed to the views expressed in modern moralists like Mandeville. Many 'modern' natural lawyers, too, including Hobbes, Locke, and Pufendorf, either held, or where seen as holding, similar views. Based on a more egoistic and subjective vision of human nature, human society, for many of the moderns, was not a 'natural' means to human flourishing, but a fellowship of fear and trembling. These were related, too, to different theological and political beliefs. 'Intellectualists' emphasised that God, because he is Good, chooses what was Good. They were opposed by 'voluntarists' who, wanting to emphasise God's absolute sovereignty, maintained that God's *will* is Good. His command or fiat, and the attendant sanction, created law. The modern natural lawyers, most notably Pufendorf, similarly saw 'law' not as the recognition of regularities discoverable in nature, but a regularity created by will. These views were neither novel nor uncommon. Epicureans, medieval nominalists, and the Reformers they inspired, all expressed similar thoughts about both human nature and God. But this theological 'positivism' was closely connected, by analogy, to the development of the modern state, especially in the wake of the British and European 'civil' wars of the seventeenth century. They would, in future, be of similar importance to modern doctrines of popular sovereignty and positivism.[188] Combined with the

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[186] RRF 90. Cf. Finnis, 288.

[187] W vi.101. See WS ii.348 and gen. W vi.101-11.

[188] Because these 'terms are immediately translatable into the temporal jurisprudence of the sovereign's government

'enthusiasm' of deductive rationalism or religious conviction, these views were critical to contractualism and radical politics. The 'balance of power' established in Europe between and within nations by treaty and agreement fuelled the development of various 'will' theories, where human will was sufficient to create the moral/legal obligations of real and social contracts.

These are complex issues, further complicated by the different combinations of these beliefs that are possible. Similarly, Burke's use of natural law and natural rights has also been the source of no small confusion.[189] His use of such appeals is more limited than often assumed. Most evident in his early career, was his 'Tracts on the popery laws', though here they play a more 'legal' than moral role, i.e. as one of a number of 'authorities'. Later, in the Impeachment of Hastings, where it was necessary to emphasise that the 'laws of morality are the same everywhere', they appear with more frequency.[190] With many of his contemporaries, Burke appears to combine strains of both ancient and modern.[191] In the *Enquiry*, for example, 'self-preservation' is a basic principle of human nature. But with Shaftesbury and especially Hutcheson before him, he reinterpreted this modern language in light of ancient benevolence.[192] Burke's natural, historical, and corporate vision was hostile to the belief in epistemological transparency and the 'will' theories that often accompanied them. To claim, as he does, that

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of the state, and into the moral government of the individual over himself, it is fundamental in political and ethical theory too: for is justice constituted by the will of the sovereign (or the self) *in vacuo*, or does justice flow from, and participate in, the essential nature of things?' Mark Goldie, 'The reception of Hobbes' in J.H. Burns and Goldie (eds), *The Cambridge history of political thought 1450-1700* (Cambridge: Cambridge Univ. Press, 1991), 590.

[189] Not least among his apologists. Perhaps the best of the 'Cold war' school is Stanlis, who properly highlighted Burke's the communitarianism of his critique. See *Edmund Burke and the natural law* (Ann Arbor: Univ. of Michigan Press, 1958). But to suggest that Burke was 'essentially a Thomist in his political philosophy' requires qualifications so heavy as to make such a claim, at least, misleading. Id., 249. Better is Burleigh Taylor Wilkins, *The problems of Burke's political philosophy* (Oxford: Clarendon Press, 1967), but he still commits the opposite sin, only venial perhaps, of *understating* differences between classical and modern schools.

[190] WS vi.346. See WS vi.459.

[191] Blackstone's jurisprudence is here, as elsewhere, unclear. He seems to have adopted many of the subjective and positivist implications of the moderns, while critiquing the voluntarism of Locke. The result was a reasonably coherent, but arguably 'impoverished' theory of natural law. The best-known modern natural lawyer, John Finnis, has written that Blackstone's 'interest in natural law was real and sustained, *and* … his definition of municipal law was free from any reference to natural law'. J.M. Finnis, 'Blackstone's theoretical intentions', (1967) 12 *Natural Law Forum* 163. But 'because the state of nature is an ambiguous and impoverished explanatory category, because natural and positive law lack intelligible modes of interconnection, and because superior will rather than reasonable connection between end and means is made the basis of obligation, Blackstone's theory not only is unable to account for his data or even his terminology, but also is in danger of collapsing into a positivism that will retard explanation as extraneous to the exposition of law'. Id.,163.

[192] Cf. Hutcheson's statement: 'If by *Obligation* we understand *a Determination, without regard to our own Interest, to approve Actions, and to perform them; which Determination shall also make us displeas'd with our selves and uneasy upon having acted contrary to this Sense*; in this meaning of the word *Obligation*, there is *naturally* an *Obligation* upon all men to *Benevolence* …. Even without considering any *Law* whatsoever … .' *Inquiry into the original of our ideas of beauty and virtue* (London: J. Darby, 1725).

'[w]e are all born in subjection to one great, immutable, pre-existent law.... This great law does not arise from our conventions or compacts; on the contrary, it gives to our conventions and compacts all the force and sanction they can have' is merely to underscore this view.[193] Burke's comments on these issues are actually quite limited and easily misleading. When he writes, for example, as he did in the 'Appeal', 'that, if no Supreme Ruler exists, wise to form, and potent to enforce, the moral law, there is no sanction to any contract, virtual or even actual, against the will of prevalent power', he is merely explaining the *enforcement* of law, not its source.[194] This was a classical commonplace. Where positive law was without sanctions, the 'law is a clear, but it is a dead letter'.[195] Even recognising the need of sanction, some amount of reasonableness was a moral and practical necessity as well. 'Living law, full of reason, and of equity and justice, (as it is, or it should not exist) ought to be severe and awful too; or the words of menace, whether written on the parchment roll of England, or cut into the brazen tablet of Rome, will excite nothing but contempt.'[196] But command did not, without more, define a moral or legal order. By drawing on a variety of sources—ancient, humanist, scholastic, benevolist, and empiricist—Burke significantly qualifies and critiques the moderns. Burke had little of their rationalism, positivism (theological or legal), subjectivism, or egoism.[197] If this puts him closer to the ancients, it should be noted that Burke, with the benevolists, transferred the emphasis from reason to sentiment. It is again Cicero, rather than Aquinas or Suarez, Pufendorf or Blackstone, who appears of most importance.[198]

As with his comments on formalism, Burke repeatedly attacked the legalism, in ethics as much as politics, of the day. For all of the importance of law, Burke's thought, even his jurisprudence, remained *virtue*-centred. Law, like other practices and institutions, was an expression of human sociability, of concord and flourishing, rather than interest and weakness. Rooted in general principles, the application of which was by no means straightforward, positive law expressed, however imperfectly, the natural. In addition, as with his comments on Parliament, individual character or private/public virtue remains a concern for (and about) the statesman. Burke could, of course, suggest clarity in the content of natural law. 'We know that we have made no discoveries', he writes,

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[193] WS vi.350, 350. Cf. WS iii.323. On real contracts and 'will' theories, see James Gordley, *The philosophical origins of modern contract doctrine* (Oxford: Clarendon Press, 1991).

[194] W iv.460. The young Burke wrote that it was 'reasonable to suppose that our Actions here are made the *Causes* of our future happiness or Misery and not that our future Misery and Happiness are designed as the Sanctions of our Duties here (N 72-3)'.

[195] WS i.66.

[196] L75. 'Reason, clearly and manfully delivered, has in itself a mighty force: but reason in the mouth of legal authority, is, I may fairly say, irresistible (L 148).' Cf. 'Reason and authority do not move in the same parallel. That reason is an *amicus curiae* who speaks *de plano*, not *pro tribunali*. It is a friend who makes an useful suggestion to the Court, without questioning it's jurisdiction (L 152)'.

[197] 'It has ever been the method of publick jurists, to draw a great part of the analogies on which they form the law of nations from the principles of law which prevail in civil community. Civil laws are not all of them merely positive. Those which are rather conclusions of legal reason, than matters of statutable provision, belong to universal equity, and are universally applicable (L 135).'

[198] Postema notes, of Aquinas, that he 'holds that law and authority are public manifestations of the collective life of the people and the means by which the whole people orders collective life (and individual lives) towards achievement of the common good'. Postema, *Bentham and the common law tradition*, 45. Whatever value this has

> and we think that no discoveries are to be made, in morality; nor many in the great principles of government, nor in the ideas of liberty, which were understood long before we were born, altogether as well as they will be after the grave has heaped its mould upon our presumption, and the silent tomb shall have imposed its law on our pert loquacity.[199]

But, with his comments on principles, his scepticism, and his distaste for formalism, it is better to see these statements in the context of universal principles commonly known, but significant altered by circumstances. 'There are some fundamental points in which nature never changes– but they are few and obvious, and belong rather to morals than to politics'.[200] This parallels, too, the views expressed in the 'Essay on taste' included in the *Enquiry*.[201] What is most important is that this provided the basis on which a natural and critical jurisprudence could be articulated.

The revolutionaries' mix of natural law/rights and popular sovereignty was a combustible one in which the conflict between the two was often ignored. The proselytising enthusiasm of revolutionary claims left little check on the popular will, at least it as expressed through revolutionary institutions. While arguing, in this way for positivism, they frequently did so on the basis of a rationalistic natural law. For Burke, this was a confusion of both principle and power.[202] The French after the revolution lived 'only under positive, arbitrary, and changeable institutions–and those not perfected nor supplied nor explained by any common, acknowledged rule of moral science'.[203] Practically, a 'certain *quantum* of power must always exist in the

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for Aquinas, it seems equally applicable to Burke.

[199] RRF 182.

[200] WS viii.498. 'But so far as regards political matter, the human mind and human affairs are susceptible of infinite modifications, and of combinations wholly new and unlooked for (WS vii.498).'

[201] See esp. PE 14-5.

[202] For 'men love to hear of their power, but have an extreme disrelish to be told of their duties (W iv.458)'.

[203] L 123.

community, in some hands, and under some appellation'.[204] Indeed, a 'politician, to do great things, looks for a *power*'.[205] Nevertheless, checks were necessary on the popular will, and even this was joined to the honour ethic.[206] For

> where popular authority is absolute and unrestrained, the people have an infinitely greater, because a far better found confidence in their own power... they are less under a responsibility to one of the greatest controlling powers on earth, the sense of fame and estimation. The share of infamy that is likely to fall to the lot of each individual in public acts, is small indeed; the operation of opinion being in the inverse ratio to the number of those who abuse power. Their own approbation of their own acts has to them the appearance of a public judgement in their favour.[207]

To give too great a share of authority to a mass was to lose accountability. While this may suggest the institutional checks associated, anachronistically, with modern 'liberal democracies', he did not deny the place of institutions in assisting in the formation of the personal character. With the classical 'Legislator', his concentration on manners diminished the efficacy of such instruction, most associated with republican traditions.[208] Institutions were not neutral or 'agnostic'. For Burke, the 'true statesman' must confront the problems of 'moral instruction' and the necessary civil compulsion 'to put many restrictions upon the immoderate exercise' of public power.[209] Indeed, a genuinely institutional approach smacked of the very formalism he questioned. Burke is in many ways closer in this to the revolutionaries (and the ancients) than either were to liberalism.[210]

If Burke's natural law was a relatively weak check on political will, particularly given his views on the power of Parliament, it was of no small importance. For Burke, as with the more general problems of any popular (or 'general') will, '[n]either the few nor the many have a right to act merely by their will, in any matter connected with duty, trust, engagement, or obligation'.[211] Power was, at best, a trust with real and significant obligations. Whatever the actual wishes of the 'people', as a natural aristocracy was inevitable, they must be cautious about their claims. They 'are not to be taught to think lightly of their engagements to their governors; else they teach governors to think lightly of their engagements towards them'.[212] Because of the inherent problems involved in any articulation of popular sovereignty, the reduction of law to public will and power was dangerous.[213] In the 'Tracts', Burke had written that

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[204] RRF 247-8. In general, it was 'not necessary to teach men to thirst after power (W iv.459)'.
[205] RRF 267.
[206] See WWM Bk P 27/206 on arbitrary power.
[207] RRF 190-1.
[208] While Hume's analyses are an essential part of the disappearance of the classical Legislator, the 'founder of states', he has been seen as prioritising institutions, 'good laws', over either public virtue or manners. For 'good laws may beget order and moderation in government where the manners and customs have installed little humanity or justice in the tempers of men'. 'That politics may be reduced to a science' in *Selected essays*, 20. But cf. 'It is ... on opinion only that government is founded ...'. Hume, 'Of the first principles of government' in *Selected essays*, 24. In general, Hume emphasised the power of institutions and the pursuit of interests to maintain civil liberty. This makes him, or so it is claimed, one of the sources of modern interest politics.
[209] Indeed, it is interesting to note that while Burke would have erected more barriers to raw public will, both he and the revolutionaries shared a concern for public virtue, education and character of citizens that will become foreign to much of liberalism. W iv.459.
[210] 'It is not in mere laws, after all, that we are to look for the securities to justice, but in the powers by which those laws have been obtained, and without whose constant support they must fall to disuse.' Ferguson, *Essay*, 160. Cf. *The federalist*, esp. No. 48, 51.

> It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position, that any body of men have a right to make what laws they please, ... No arguments of policy, reason of state, or preservation of the constitution can be pleaded in favour of such a practice.... of all things this is the most truly absurd, to fancy that the rule of justice was to be taken from the constitutions of commonwealths, or that laws derived their authority from the statutes of the people, the edicts of the princes, or the decrees of judges. If it is to be admitted that it is not the black-letter and the king's arms that makes the law, we are to look for it elsewhere.[214]

Indeed, even the 'power of acting by a majority', the principle of majority rule, was not a 'law of our original nature', but 'must be grounded on two assumptions: first, that of an incorporation produced by unanimity; and secondly, an unanimous agreement that the act of a mere majority (say of one) shall pass with them and with others as the act of the whole'.[215] Leaving aside other considerations, like what capacity was required for such participation, it is clear that such events never happened. Even majority rule was a matter of convention that was 'confirmed afterwards by long habits of obedience, by a sort of discipline in society, and by a strong hand, vested with stationary, permanent power to enforce this sort of constructive general will'.[216] Even so established, as he had noted of public opinion against Americans in their revolution, '[p]hrensy does not become a slighter distemper on account of the number of those who may be infected with it'.[217] The tyranny of the majority was no less real in having the consent, actual or implied, of the populace. Burke's own critical legal comments are less the result of an absence of principles, which he clearly believed to exist, but the transparency and tenacity with which others presented them.[218]

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[211] W iv.458. See W iv.458.

[212] W iv.458. 'Kings will be tyrants from policy when subjects are rebels from principle (RRF 172).'

[213] It is this hostility to monopolies of power that Conor Cruise O'Brien saw as Burke's 'great melody', drawing together the various critiques of Ireland, India, and France. 'I can hardly overrate the malignity of the principles of the Protestant ascendancy, as they affect Ireland; or of Indianism, as they affect those countries, and as they effect Asia; or of Jacobinism, as they affect all Europe, and the state of human Society itself (C x.32). See Conor Cruise O'Brien's *The great melody: a thematic biography and comment anthology of Edmund Burke* (London: Sinclair-Stevenson, 1992).

[214] WS ix.455-6 (specifying 'Hobbs').

[215] W iv.463. 'Majority rule ... is not, *pace* Locke, a 'natural law' principle; it must be *adopted*, by unanimity or by authoritative, i.e. customary, rule'. John Finnis, *Natural law and natural rights* (Oxford: Clarendon Press, 1980), 256 (citing Burke).

Similar arguments are made on the unchosen nature of obligation and duty.[219] 'Men without their choice derive benefits from that association; without their choice they are subjected to duties in consequence of these benefits; and without their choice they enter into a *virtual* obligation as binding as any that is *actual*.'[220] Here Burke's link between familial and social obligations is not merely analogical. Consequently,

> Men come in that manner into a community with the social state of their parents, endowed with all the benefits, loaded with all the duties of their situation. If the social ties and ligaments, spun out of those physical relations which are elements of the commonwealth, in most cases begin, and always continue, independently of our will, so, without any stipulation on our own part, are we bound by that relation called our country, which comprehends) as it has been well said) "all the charities of all.".[221]

This was true, too, of the 'nation', the 'ancient order into which we are born'.[222] It

> is a choice not of one day or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages

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[216] W iv.463-4. Cf. 'If men dissolve their ancient incorporation in order to regenerate their community, in that state of things each man has a right, if he pleases, to remain an individual.... If any ... is forced into the fellowship of another, this is conquest and not compact (W iv.464).' This was as problematic in policy as in theory.

[217] WS iii.308.

[218] Alexander M. Bickel, *The morality of consent* (New Haven: Yale Univ. Press, 1975), 4.

[219] 'I cannot too often recommend it to the serious consideration of all men who think civil society to be within the province of moral jurisdiction, that, if we owe to it any duty, it is not subject to our will. Duties are not voluntary. Duty and will are even contradictory terms (W iv.459-60).'

[220] W iv.460 (italics added). 'We have obligations to mankind at large, which are not in consequence of any special voluntary pact. They arise from the relation of man to man, and the relation of man to God, which relations are not matters of choice. On the contrary, the force of all the pacts which we enter into with any particular person or number of persons amongst mankind depends upon those prior obligations (W iv.460).'

[221] W iv.461 (quoting Cicero). No one had a 'right ... to free themselves from that primary engagement into which every man born into a community as much contracts by his being born into it, as he contracts an obligation to certain parents by his having been derived from their bodies (W iv.461)'. See W iv.460-1.

[222] W iv.461. 'Nor are we left without powerful instincts to make this duty as dear and grateful to us as it is awful and coercive. Our country is not a thing of mere physical locality. It consists, in a great measure, in the ancient order

> and of generations; it is a constitution made by what is ten thousand times better than choice; it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time.[223]

In this way that the natural and civil are interconnected.[224] Communities, and the state, were always the products of prejudice *and* choice. At its best, this permitted the whole to become a 'vestment which accommodates itself to the body'.[225] More fundamentally, Burke is underscoring his belief that in relationships of community, there was more often a 'consent' of the affections than any meeting of the minds.[226]

In addition to his political differences with the revolutionaries, Burke's well-known hostility towards claims of 'natural' rights was of a piece with his scepticism towards formalism. Because of its currency, even Burke occasionally makes use of the language of 'natural' rights, especially true of the 'Tracts' where, claims of right stand aside those of the 'general sense of mankind'. In Burke, the use of eighteenth-century 'rightstalk' was largely rhetorical and generally restricted to period before entering Parliament.[227] While there is evidence of his reluctance to speak of rights as early as the 1750s, it was the American war that most clear displayed his frustration with formalism and legalism.[228] Here, Burke would refer to the debates on rights, as he would a quarter-century later in the *Reflections*, as the '*Great Serbonian bog ... where armies whole have sunk*'.[229]Against a once-common view of the American revolution as a

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into which we are born (W iv.461).'

[223] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 398. 'Did one generation of men go off the stage at once, and another succeed, as is the case with silkworms and butterflies, the new race ... might voluntarily, and by general consent, establish their own form of civil polity, without any regard to the laws or precedents which prevailed among their ancestors.' Hume, 'Of the original contract' in *Selected essays* (Oxford: Oxford Univ. Press, 1998), 284. Cf. Burke's 'flies of the summer' at RRF 192.

[224] Henry Sumner Maine later wrote that, for 'progressive societies', the movement of history was one from '*Status to Contract*'. Burke would have maintained that his society was progressive precisely because it balanced these two. See Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (London: John Murray, 1930 [1862]), 182. Burke did not, as Postema suggests, simply defend found, organic communities (*Gemeinshaft*) against those chosen associations (*Gesellshaft*) associated with modern 'society'. Cf. Postema, *Bentham and the common law tradition*, 66. Instead, he continued to underscore the importance of communitarian and non-rationalistic human association. On *Gemeinshaft* and *Gesellshaft*, see Ferdinand Tönnies, *Community and society* (New York: Harper & Row, 1963 [1878]), C.P. Loomis (tr.).

[225] 'Speech on the representation of the Commons in Parliament (1782)' in Stanlis, *Edmund Burke*, 398.

[226] 'There are many things in the constitution of establishments,' he wrote, 'which appear of little value on the first view, which in a secondary and obliquely manner produce very material advantages (WS iii.531)'. Cf. Hale. 'There are many things especially in Laws and Governmts yt mediately, Remotely and consequentially are reasonable to be approoved, though the reason of the party doth not presently or imediately and distinctly'. In Holdsworth, v.504.

[227] Cf. Mary Ann Glendon, *Rightstalk: the impoverishment of political discourse* (New York: The Free Press, 1991).

[228] See, e.g., 1758 R 2-3.

[229] WS iii.135 (alluding to Milton's *Paradise Lost*). He uses the phrase again two decades later in RRF 313.

natural rights-based Lockean affair, Burke saw the revolutionaries as appealing to historical rights against *British* intransigence and insistence on abstract parliamentary rights.[230] 'I am not here going into the distinctions of rights, nor attempting to mark their boundaries. I do not enter into these metaphysical distinctions; I hate the very sound of them.'[231] He claimed his 'consideration' was instead 'wholly limited to the policy of the question'.[232] In the most famous of his American works, the 'Speech on conciliation with America', he insisted:

> Do not entertain so weak an imagination as that your registers and your bonds, your affidavits and your sufferances, your cockets and clearances, are what form the great securities of your commerce. Do not dream that your letters of office, and your instructions, and your suspending clauses are the things that hold together the great contexture of this mysterious whole. These things do not make your government. Dead instruments, passive tools as they are, it is the spirit of the English communion that gives all their life and efficacy to them.[233]

The same practical considerations remained an important part of Burke's political philosophy. For Burke, to discuss the natural was to discuss human inclinations, expressed in a myriad of different ways in different human societies. The use of natural rights, common to periods of political conflict precisely because they acted as trumps was a confusion of legal precision with moral complexity.[234]

It is certainly true that Burke disagreed with the political implications of the revolutionaries, but his objections to rights claims were also practical, epistemological, and ontological.[235] In the British context, the 'high claim of *Right*, leaves with Parliament no *discretionary* power whatsoever concerning almost any part of *Legislation*'.[236] Against these rights, 'there can be no prescription; against these no agreement is binding: these admit no temperament, and no compromise: any thing withheld from their full demand is so much of fraud and injustice'.[237] A deeper concern in France was the 'right of the people is almost always sophistically confounded with power'.[238] If not simply, as Bentham believed, 'nonsense on stilts', Burke believed that rights theories were 'at best a confusion of judicial with civil principles' at worst between rationalism and positivism.[239] The 'science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *à priori*'.[240] The rights of the revolutionaries were 'pretended' insofar as they projected a precision, metaphysical or juridical, significantly altered in a complex, civil society.[241] In this civil state, 'metaphysic rights entering into common life, like rays of light which pierce into a dense medium, are ... refracted from their straight line'.[242] Burke could adopt the language of rights himself, but only to deny its radical implications. If 'not impossible to be discerned', the 'rights of men are in a sort of *middle*, incapable of definition'.[243] The importance of existing historic, '*chartered*', rights was patent.[244] As these 'embodied' in a balance between natural demands and artificial necessities, they were the '*real* rights of men'.[245]

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[230] 'It is not what a lawyer tells me I *may* do, but what humanity, reason, and justice tell me I ought to do.... Or does it lessen the grace or dignity of relaxing in the exercise of an odious claim, because you have your evidence-room full of titles, and your magazines stuffed with arms to enforce them (WS iii.135)?' See WS ii.458, PH xxii.722. Like their British counterparts, 'Americans of the revolutionary period unreflectively intermixed arguments ... with scarcely a thought about the relationship and potential inconsistency of custom, reason, and revelation.' Michael W. McConnell, 'Tradition and Constitutionalism before the Constitution', 1998 *U Ill L Rev* 173, 193.

[231] WS ii.458.

[232] WS iii.135. See WS iii.133-4.

[233] WS iii.165. Burke thought it best perhaps to proceed 'through a wise and salutary neglect (WS iii.118)' and the 'unsuspecting confidence' that 'was the true centre of gravity amongst mankind (WS iii.321-2)'. 'When confidence is once restored, the odious and suspicious *summum jus* will perish of course (WS ii.457).' See L 132. See also WWM Bk P 27/206 on 'paper politics' and government.

[234] See WWM Bk P 25/58.

[235] See RRF 152-3.

[236] C vi.102.

In Britain, radical Whig Dissenters were among the most modern of eighteenth-century actors. In many ways, they followed in or were sympathetic to the tradition of modern natural law, though the source of their epistemic claims of transparency could be rationalist or revelatory. Given the more literal tendencies of scriptural hermeneutics among them, it is perhaps unsurprising that they would increasingly adopt habits of legalism.[246] In any event, English Dissenters were among the most vocal advocates of the 'Rights of Man'. These were still in many ways only rhetorical and eighteenth-century theories of rights remained largely subordinated to larger theories of the moral and public good.[247] For Burke, 'abstract principles of natural right–which the dissenters rested on, as their strong hold–were the most idle, because the most useless and the most dangerous to resort to. They superceded society, and broke asunder all those bonds which had formed the happiness of mankind for ages'.[248] They threatened, as the revolutionaries would in France, civilisation itself. 'Am I to congratulate an highwayman and murderer, who has broke prison, upon the recovery of his natural rights?'[249] His focus, he insisted, was instead on the 'civil social man', who in order to 'obtain justice … gives up his right of determining what it is in points the most essential to him'.[250] This takes place, not after the spontaneous expression of the popular will, but in the context of the gradual, non-purposive historical origin of civil societies. Again, in the 'Appeal', he writes that '[i]f civil society be the offspring of convention', he writes (playing on the suggestion of contract for what are historical practices), 'that convention must be its law. That convention must limit and modify all the descriptions of constitution which are formed under it'.[251] The logic of the revolutionary position was theoretically anarchy and practically tyranny, Robespierre or Napoleon. In was in this sense that the 'foundations on which obedience to governments is founded are not to be constantly discussed.... Otherwise we would dispute all the points of morality, before we can punish a murderer, robber, and adulterer, we should analyse all society'.[252] But

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[237] RRF 148.
[238] RRF 153.
[239] W iv.485. See WWM Bk P 25/56 on political and moral rights.
[240] RRF 148.
[241] RRF 153. 'The pretended *rights of man* ... cannot be the rights of the people. For to be a people, and to have these rights, are things incompatible. The one supposes the presence, the other the absence, of a state of civil society (W iv.474).' 'On the scheme of the present rules in our neighbouring country, regenerated as they are, they have no more right to the territory called France than I have (W iv.464).' See also W iv.467, 471.
[242] RRF 152.
[243] RRF 153.
[244] 'Test and corporation acts of 1790'. See WS v.383-4. Indeed, the 'things secured by these instruments may, without any deceitful ambiguity, be very fitly called the *chartered rights of man* (WS v.384)'. See W ii.411-3.
[245] RRF 149.
[246] Corresponding perhaps to the literalism and Old Testament theology of much, though far from all, of low Protestant theology. Hutcheson, for example, represented a less Augustinian Presbyterianism deeply informed by 'ancient', and non-Judeo-Christian, sources. See Harold J. Berman, 'The origins of historical jurisprudence: Coke, Selden, Hale', (1994) 103 *Yale L J* 1651, 1721-31, esp. 1722-3, for a discussion of 'The relationship of English

> Society requires not only that the passions of individuals should be subjected, but that even in the mass and body, as well as in the individuals, the inclinations of men should frequently be thwarted, their will controlled, and their passion brought into subjection. This can only be done *by a power out of themselves*; and not, in the exercise of its function, subject to that will and to those passions which it is its office to bridle and subdue. In this sense the

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historical jurisprudence to seventeenth-century religious and scientific thought'.

[247] This is true, too, of the 'Declaration of the Rights of Man'. Again, cf. Hutcheson. 'Whenever it appears to us, that a Faculty of doing, demanding, or possessing anything, universally allow'd in certain Circumstances, would on the whole tend to the general Good, we say that any Person in such Circumstances has a Right to do, possess, or demand that Thing.' *Inquiry*, 256. More surprisingly, this continues: 'And according as this Tendency to the *publick Good* is *greater* or *less,* the *Right* is *greater* or *less*.' Id. This was very important to Smith's development of the 'impartial spectator'.

[248] 'Test and corporation acts of 1790'.

[249] RRF 90.

[250] RRF 150.

[251] RRF 150.

[252] W vi.106. 'A man desires a sword; why should he be refused? a sword is a means of defence, and defence is the natural right of man.—nay, the first of all his rights, and which comprehends them all. But if I know that the sword desired is to be employed to cut my throat, common sense, and my own self-defence, dictate to me to keep out of his hands this nature right of the sword (W vi.110).' Cf. Cicero, 'On Duties, III.

> restraints on men, as well as their liberties, are to be reckoned among their rights.[253]

In criticising what others might see as the more extreme elements of the revolution, Burke was also criticising fundamental, if largely tacit, beliefs that would become an increasingly important element of politics in the nineteenth century.[254] For Burke, the real danger was that in acting on behalf of 'natural' liberty, the advocates might actually obtain it.

Government was to pursue the public good, but Burke saw the claims of natural rights (as typically formulated) as implicitly subjective and based on self-interest, and destructive of actual social and individual flourishing.[255] The

> moment you abate any thing from the full rights of men, each to govern himself, and suffer any artificial positive limitation upon those rights, from that moment the whole organization of government becomes a consideration of convenience.... What's the use of discussion a man's abstract right to food or to medicine? .... I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics.[256]

Indeed, '[g]overnment is a contrivance of human wisdom to provide for human *wants*' and the 'rights of men in governments are their advantages'.[257] As these 'vary with times and circumstances, and admit of infinite modifications, they cannot be settled upon any abstract rule'.[258] Summarising the *Reflections* in the 'Appeal', Burke writes that

> The foundation of government is there laid, not in imaginary rights of men (Which at best is a confusion of judicial with civil principles,) but in political convenience, and in human nature; either as that nature is universal, or it is

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[253] RRF 150. Cf. Adam Ferguson. The 'very restraints by which he is hindered from the commission of crimes, are a part of his liberty'. *An essay on the history of civil society* (Cambridge: Cambridge Univ. Press, 1995 [1767]), 150. 'Liberty is opposed to injustice, not to restraint; for liberty even cannot subsist without the supposition of every just restrain. Natural liberty is not impaired, as sometimes supposed, by political institutions, but owes it existence to political institutions ...'. *Institutes of moral philosophy for the use of students in the college of Edinburgh* (London: Routledge/Thoemmes, 1994 [1769]), 288-9.

[254] 'This fundamental natural-law—and in the end Protestant—idea of the necessity of personal judgment in morals always favored the rights-side of the Janus faced notion of duty/right' Knud Haakonssen, 'From natural law to the rights of man: a European perspective on American debates' in Michael J. Lacey and Haakonssen (eds), *A culture of rights: the Bill of Rights in philosophy, politics, and law–1791 and 1991* (Cambridge: Cambridge Univ. Press, 1991), 51. 'The man who saw most clearly what this would lead to–and disliked what he saw–was Edmund Burke ...'. Id., 61.

[255] After dismissing the social compact as a 'mere fiction', Ferguson notes that the 'rights of men ... by being referred to a supposed convention ... are actually weakened'. *Institutes*, 220, 221. 'Civil society is now, whatever it might have been originally, the general state of man (1767 R 311 *bis*).'

[256] RRF 151-2.

[257] RRF 151, 153.

> modified by local habits and social aptitudes.... [It] is laid in a provision for our wants, and in conformity to our duties; it is to purvey the one; it is to enforce the other.[259]

It is, Burke insists throughout his life, the 'happiness or misery of mankind, estimated by their feelings and sentiments, and not by any theories of their rights, is, and ought to be, the standard for the conduct of legislators towards the people'.[260]

This should also suggest the degree to which Burkean analysis resembles utilitarian assumptions.[261] The 'essence of law... requires that it be made as much as possible for the benefit of the whole'.[262] But Burke's 'general and public utility' had little to do with the developing Benthamite tradition.[263] In Bentham, individual happiness was a reductive 'felicific' or 'hedonic' calculus of pleasure and pain. Because he adopted a subjectivism similar to that of other radicals, social happiness (Benthamite 'utility') was a theoretically simple aggregation of individual responses. Based on his efforts at reform, Burke was initially seen by Bentham, and later Paine, as a fellow traveller. However, Burke's view of 'utility' was closer to Ciceronian *utilitas* or Aristotelian *eudemonia*–as prudence was *phronesis*–in which both individual or social well being

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[258] RRF 151. See WS viii.481.

[259] W iv.485. 'These doctrines do of themselves gravitate to a middle point, or to some point near a middle (W iv.486).' On his split see PH xxviii.374 and PH xxix.369.

[260] W vi.103. See WS ix.464.

[261] Cf. David Lieberman 'The legal needs of a commercial society: the jurisprudence of Lord Kames' in Itvan Hont and Michael Ignatieff (eds), *Wealth and virtue: the shaping of political economy in the Scottish Enlightenment* (Cambridge: Cambridge Univ. Press, 1983), 212. See 212. Lieberman's insistence on referring to Kames and 'his fellow *philosophes*' seems to overstate the case of the Scottish 'enlightenment' significantly.

[262] WS ix.456-7. See WS ix.456-8, W vi.103. It is in this same sense, that the 'foundations of law' are 'equity and utility', of individual and systemic justice (WS ix.456). Utility was 'connected in the same manner with, and derived directly from, our rational nature.... Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action (WS ix.456)'. Equity 'grows out of the rule of equality, which is grounded upon our common nature, and which Philo, with propriety and beauty, calls the mother of justice. All human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice (WS ix.456)'. Cf. the discussion of Kames on justice and utility in Neil MacCormick, 'Law and Enlightenment' in R.H. Campbell and Andrew S. Skinner, *The origins and nature of the Scottish Enlightenment* (Edinburgh: John Donald, 1978), 157. These were part of a series of overlapping distinctions of the day: distributive and commutative justice, positive and negative justice, imperfect and perfects rights (or duties), natural and artificial rights (or virtue), beneficence (benevolence) and law, justice and policy, etc.

[263] WS ix.456, W vi.103. See WS iii.484, RRF 153, and Jeffrey Waldron (ed.), *'Nonsense upon stilts': Bentham, Burke and Marx on the Rights of Man* (London: Mentheun, 1987), 86-7. After Bentham set up a model of his wheel-shaped Panopticon prison, allowing the continuous supervision of prisoners, he invited the public to see it. Burke visited and noted of Bentham, 'Yes! there's the keeper, – the spider in his web.' Quoted in Mary P. Mack, *Jeremy Bentham: An odyssey of ideas, 1748-1792* (London: Heinemann, 1962), 204. See J.R. Dinwiddy, 'Utility and natural law in Burke's thought: a reconsideration', (1974-5) 16 *Studies in Burke and His Time* 105. The same was true, I believe, of Hutcheson, whose use of the 'greatest happiness for the greatest number' and its use, or misuse. by Bentham, has often been seen as a utilitarian (or consequentialist). For Hutcheson, it was a sort of moral shorthand rather than a political imperative.

was a complex, constant balance of conflicting, but nevertheless real, human inclinations. Different cultures, each reflecting these natural bases, were thus better or worse at achieving this happiness.[264] Furthermore, while Burke was reluctant to speak of natural rights, it is arguable that his career showed him keenly intent on developing 'chartered' civil rights. On the other hand, revolutionary enthusiasm, in assuming on philosophical premises, a harmony of individual and public interests, collapsed any meaningful space for natural or civil rights.[265] It is in this sense that prudence was 'not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.'[266] The abstract speculation on government and the elimination of checks on political, and only questionably popular, will led not to private liberty or public virtue, but the Terror.[267] Burke believed Britain, with all its faults, not least in respect to Ireland, to balance the demands of liberty and virtue. It was, in this way, the most progressive of European societies. Often, however, this had been the result of parliamentary reason more than popular sentiment. But this is clearly problematic for Burke, for if the 'bulk of mankind … are not excessively curious concerning any theories whilst they are really happy; … one sure symptom of an ill-conducted state is the propensity of the people to resort to them'.[268] What he denied was that the 'people' had resorted to them. Instead, in both Britain and France, and perhaps due to the very patrician politics he espoused and the civic analysis to which he so often resorted, it was not the people but a discontented, self-interested faction that was speaking for them. There were no clear authorities, no easy metric, by which to determine if the citizens of France were 'justly discontented'.[269] Moreover, the principles that could suggest that French theory and practice might undermine human happiness, gave slight assistance to any positive contribution toward public utility.

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[264] It would be possible, though exceedingly difficult to elaborate a Burkean theory of alienation or corruption. Cf. Albert W. Alschuler's similar claim in 'Rediscovering Blackstone', (1996) 145 *U Pa L Rev* 1, 23-4. In the state or civil society, he suggested: 'The stock of materials, by which any nation is rendered flourishing and prosperous, are its industry; its knowledge or skill; its morals; its execution of justice; its courage; and the national union in directing these powers to one point and making them all centre in the publick benefit. Other than these I do not know, and scarcely can conceive any means, by which a community may flourish (WS ix.476).'

[265] The revolutionary calculus was the 'weighing' of … 'as it were, in scales hung in a shop of horrors (RRF 166)'. Cf. L 121 on a 'war of calculation'.

[266] W iv.407. See C iii.118-20, L 241, WS ii.281-2.

[267] It is in this sense, suggested by contemporary rightstalk in both France and Britain, that it was 'always to be lamented, when men are driven to search into the foundations of the commonwealth ('Speech on the duration of Parliament' in Stanlis, *Edmund Burke*, 386)'.

[268] WS iii.319.

[269] WS ix.479. 'There are occasions ... of public necessity, so vast, so clear, so evident, that they supercede all laws. Law, being only made for the benefit of the community, cannot in any one of its parts resist a demand which may comprehend the total of the public interest. To be sure, no law can set itself up against the cause and reason of all law (WS iii.527).'

CONCLUSION:

While many of the details of Burkean jurisprudence remain unclear, several important points may be made. While he became increasingly nervous about the implications of radical Whig thought, Burke's parliamentary career was largely engaged in reform, not least for Ireland. In this, it was not the common law courts, but Parliament that was at the centre of legal change. At its best, it acted as a Senate independent of the vagaries of public opinion and, as a body, the influence of the crown. While they had none of the clarity of the 'Rights of Man', general principles of natural law, the fruit of the induction and deduction across ages, guided positive law. This was part of the distaste for formalism Burke's revealed as early as the 1750s. Similarly, while Burke combines strains of both classical and modern schools of natural law, he was clearly in greater sympathy with the ancients, if not necessarily Aquinas. While the concentration on 'perfect' justice, the systemic justice of the legal order, was an advance in practical terms, the realm of 'imperfect' justice continued to be of great importance. Burke would have seen the moderns as applying the certainty of theoretical deduction and practical legal forms to a complex social order. He had little of their rationalism, positivism (theological or legal), subjectivism, or egoism. His own emphasis on the imperfect obligations of the civil economy of glory were based on the belief that it was the most effective at securing the public good. In this, it may be observed that he was wrong and failed to see the possibilities of post-revolutionary Western thought. But it also seems fair to note that revolutionary success came with no small cost and only in greatly reducing its hopes in the direction of Burke's more meliorist progress.

BENEFICENCE ACTING BY A RULE

'If civil society be made for the advantage of man, all the advantages for which it is made become his right. It is an institution of beneficence; and law itself is only beneficence acting by a rule (RRF 149).'

A CONFUSED JUMBLE OF PARTICULAR FACTS AND DETAILS:

While there are over twenty published volumes of Burke's writings, speeches, and correspondence—not to mention much neglected archival material—the reconstruction of a detailed theory of law is, I believe, impossible. Burke's extensive use of legal *language* obscures how little he actually wrote about jurisprudence. More importantly, the meaning of terms like 'contract', 'partnership', 'prescription', and 'right' in his work is rarely straightforward. By studying his texts, however, and setting them in context, a reasonably comprehensive and coherent picture of Burkean jurisprudence emerges, one often at odds with common assumptions. His jurisprudential commentary, and especially his legal rhetoric, is best seen as an attempt to enrich, or to problematise, late eighteenth-century thought. This is true in at least two ways. First, it was a challenge to the legalism of contemporary politics and ethics. Society was a 'contract' only by analogy, a point mistaken more often perhaps by those outside, than those within, the legal profession. Secondly, and linked to legalism in its own way, Burkean jurisprudence was a challenge to whiggish and insular common law/constitutional histories. In both the error, practical and philosophical, was the failure to attend to law's relationship to manners and history. It was, indeed, a failure to contextualise law and to qualify legal analogies, the substantive meaning and practical value of which were dependent on questions of what we now call 'culture'.

I have sought in previous chapters to understand Burke, rather than to judge him or his relevance. 'Manners are of more importance than laws' served as a biographical introduction and general overview. 'The moral constitution of the heart' illustrated the character of Burke's empiricism and his use of a variety of eighteenth-century critical languages. 'A very mixed and heterogeneous mass' investigated his relationship to, and criticisms of, contemporary histories, historiographies, and historical jurisprudence. 'Bank and capital of nations, and of ages' explored the more complex history of manners Burke believed responsible for European progress. Finally, in 'Pride of the human intellect', I turned more clearly to his views on legal reform, on the relationship of Parliament and the courts, and on natural law and rights. In each case, I have tried to engage Burke on the terms of his age, rather than on ours. In concluding, I will briefly review errors common in legal discussions of Burke and draw some inferences I have been heretofore reluctant to make.

While many historians and jurists accept as given the role of the common law to Burke's thought, his connection to English jurisprudence is in fact quite complex. Those elements in his thought consistent with what J.G.A. Pocock called the 'common law mind'— especially the corporate, cumulative development of thought over time—had other, equally important eighteenth-century sources.[1] These were not unique to Burke. The progressive 'wisdom of the ages' was inherent in the dialogical 'polishing' of the 'culture of politeness', the 'common sense' humility of latitudinarianism, and a long tradition of humanism reinforced by contemporary 'comparative' histories. If more often concerned with degeneration than development, the civic traditions, too, provided a rich, resourceful vocabulary of cultural growth and decline.[2] Most important of all, however, was the complex empiricism expressed in the Burke's *Enquiry* and exemplified throughout his work.

This is not to say that a common law ethos does not influence the method of the *Enquiry*. After all, the work followed his legal studies by only a few years. But Burke imbibed many other influences before ever arriving at the Middle Temple. The *Enquiry* was itself begun at Trinity, and Burke's critical comments on English legal pedagogy and philosophy consequently makes any significant role for either unlikely. Indeed, at the same time as the publication of the *Enquiry* (and its revised second edition), Burke had already begun his abridged English history and fragment on law. Both were unflattering in their portrayal of the lack of sophistication, the intellectual insularity, of contemporary English historiography and jurisprudence. Even later in life, Burke's praise of British, or English, constitutionalism concerned its effectiveness as mythology. The appeal to the past created a useful continuity necessary, as he saw it, for progress. But it was still mythology, or ideology, a point the Irishman *qua* Irishman would not forget.

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[1] See Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge: Cambridge Univ. Press, 1986 [A reissue with a retrospect]), 243.

[2] These have been explored in detail by Pocock, though his adoption of 'humanism' is unfortunate given the wide variety of meanings already associated that term. The civic traditions were not also humanistic, nor humanists civic. See esp. *The Machiavellian moment: Florentine political thought and the Atlantic republican tradition* (Princeton: Princeton Univ. Press, 1975).

If, then, there is any truth in the claim made by Gerald J. Postema that 'Common law patterns of thought were given new political life by Burke', it was only by going beyond contemporary legal thought to what Burke called a 'more extended and perfect induction'.[3] Here as elsewhere, abstract ideas and general principles played a guiding, though falsifiable, role, without which 'all reasonings … would be only a confused jumble of particular facts and details'.[4] Society and law progressed not simply by aggregative experiences over time, though that was important, but also by a critical attitude towards that experience. Burke's animosity towards *radical* reformations, social as well as constitutional, must not obscure his belief in the necessity of legislative reform. The 'gradual and organic development' of law was in no way contrary to 'conscious law-making'—as suggested in the *Oxford companion to law*—but required it for progress.[5] Nor should it be surprising, given his career as a legislator, that Burke defended *parliament* as the proper site for 'law-making'.[6] The difficult duty of articulating the law—in light of general principles on one hand and local manners on the other—was, in large part, the responsibility of the corporate legislature. This body represented, at least virtually and ideally, the public virtue of Britain in a way that the courts, as suggested by Blackstone and Mansfield, could not.[7]

This is not to suggest that Burke believed that legal precedent, legislative or judicial, was a straightforward matter. Though he believed there were defensible, if thin, 'principles' inherent in the law, Burke did not argue that it presents distinct, simple or single solutions. There was nowhere, as Michael Lobban suggests, a 'simple application of rules derived from precedents to the facts of new cases'.[8] This type of rationalism runs contrary to the whole tenor of Burke's thought. Similarly, Burkean 'prescription' is problematic, but it is so for its *absence* of rules for application. The presumption in favour of established rules and institutions was essential, but it was not ultimately uncritical.[9] It was instead a prudential consideration rooted, in part, on the essentially communitarian and non-rationalistic nature of human association and the 'natural', i.e. naturalistic, basis of human presumption, habituation, etc..[10] In this way, Burke did not defend found, organic communities or 'cultures' against the voluntary, chosen associations of modern 'society'.[11] Nor did a genuinely 'progressive' society result from a movement in history from '*Status to Contract*', as Sir Henry Summer Maine famously wrote.[12] The modern and enlightened cultures of pre-revolutionary Europe were historically progressive, as Burke saw it, precisely because they balanced the inevitable development of relationships of status *with* those of choice, including contract. If Burke failed to see how flexible these relationship were, that failure pales in comparison with the freedom given human choice by many *philosophes* and many of their modern Liberal heirs. 'Prejudices' could be constructive or destructive, but they were unavoidable considerations for the practicing and practical politician.

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[3] Postema, *Bentham and the common law tradition* (Oxford: Clarendon Press, 1986), 29; PE 4.

[4] W vi.101.

[5] David Walker (ed.), *Oxford companion to law*, (Oxford: Clarendon Press, 1980), 573.

[6] Statutory interpretation was, of historical and practical necessity, carried out according to common law court custom, but this was a question of habit—or 'prejudice'—as much as authority. Cf. Postema, 17.

[7] See M.D.A. Freeman's *Lloyd's Introduction to jurisprudence* ((6th edn) London: Sweet & Maxwell, 1994), 113 and Alasdair MacIntyre, *Whose justice? Which rationality?* (Notre Dame: Univ. Notre Dame Press, 1988), 229. The connection to Mansfield is more often implied than stated, but see J.B. Jaworozykowski's *The legal philosophy of Edmund Burke* (unpublished PhD dissertation, Oxford (University College) 1950), 203. While he makes a strong case for the development of the common law 'under the legislative direction of reason and sense of justice', Jaworozykowski fails to adequately distinguish Manfield's judicial 'activism' from the priority Burke grants the legislature. Id. See below.

[8] Lobban, *The common law and English jurisprudence*, 1760-1850 (Oxford: Clarendon Press, 1991), 1-2 and 4-5. Cf. the surprisingly similar statement in Knud Haakonssen, *The science of a legislator: the natural jurisprudence of David Hume and Adam Smith* (Cambridge: Cambridge Univ. Press, 1981), 132.

Many of these misunderstandings of Burke result from the absence of studies of his jurisprudence. They are the result of assumptions, based on a scholarly walkabout into his work or secondary sources, rather than analysis. Unfortunately, the only extended study of Burke's jurisprudence suffers from a failure to go beyond narrowly legal concerns. J.B. Jaworozykowski's *The legal philosophy of Edmund Burke*, an unpublished doctoral dissertation at Oxford University (1950), remains valuable. The author properly notes the psychological—I have said 'naturalistic'—bases of Burke's thought and the importance of history and manners. I have argued, of course, that Burke saw manners as both the ultimate source of the laws and practical limits to their efficacy. Law, for all the uniqueness of its mechanisms and sanctions, was ultimately 'beneficence acting by a rule'. This emphasis on manners and ultimately on

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[9] Cf. Lobban, 83.

[10] Whatever one feels about Burke's general defence of eighteenth-century culture and society, it was *not* conducted on the basis of the property rights associated with quasi-Lockean liberalism. Burke does not 'belong[] in the end to the Lockean tradition of natural-rights individualism'. Frederick A. Dreyer, *Burke's politics: a study in Whig orthodoxy* (Waterloo, Ontario: Wilfred Laurier Univ. Press, 1979), 69. Indeed, such a view is the very antithesis of his historical and communitarian thought.

[11] Cf. Postema, 66 and see Ferdinand Tönnies, *Community and society* (New York: Harper & Row, 1963 [1878]), C.P. Loomis (tr.) on *Gemeinshaft* and *Gesellshaft*.

[12] Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas* (London: John Murray, 1930 [1862]), 182. Maine was not, at least not intentionally, stating a prescriptive choice, but a descriptive observation about human history.

'natural' beneficence is Burke's most serious intellectual challenge to the epistemological transparency and ontological subjectivism of Dissenting and radical enlightenment thought. Having stated similar themes, Jaworozykowski rarely pursues them. Instead, judging Burke and Burke's relevance by the standards of mid-*twentieth* century jurists, those few occasions in which he wanders beyond the pale of the law are his most muddled and anachronistic.[13]

A more interesting aspect of *The legal philosophy of Edmund Burke*, and where its author's presentism assists his analysis, is the analogy drawn between Burke's jurisprudence and then well-known (1950) theories of 'natural law with a changing content'.[14] I have already made clear that discussions of the influence of natural law thought on Burke are often exaggerated. To claim, for example, that he was 'essentially a Thomist in his political philosophy' requires qualifications so heavy as to make such a statement misleading at best.[15] But if the role of natural law has been overstated, others have folded Burke's jurisprudence into history without qualification. If the one sin is venial, the other is mortal. As astute a legal historian as Harold J. Berman has suggested that, with the nineteenth-century German jurist Karl von Savigny, 'Burke opposed history, tradition, custom, precedent, and the like, to reason and politics–to natural law and positivism.'[16] In response to the *philosophes* and related elements within nineteenth-century codification movements, Savigny replaced reason—or *Reason*—with the mystical *Volksgeist*, the 'spirit of the nation or people'.[17] But as Jaworozykowski accurately states that:

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[13] See esp. chapter four, 'Property, labour, and inheritance', his discussion of political economy.

[14] The phrase is Rudolf Stammler's, but Jaworozykowski also suggests similarities between Burke and jurists Eugene Ehrlich, Léon Duguit, and François Gény.

[15] Peter J. Stanlis, *Edmund Burke and the natural law* (Ann Arbor: Univ. of Michigan Press, 1958), 248. Cf. Burleigh Taylor Wilkins, *The problems of Burke's political philosophy* (Oxford: Clarendon Press, 1967).

[16] Berman, 'The origins of historical jurisprudence: Coke, Selden, Hale', (1994) 103 *Yale L J* 1651, 1737. Burke 'provided a basis for ... 'the [German] historical school' ... in which the historical jurisprudence that had originated with Coke and Selden and Hale (among others) became separated from the political and moral theories–positivism and natural law–with which they had originally been integrated.' Id., 1736. Berman fails to appreciate the vast differences between Burke or the 'historical school' and the comparatively primitive historical jurisprudence of seventeenth-century common lawyers. He also neglects eighteenth-century Scottish jurisprudence.

[17] This seems to turn the enlightenment rather neatly on its head. It amounts, however, to a poorly historicised *volonté générale*, with all its attendant problems. The 'historical school' perpetuated, or perfected, the positivism of the revolution, though it transferred it from legislature-constitutional bodies to more 'organic' institutions, including the courts. That is, while opposing the rationalist element in codification (resulting in a sort of codal-positivism) and seeing legislation as an inferior juridical mechanism, Savigny maintained a customary-positivism guided by magistrates and doctrinal writers. Codification was most often opposed, not because a code could not contain the whole of the law, but because it was feared that it would arrest its organic development. Actual codification, the 'law in action', it might be added, was nowhere so rationalistic as it is often portrayed. In France, for example, Jean-Etienne-Marie Portalis, one of the most important redactors of the *Code Civile*, made clear that 'the code builds on much pre-Revolutionary law and legal scholarship; and … the provisions of the code are best thought of as principles or maxims, "féconds en conséquences," to be developed and applied by judges and other jurists'. John

> Burke's concept of the working of reason through historical experience of the human race gives a rational basis to his views on history…. the historical school, which to some extent was evolved as a reaction against the law of nature, went towards the opposite extreme. When opposing the inclination towards the immutability of legal rules, the historical school arrived at an exaggerated idea of the mysterious working of law out of the depths of national spirit. These drawbacks of historical thinking in law were balanced in Burke's thought by his views of the working of reason … .[18]

Whatever its faults, Burke's jurisprudence fused the natural, positive, and historical elements of law into what Berman has elsewhere called a 'integrative jurisprudence'.[19] Natural law was expressed or instantiated, however imperfectly, in history through a variety of legal orders and 'changing contents'. If the 'statesman's duty' was 'to be guided by circumstances' it was only with the proviso that it was accomplished while 'never losing sight of principles'.[20] This was necessary, as I have repeatedly stated, to Burkean 'induction'.

The Irish jurist J.M. Kelly made a claim similar to that of Berman, one that played an important role in inspiring this study. In his *Short history of Western legal theory* (1992), perhaps the best introduction to jurisprudence in English because it sets law in a social and historical context, Kelly wrote that Burke had 'some claim to rank ... as the father of historical jurisprudence'.[21] The method adopted for this study quickly made clear the degree to which this statement blurred crucial distinctions while, at the same time, preventing any direct comparison to *nineteenth*-century jurists. Burke's influence—with Shaftesbury, Montesquieu, the Scots, and Gibbon—on German thought is real and significant, not least in the deepening appreciation of 'culture'.[22] Indeed, it is a noteworthy error to suggest, as Peter J. Stein has, that Johann Gottfried

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Henry Merryman, *The civil law tradition: an introduction to the legal systems of Western Europe and Latin America* ((2nd edn) Stanford: Stanford Univ. Press, 1985), 30. If this is not how Napoleon (or a Justinian) might have seen it, the civil law, like the common law, has its own mythologies.

[18] Jaworozykowski, 102. Cf. 170.

[19] Cf. Berman, 'Towards an integrative jurisprudence: politics, morality, history', (1988) 76 *Cal L J* 779, esp. 789.

[20] W vi.101.

[21] Kelly, *A short history of Western legal theory* (Oxford: Clarendon Press, 1992), 274.

[22] A comparative analysis of Burke and Herder would be particularly instructive. Early romanticism shared broadly similar impulses and ideas: community, intermediate groups, 'organic' growth, a more robust rationality, natural benevolence, etc.. See 'introduction' to Frederick C. Beiser (ed.), *The early political writings of the German romantics* (Cambridge: Cambridge Univ. Press, 1996) and *The fate of reason: German philosophy from Kant to Fiche* (Cambridge, MA: Harvard Univ. Press, 1987). Gibbon may have exerted the most direct influence through Gustav Hugo's translation of the forty-fourth chapter of *The history of the decline and fall of the Roman empire* (1776-94) on the 'classical' period of Roman jurisprudence. See John W. Cairns, 'The influence of the German historical school in early nineteenth-century Edinburgh', (1994) 20 *Syracuse J Int'l L & Com* 191.

Herder 'stressed the importance of tradition but for him [unlike Burke] what was important was not a political but a cultural tradition'.[23] There are few points more important in understanding Burkean jurisprudence than the recognition that he does not collapse 'civil society' into the state, but the state into civilised society. Rhetoric aside, he never confused the 'nation' with the 'state', or law with manners. As an Irishman, how could he? If Kelly's intention was only to underline the importance accorded by Burke and the 'historical school' to 'culture', to (apparently) extra-legal influences on law, what of Montesquieu or any number of earlier European legal humanists?[24]

The comparison between Burke and the 'historical school' is, however, far more problematic. For all its importance, the jurisprudence of Savigny—the true 'father' of the 'historical school'?–is surprisingly unsophisticated, at once mystical, narrowly nationalistic, and remarkably *unhistorical*. If there are passages in the *Reflections* that sound mystical, there are many more that reflect the sensationalism of the *Enquiry*. For the 'historical school', the developed 'culture' was, like a seed, largely present in essence at its origin. The implication is, as Kelly himself notes, 'that some institutions ... would turn out, on investigation, to be peculiarly 'natural' to that particular people, ... while others would turn out to be spurious, grafts from an alien stock ... and hence with no claim to perpetuation in the rigid form of a code'.[25] Burke recognised, of course, general differences in national character and culture, but these were extraordinarily fluid. European progress, in both manners and laws, was the result of the 'communication' of cultures. 'Grafts of alien stock' contributed significantly to English jurisprudence and the British constitution, if not yet to Ireland. Unlike Burke, in Savigny, '[h]istory ... is reduced to *the space within which a natural development unfolds*'.[26] It was only in the English legal-political myth that, as Savigny argued about Germanic law, 'in the earliest times ... the law will be found to have already attained a fixed character, peculiar to the people'.[27]

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[23] Stein, *Legal evolution: the story of an idea* (Cambridge: Cambridge Univ. Press, 1980), 58. Stein had just quoted Burke's famous 'Society is ... a contract' paragraph on RRF 194-5. See below.

[24] Note even Hegel's focus, 'following Montesquieu', on 'customs (*Sitten*) and ethical life (*Sittlichkeit*)–what was known to Burke and to ancient philosophy as laws and manners'. J.-F. Suter, 'Burke, Hegel, and the French Revolution' in Z.A. Pelczynski (ed.), *Hegel's political philosophy: problems and perspectives, a collection of new essays* (London: Cambridge Univ. Press, 1971), 65.

[25] Kelly, 322.

[26] Ernst-Wolfgang Böckenförde, 'The school of historical jurisprudence and the problem of the historicity of law' in *State, society and liberty: studies in political theory and constitutional law* (New York: Berg, 1990), J.A. Underwood (tr.), 7.

[27] Savigny, 'Of the vocation of our age for legislation and jurisprudence' in Clarence Morris (ed.), *The great legal philosophers: selected readings in jurisprudence* (Philadelphia: Univ, of Pennsylvania Press, 1959), 290. That this is

In the end, the *Volksgeist* resembles nothing so much as the unhistorical Saxon 'spirit' of vulgar whiggism.[28] The often rowdy amalgamation of English and Celts, protestants and catholics, Whigs and Tories, that Burke sought to harmonise as a legislator bore little resemblance to any of these images.

A PARTNERSHIP ... IN ALL PERFECTION :

In what may be his most famous passage, Burke wrote

> Society is, indeed, a contract.... Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those whose are dead, and those who are to be born.[29]

But this extract shows, perhaps better than any, the mistake of applying to Burke any narrowly political or jurisprudential reading. Understood in the context of the *Reflections*, much less than in the whole of his thought, it suggests, too, the close connections between manners, history, and law. Burke's point is precisely to deny that the language of 'contract' is sufficient to understanding the complexities of human community and history. Society, the *civil* or civilised society, was an entity wider than any state or nation. It was the felt sociability and lived associations of men, plural and corporate, enveloping *all* social practices and institutions. While these were based in natural human dispositions, they were not insignificantly altered by culture and historical circumstance. It is in this sense that manners are prior to laws and that for all the

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prescriptive more than descriptive, given the absence of a single German state, seems clear. But the German school 'appears to postulate a degree of unity of thought and action in particular nations, races, or the inhabitants of political units, of which there is little evidence in human history.' M.D.A. Freeman (ed.), *Lloyd's introduction to jurisprudence* ((6th edn.) London: Sweet & Maxwell Ltd., 1994), 787.

[28] Neither Savigny (nor even Hegel) envisioned the development that political nationalism would take. But it is clearly implicit in their work.

[29] RRF 194-5. Cf. again Stein, 58. For a discussion similar to mine here, see Mark C. Henrie, 'Edmund Burke and contemporary American conservatism' in Ian Crowe (ed), *Edmund Burke: His life and legacy* (Dublin: Four Courts Press, 1997).

uniqueness of its mechanisms and sanctions, law was ultimately 'beneficence acting by a rule'.[30] In general, Burke's frequent use and misuse of legal terms is intended to reaffirm the communitarian and cultural foundations of jurisprudence. In his day, this was a view undermined by the legalistic ethics of an emerging 'modernism', of which contractualists, English radicals, and French revolutionaries were but the vanguard.

In sum, the relationship of manners, history, and law was rooted in a naturalism based, not in eternal verities, but in the dynamic empiricism of his age, the legacy of the 'culture of politeness', and religious latitudinarianism. The 'moral constitution of the heart', the formation of individual character, was a sublime amalgamation of native predispositions and cultural influence. It was on this 'constitution' that Burke saw the history of European manners and progress built. In articulating this sense of progress, he was working in parallel, if not actually in partnership, with many of the most sophisticated historians and jurists of the day, especially those of the Scottish enlightenment. A 'civil economy of glory' continued, he believed, to provide the social stability necessary for improvement and a link between private and public interest. On the other hand, a commercial humanism provided energy and ambition for social change and 'communication'. And, in Ireland, it promised to dismantle both the economic monopoly of other parts of Britain over Ireland and perhaps the wider monopoly of the Ascendancy within Ireland.

Here as elsewhere, Burke's use of the language of the 'civic' traditions, both ancient and modern, leavened his faith in commerce and indeed in law. Increasingly nervous, for practical and philosophical reasons, about the implications of political radicalism, Burke's parliamentary career was largely engaged in reform (economic, religious, criminal, etc.). In this, it was not the common law courts, but Parliament that was at the centre of legal change. At its best, Parliament acted as a Senate dedicated to public virtue and independent of the vagaries of public opinion and, as a body, the influence of the crown. Finally, with none of the clarity of the 'Rights of Man', general principles of natural justice, the fruit of a 'more extensive and perfect deduction' across ages, continued to guide positive law. Ultimately, law was itself only a highly formal, though important, method of ensuring 'public' virtue and 'private' beneficence in light of manners and history. In respect to these views, especially on legal history and constitutional theory, Burke disagreed in significant ways with many of his contemporaries, not least the jurists

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[30] RRF 149.

Blackstone, Lord Mansfield, and fellow Irishman Sullivan.

In each of this areas may also be seen Burke's challenge to the more radical elements of the Enlightenment. As he wrote in the *Reflections*, even before the Terror, his fears included:

> first of all the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of the ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would no longer be studied.

—Even manners might lose all anchor—

> Personal self-sufficiency and arrogance (the certain attendants upon all those who have never experienced a wisdom greater than their own) would usurp the tribunal.... No principles would be early worked into the habits.... Who would insure a tender and delicate sense of honour to beat almost with the first pulses of the heart, when no man could know what would be the test of honour in a nation, continually varying the standard of its coin?

—And the historical progress of society in Europe endangered—

> No part of life would retain its acquisitions. Barbarism with regard to science and literature, unskilfulness with regard to arts and manufactures, would infallibly succeed to the want of a steady education and settled principle; and thus the commonwealth itself would, in a few generations, crumble away, be disconnected into the dust and powder of individuality, and at length dispersed to all the winds of heaven.[31]

Because human civility, commerce, and civilisation were inherently communal, the 'powder and dust of individuality', the denial of man's necessarily social nature, posed a new and dangerous order of will and power. As they have for over two centuries, these remain persistent, if perhaps often less passionate, concerns.

The French revolution inaugurated a world in which much of Burke's reasoning appeared increasingly irrelevant to changing popular sentiment. For all his apparent prescience, he failed to see the more positive possibilities of many of these innovations. Much of this modernity is the fruit of legalism, with all the virtues and vices of a world seen through such a lens.[32] If Burke fuelled reaction against the revolutionaries and radicals, it must also be admitted that the principles embodied in his work were of profound importance to those more moderate reformers, ultimately as important as they were to European progress, who followed after him. Modern jurists and legislators still often neglect the importance of culture, especially of social norms beyond the pale of legal sanction. In contrast, Burke's jurisprudence is 'imperfect' in both the general and eighteenth-century senses. For better and worse, the Irishman argued that manners and history continually reassert themselves in the face of a more 'perfect' justice.[33]

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[31] RRF 193-4.

[32] Liberalism is', as Pocock has written, the 'child of jurisprudence'. 'Cambridge paradigms and Scotch philosophers: a study of the relations between the civic humanist and the civil jurisprudential interpretation of eighteenth-century social thought', in Itvan Hont and Michael Ignatieff (eds), *Wealth and virtue: the shaping of*

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political economy in the Scottish Enlightenment (Cambridge: Cambridge Univ. Press, 1983), 249.

[33] It is the recognition of this that made it possible for the Marxist Raymond Williams to write that Burke 'prepared a position in the English mind from which the march of industrialism and liberalism was to be continually attacked.... He established ... the idea of what has been called the 'organic' society, where the emphasis is on the interrelation and continuity of human activities, rather than on separation into spheres of interest ...'. *Culture and society 1870-1950* (New York: Harper Torchbooks, 1958), 11. Cf. W iv.432.

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