

---

# *Edmund Burke's Legal Erudition and Practical Politics: Ireland and the American Revolution*

## I. Burke's Legal Erudition

Edmund Burke (1729-1797), was born and grew up in Dublin, Ireland, and even before he graduated from Trinity College in 1749, his father, Richard Burke, registered him as a student of law in the Middle Temple in London. At age twenty-one, in 1750, Burke went to London to study law. At that time Richard Burke was a practicing attorney in Dublin, and the understanding between father and son was that Edmund would complete his legal studies in England, be admitted to the bar, and then return to Dublin and practice law with his father. But this apparently reasonable family plan for Edmund's future life never was fulfilled, because it failed to take into account Edmund's unique nature and talents and his acquired independent and self-reliant character.

In Burke's time, Trinity College in Dublin probably was much superior as an educational institution to many of the colleges in Oxford or Cambridge, because it had retained in a far purer form the Medieval tradition of the Trivium and Quadrivium. Burke received an excellent education in the liberal arts; in addition, his strong intellectual curiosity made him a far more diligent and perceptive reader in the full range of the humanities than most serious undergraduate students. His innate literary genius, which eventually made him into one of the most powerful prose stylists in English literature, was already well-developed, and his knowledge and understanding of European history, literature, philosophy, science, religion, and politics was matured far beyond his peers.

Soon after he was launched into his legal studies Burke was repelled by what he called “the narrow and contracted notions”<sup>1</sup> of his law teachers at the Middle Temple. He emphatically rejected their mechanistic, materialistic, utilitarian, and pragmatic assumptions and case law methods in teaching law. To Burke, a knowledge and understanding of the liberal arts, from the ancient Greek and Roman classics to his own era, was an essential background dimension in legal education. He believed that law had to have a philosophical basis, so that jurisprudence was the best foundation for positive or statutory law. By omitting jurisprudence, his teachers merely sharpened the minds of their students by narrowing their understanding through specialization. To Burke, jurisprudence included a moral and cultural dimension in the law; by omitting it, the moral and social virtues were separated from the intellectual virtues. The result was the same in law that had been produced in political theory by Machiavelli in *The Prince*; clever and unscrupulous sophists rather than humane and honorable practitioners in politics and law.

Burke’s strong dissatisfaction with his legal studies, combined with his highly developed literary interests and skills, led him to abandon the law as a profession, and to begin a career in literature, much to his father’s disappointment. But his interest in law as a cultural and social foundation for English politics and European civilization remained very intense, so that between 1750 and 1765, when he was elected to the House of Commons, he had acquired a legal erudition as great as anyone in Britain. In 1780, in reflecting retrospectively upon his political career, Burke stated that since “very early youth” he had “been conversant in reading and thinking upon the subject of our laws and constitution, as well as upon those of other times and other countries.” A decade before his death, he said in Parliament that he “had in the course of his life looked frequently into law books on different subjects.”<sup>2</sup> To understand all that is contained in these abstract statements it is necessary to examine in specific detail the depth of his legal erudition.

Among the 664 known volumes in Burke's personal library, many dealt with jurisprudence and political and social theories of man in civil society, from ancient times to his own era. In addition, of course, Burke had access to the great public libraries in Britain. His speeches during debates in the House of Commons were frequently enhanced with quotations and references to the outstanding legal and political thinkers of European civilization. Among the ancients, he was very attracted to Aristotle's treatises on *Politics* and *Ethics*, to Cicero's *De officiis* and *De legibus*, and to such Roman stoics as Epictetus. Among Medieval writers Burke had read the theology of St. Thomas Aquinas and St. Augustine, and the jurisprudence of Henry de Bracton. Richard Hooker's *Laws of Ecclesiastical Polity* was for Burke the great fountainhead of post-Reformation English canon law. He was familiar with the writings of Francis Bacon, Sir Edward Coke, Hobbes and Locke, and the jurisprudence of Delolme, Prynne, and Blackstone. Among writers on natural law and international law he knew Suarez's *Tractatus de legibus*, Grotius' *On the Law of War and Peace*, Pufendorf's *On the Law of Nature and Nations*, and Vattel's *Droit des gens*. In a parliamentary report Burke noted that "much has been written by persons learned in the Roman law, particularly in modern times,"<sup>3</sup> and he made use of compilations in the Justinian code, as well as in Montesquieu's *L'esprit des lois*. In his *Reflections on the Revolution in France* (1790), Burke referred to the French jurist, Jean Domat, whose *Civil Laws in Their Natural Order* established him as "one of the greatest lawyers" in the French National Assembly.<sup>4</sup>

Among Burke's early literary projects was *An Abridgement of the English History*, which he wrote in 1757, and to which he added a sequel, "An Essay Toward a History of the Laws of England." Although this work was never completed, and was published posthumously in 1811, it is significant because it reveals Burke's early and sustained conception of the place of law in relation to custom and religion within the history of Europe. It also contains important glimpses into his conception of human nature, his principle of moral prudence as the essential method in

reforming abuses or eliminating weaknesses in civil society. Burke believed that “three capital sources” combined to form modern European civilization.<sup>5</sup> After the collapse of the Roman empire in the middle of the fifth century, which left much of Europe in a state of utter social chaos, three powers combined to slowly and painfully restore and improve civil order in Europe “First, the ancient traditionary customs of the North,” centered in the customs of the Teutonic tribes that had invaded and overrun the Roman Empire; “the second source was the canons of the Church,” that is, the moral and spiritual laws and rituals of the Christian religion, that were “reduced into system and a regular form of jurisprudence,” first in canon law and later in the secularized common law in various nations; “the third source,” Burke noted, consisted of “some parts of the Roman civil law.”<sup>6</sup> In summary, Germanic tribal customs, Christian ethics, manners, and laws, and the remnants of the Roman Justinian code (the *corpus juris civile*, the *institutes*, *digests*, and *ordinances*) combined in various ways in different European provinces and regions, to gradually restore the conditions of an orderly civil society within the emerging nations of Europe. This was Burke’s view of European civilization from 1757 to and beyond the French Revolution.

Burke knew that it took over twelve centuries to overcome the chaos into which Europe was plunged after the fall of the Roman Empire. But unlike Edward Gibbon, the great historian who recorded the history of the decline and fall of Rome, and who concluded that history was “little more than the crimes, follies, and misfortunes of mankind,”<sup>7</sup> Burke had faith that what he called “the Christian commonwealth of Europe”<sup>8</sup> possessed the means of sustaining a continuity of growth and refinements in the constitutional laws that extended the rights and protections of life, liberty, and property for all human beings. Burke regarded history as “the known march of the ordinary providence of God.” History was to him “a preceptor of prudence,”<sup>9</sup> a secondary form of revelation that supplemented in the empirical affairs of man the Divine laws of revelation in Scripture and Church traditions. For

civilization to grow and prosper, men needed to obey the moral laws of prudence, which Burke regarded as the first of political virtues. The customs, manners, laws, and normative moral principles which had restored order to European society, and made possible the fulfillment of man's corporate nature, could function in making still further improvements in European civilization, but only if the natural depravity in human nature, so evident in the seven deadly sins—pride, lechery, envy, anger, covetousness, gluttony, sloth—was kept under strict moral and legal control. It is important to remember that in 1789, when the French Revolution burst upon Europe, Burke suspended his judgment of that event because he hoped that it would obey the laws of moral prudence in reforming all that was wrong in French society. But when he perceived that the revolution was dominated by militant atheists, whose speculative rational ideology was not directed at making necessary reforms, but at destroying the entire religious, legal, and social inheritance of Europe, in order to create a blank blackboard of society from which to establish a Utopian social order, he became the first and foremost critic of the Revolution. Burke regarded speculative ideology as a form of metaphysical insanity which totally disregarded historical experience and the depravity in human nature regarding the uses of political power. But during the thirty-two years between his composition of his essay on the history of the laws of England and his criticism of the French Revolution, Burke had many occasions in which to develop still further his legal erudition.

Burke's interest in law and constitutional politics was strongly reinforced through the large number of book reviews he wrote on legal studies for Dodsley's *Annual Register*, from 1758 to at least 1765. He reviewed all of the important books on law published in Britain during those years. His first review was on Blackstone's *Discourses on the Study of Law* (1759). The next year he reviewed George Wallace's *A System of the Principles of the Laws of Scotland* (1760), in which he wrote

The work before us is a piece of uncommon labour, research, and

reach of thought. The laws of Scotland are here referred to, and grounded upon, those of nature and nations; and the author has 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 Pufendorf. Tho' his plan has limited him principally to the municipal laws of Scotland, there are several parts of so general a nature, and so well reasoned, that they cannot fail of giving general entertainment and instruction.<sup>10</sup>

It is noteworthy, that the ease with which Burke distinguished between Scottish and English constitutional law, and yet noted that both are subject to moral natural law and international law, is evidence of how perceptive he was in all of his studies and understanding of European jurisprudence. He also reviewed Grey's *Debates of the House of Commons* (1763), and Elly's *Liberty of Subjects in England* (1765). After his election to the House of Commons in 1765, Burke probably severed his connection with the *Annual Register* during 1765-1766; yet he continued his reviews with Blackstone's *Commentaries* (1767-68); Beccaria's *Essay on Crimes and Punishment* (1767); Dalrymple's *Memoirs of Great Britain and Ireland* (1771); and Sullivan's *Lectures on the Feudal and English Laws* (1773). All of Burke's reviews of legal studies reveal that very early in his life, and by the outset of his political career, he had acquired a masterful knowledge and understanding of constitutional, civil, and criminal law, in their relationship to moral natural law.

Early in 1759 an event occurred which diverted Burke from his literary career, and placed him on the road that led ultimately to his career in politics. He was introduced to William Gerard Hamilton, a wealthy young man with influential connections, already in Parliament, and with ambitions to go much further in politics. Hamilton was made secretary to the Earl of Halifax, recently appointed Lord Lieutenant of Ireland, and since he knew that Burke possessed an extensive knowledge of Ireland, he induced him to accompany him back to his native land as his assistant. After eleven years in England, Burke was pleased to

return to Ireland in a position of influence. He lived in Dublin Castle for the winters of 1761-62 and 1762-63, returning to London during the summers.

## II. The Penal Laws against Irish Catholics

While in Ireland during 1761, Burke began to compose his *Tracts Relative to the Laws against Popery in Ireland*. Even more than his legal erudition, this important work reveals much that is most significant in the development of Burke's political philosophy. Yet it remained a fragment, and was not published until after his death, because to have published it soon after it was written would have precluded any possibility for a career in English politics. Burke's other writings up to this time had made clear the historical basis of his political beliefs, his reverence for the continuity of legal, religious, and social traditions, and the prescriptive foundations of society in constitutional law. But in his tract on the Popery laws against Irish Catholics, for the first time he set forth the essential philosophical principles in his mature political beliefs, based upon the moral natural law.

John Morley has written one of the best summaries of the penal laws against Catholics, and of their effect upon Ireland during the eighteenth century:

After the suppression of the great rebellion of Tyrconnel by William of Orange, nearly the whole of the land was confiscated, the peasants were made beggars and outlaws, the Penal Laws against the Catholics were enacted and enforced, and the grand reign of Protestant Ascendency began in all its vileness and completeness. The Protestants and landlords were supreme, the peasants and the Catholics were prostrate in despair.<sup>11</sup>

In 1792, in a letter to Sir Hercules Langrishe, a member of the Irish Parliament who wished to enact laws lifting some of the civil disabilities against Catholics, Burke set forth his own summary of the penal laws.

You hated the old system as early as I did... You abhorred it, as I did, for its vicious perfection. For I must do it justice: it was a complete system, full of coherence and consistency, well digested and well composed in all its parts. It was a machine of wise and elaborate contrivance, and as well fitted for the oppression, impoverishment, and degradation of a people, and the debasement, in them, of human nature itself, as ever proceeded from the perverted ingenuity of man.<sup>12</sup>

This summary was fleshed out in great detail in his *Tracts Relative to the Laws against Popery in Ireland*.

Having grown up in Ireland, and with Catholic relatives in his mother's family, Burke was well aware that the "popery laws" had two general purposes: to persecute Catholics for adhering to their religion, and to reduce them to extreme poverty and ignorance by proscribing them from the social rights and political benefits of the British constitution. In the first section of his *Tracts*, he described how particular statutes prohibited the rights of inheritance, encouraged children "to revolt against their parents" by going to court to secure their estate; gave wives who became Protestant power over the children and property of their Catholic husbands, and excluded Catholics from all the professions. He noted that the penal laws prevented Catholics from attending schools, or establishing their own, or even from sending their children abroad to be educated. These laws extended to the keeping of arms for "the right of self-defence," which Burke called "one of the rights by the law of nature." He noted that "in order to enforce this regulation, the whole spirit of the common law is changed, very severe penalties are enjoined, the largest powers are vested in the lowest magistrates." The whole system of the penal laws was fed by "informers," who received a share of the fines levied or of property confiscated. In addition, many of the Catholic clergy were "banished the kingdom," and "should they return from exile" they were "to be hanged, drawn, and quartered." All of these unjust statutes, Burke insisted, violated the

natural and civil rights of Catholics, and kept Ireland in a perpetual state of unrest.<sup>13</sup>

In the second part of his *Tracts*, Burke turned to the larger questions of the nature and purpose of law, government, and civil society. Here he examined not the particular provisions and civil effects of the penal laws, but the legal and moral implications of their principles. Here, for the first time in his early political and legal writings, Burke set forth his belief in the moral natural law as the basis of every just and free social order. He rejected the claim that rulers have the right to make whatever laws they please, by virtue of being the duly authorized legal power of government:

They have no right to make a law prejudicial to the whole community...because it would be made against the principle of a superior law, which it is not in the power of any community, or of the whole race of man, to alter—I mean the will of Him who gave us our nature, and in giving impressed an invariable law upon it. 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—or that laws can derive any authority from their institution merely, and independent of the quality of the subject-matter. No argument of policy, reason of state, or preservation of the constitution can be pleaded in favor of such a practice. They may, indeed, impeach the frame of that constitution, but can never touch that immovable principle. This seems to be, indeed, the doctrine which Hobbes broached in the last century, and which was then so frequently and so ably refuted. Cicero exclaims with the utmost indignation and contempt against such a notion: he considers it not only as unworthy of a philosopher, but of an illiterate peasant, that of all things this was the most absurd, to fancy that the rule of justice was to be taken from the constitution of commonwealths, or that laws derived their authority from the statutes of the people, the edicts of princes, or the decrees of judges. If it 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.<sup>14</sup>

Clearly, Burke rejected Thomas Hobbes' conception of political and legal sovereignty, that the arbitrary will of the sovereign dictates the law of the land. Such a theory of sovereignty sanctifies every species of tyranny, whether under monarchy, oligarchy, or democracy. Like Sir Edward Coke, who insisted that the king is under the law, Burke believed that all rulers are obliged to obey the laws of equity and general public utility, in conformity to constitutional law, which itself is based upon moral natural law.

Burke was well aware that the most fundamental reason why the British government persecuted the people of Ireland was that they persisted in adhering to the Catholic religion. The whole question of how any established institution, in church or state, responds to revolutionary innovations involves different views of persecution. Burke noted that "it is proper to recollect that this religion, which is so persecuted in its members, is the old religion of the country, and the once established religion of the state—the very same which had for centuries received the countenance and sanction of the laws." He then observed that "veneration of antiquity is congenial to the human mind." Persecution is never warranted, Burke argued, but an established religion, like a state, at least has "prepossession" and "the veneration of past age" on its side in defending itself from revolutionary innovations. "But an opinion at once new and persecuting is a monster, because, in the very instant in which it takes a liberty of change, it does not leave to you even a liberty of perseverance."<sup>15</sup> Historical prescription in institutions, like private property rights, was for Burke the soundest, most general, and most recognized title within society, and rested not upon anyone's arbitrary will, but was a title which is not the creature, but the master, of positive law, and is rooted in the constitutional system of a nation.

Burke once stated that among the first thoughts that crossed his mind on being elected to Parliament in 1765 was that he might

achieve some measure of justice to his native country. He was acutely aware that appeals to the principles of moral natural law and constitutional law were in themselves ineffectual against prevailing political power: “these principles,” he noted, “in their abstract light, will not be very strenuously opposed.”<sup>16</sup> But in practice the arbitrary will of those in power reigned supreme. It was no news to Burke that large numbers of men in their exercise of power were incurably corrupt. In his letter to Sir Hercules Langrish (1792), Burke observed, ironically, that in his coronation oath “the king swears he will maintain...‘the laws of God.’ I suppose it means the natural moral laws.”<sup>17</sup> This oath was consistent with Burke’s belief that “the principles of true politics are those of morality enlarged.” But he reminded Langrishe that for several centuries under English kings, Ireland had suffered “penalties, incapacities, and proscriptions from generation to generation,” and was kept constantly “under a deprivation of all the rights of human nature.”<sup>18</sup> This systematic tyranny was sustained because the king and English Parliament chose to rule by their arbitrary will, while knowing perfectly well that they violated both moral and constitutional law.

During almost three decades in Parliament, the practical means of removing the penal laws against Irish Catholics frequently absorbed Burke’s attention. He maintained an extensive correspondence with many Irishmen, such as Reverend Thomas Leland and Lord Kenmare, whose major concern was religious freedom; and he wrote to members of the Irish Parliament, such as Edmund Pery, Thomas Burgh, William Smith, and Sir Hercules Langrishe. Burke was particularly interested in removing restrictions against freedom in economics and religion. In 1778, in cooperation with Lord Nugent, he obtained some commercial rights for Ireland. Because he was Irish, and was suspected by some political enemies of being a Catholic in disguise, he had frequently to work in-directly on behalf of Ireland. Burke wrote much of the Savile Act of 1778, introduced by George Savile, which eased restrictions on Catholics in England, and became the model for similar legislation in Ireland. In 1779-80 and 1782, he

drafted bills that gave some constitutional rights to Ireland in economics and religion. His efforts to include Ireland in “the principles of free trade” for Scotland in 1780 cost Burke his Bristol constituency. But in 1785, Pitt’s “Irish Propositions,” based on Burke’s bill and Adam Smith’s theory of free trade, was passed.

Whenever England faced a serious crisis abroad, as during the American and French revolutions, Burke used these occasions to compel the English government to extend the benefits of equal citizenship to Ireland. Two years after the French Revolution began, in 1791, the Society of United Irishmen was formed, including Presbyterians and Catholics, whose membership included many who held radical ideological revolutionary theories. Some had publicly expressed their sympathy with the French Jacobins, and hoped by violence to overthrow the English government and to install a state modelled on the French Revolution. Burke believed that such a revolution would replace one tyranny with another tyranny. He urged the Prime Minister of England, William Pitt the Younger, to prevent such an event by granting the Irish the civil rights of the constitution.

### **III. Burke’s Legal Erudition and the American Revolution**

Since this essay is centered in Burke’s legal erudition in relation to his politics, it will not discuss the thesis of such scholars as Robert R. Palmer, Bernard Bailyn, and Gordon Wood, among others, that the American Revolution was ideological in its origins, that from the very beginning of the conflicts with Britain, and even before there were any serious points of friction over taxes and other matters, the Americans aimed at being independent from Britain. Such an interpretation of the American Revolution presupposes that deists and atheists, the dissenting Protestant sects, such as Congregationalists, Baptists, and Presbyterians, and the preponderance of lawyers sent to the Colonial Congress, were all essentially precursors of the French revolutionary Jacobins. Despite Burke’s part in writing *An Account of European Settlements in America* (1757), his active role and

correspondence as agent in Parliament for the General Assembly of the Province of New York (1771-1774), and his own statement that he had “spared no pains to understand” America,<sup>19</sup> (1777), he has been charged with a profound ignorance in not understanding the supposed ideological basis of the American Revolution, or of choosing to ignore the extent to which America was dominated by eighteenth-century Commonwealthmen. Burke expressly denied that the Colonies were the aggressors in the events that led to military opposition to Britain; he held that the Americans stood in relation to Britain as the English people did to King James II in 1688. He almost never used the phrase “the American Revolution” because to him the conflict began as a civil war within the British Empire over the constitutional rights of the colonists, and eventually evolved into a war of colonial independence. To Burke, the American Revolution was not a prelude to the French Revolution.

Almost from the moment that Burke was elected to Parliament he was wholly absorbed by the legal nature of the conflict between Britain and her American colonies. Undoubtedly, his experience of how grievously the English government violated the moral natural law in Ireland did much to sharpen his awareness of the grounds of Colonial complaints regarding taxes, restrictions placed upon their trade, and the refusal to grant legislative authority to the Colonial assemblies in their internal affairs. Since these legal conflicts were far less serious than the penal laws against Irish Catholics, it was not necessary for him to appeal directly to the moral natural law in seeking redress for colonial grievances. Only the most extraordinary violations against life, liberty, and property, such as British arbitrary will through tyranny in Ireland and India, and the Jacobin tyranny in France, required direct appeals to the ethical principles in natural law. The conflict with the American colonies could best be discussed in terms of violations of the British constitution and moral prudence through the arbitrary will of such ministers as George Grenville and Lord North, in their insistence that they had the legal abstract “right” through their sovereignty to legislate in all

things to the colonies. Such an assumption completely ignored the great historical changes that had taken place in the colonies, the diversity of the population, the temperament of its people, and the extent to which the colonial assemblies had become self-sufficient legislative bodies that reflected their love of freedom. To ignore constitutional legal restraints and the cultural inheritance of the colonies, was to Burke a preliminary stage that in time would result in the more serious violations of moral natural law.

In his first speech in the House of Commons, early in 1766, in favor of repealing the Stamp Act, Burke's legal erudition and future greatness as a politician was clearly evident. On March 9, 1766, Dr. Samuel Johnson wrote of Burke's initial speech:

He has gained more reputation than perhaps any man at his first appearance ever gained before. He made two speeches in the House for repealing the Stamp Act, which were publicly commended by Mr. Pitt, and have filled the town with wonder. Mr. Burke is a great man by nature, and is expected soon to attain civil greatness.<sup>20</sup>

Johnson was not easily given to praise men, and his own party politics were very different from Burke's Whig beliefs, but he recognized that the immense legal learning that Burke brought to bear upon political issues set him far above the understanding of his colleagues. From 1766 until the conclusion of hostilities with America, Burke continued to fill the political world with wonder.

A pamphlet by George Grenville, the king's prime minister, accusing Burke and the Rockingham Whigs of ruining his policy of taxing the colonies for revenue, provoked Burke to reply in *Observations on "The Present State of the Nation"* (1769). In his defense of his party, Burke attributed Britain's problems in the Colonies to "the injudicious tampering of bold, improvident, and visionary ministers," who violated historical experience and the restraints of constitutional law, and made their own speculative, abstract, *a priori* reasoning the basis of politics.<sup>21</sup> Burke's characteristic skepticism regarding ideology, and his trust in legal

prescription and historical experience, is clearly evident in his rebuttal of Grenville. This argument became his grand theme throughout his criticism of the later colonial policies of Lord North. In his *Thoughts on the Cause of the Present Discontents* (1770), he condemned the “high talk of Parliamentary rights, of the universality of legislative powers, and of uniform taxation,” without regard to the circumstances of each colony, or to the consequences of such acts, as a violation of moral prudence. He warned the members of the House that “an attempt towards a compulsory equality in all circumstances, and an exact practical definition of the supreme rights in every case, is the most dangerous and chimerical of all enterprises.”<sup>22</sup> Burke’s critical response was similar to that of Sir Edward Coke and the seventeenth century constitutional lawyers who opposed the arbitrary will of the Stuarts and their ministers. Under the constitutional law of England, liberty and property were entailed inheritances derived from their forefathers, and not favors that could be granted or withheld by rulers.

During his speeches in Parliament, Burke frequently paid special tribute to the legal profession as a source of political authority. In 1770 he remarked: “No man here has a greater veneration than I have for the doctors of the law.”<sup>23</sup> Four years later, in his, *Speech on American Taxation*, he voiced one of his greatest tributes to outstanding lawyers and the law: “The law...is, in my opinion, one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalize the mind in exactly the same proportion.”<sup>24</sup> Since he believed that nothing sharpens the mind better than the study of the law, he cautioned his colleagues during his *Speech on Conciliation* (March 1775), not to underestimate the resources of the Americans, who had bought as many copies of Blackstone’s *Commentaries* as the British public. “In no country perhaps in the world is law so general a study.” The political consequence in defence of liberty and property was perfectly clear: “This study renders men acute,

inquisitive, dexterous, prompt to attack, ready in defence, full of resources." But beyond what the law allows or prohibits, Burke believed, politics should take into account the whole cultural inheritance of a people: "It is not what a lawyer tells me I may do, but what humanity, reason, and justice, tell me I ought to do."<sup>25</sup> Like Aristotle, Burke believed that politics should be adjusted not to human reasonings, even legal reasonings, but to human nature, in which reason is but a part, and by no means the greatest part.

The ultimate conflict between Britain and her American colonies finally came down to the question of sovereignty and independence: whether or not British sovereignty could be reconciled with the American insistence upon civil liberty. If each American opposition to particular violations of constitutional law was treated by the British Parliament as a denial of its sovereignty, there was no way to reconcile their differences. The Americans refused parliamentary demands for unconditional submission in all things as a denial of their constitutional freedom. As Burke put it in his *Speech on American Taxation*: "If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face. Nobody will be argued into slavery." Only through conciliation, Burke believed, could Britain restore "the former unsuspecting confidence of the colonies in the mother country."<sup>26</sup>

Conciliation became Burke's key word for any chance of preventing armed resistance to the claim of Parliament that it ruled "according to abstract ideas of right." Conciliation was to Burke synonymous with moral prudence, which he considered the first of political virtues. Not force, but "a wise and salutary neglect" was the means of a "prudent management" of the colonies. In countries where lawyers are not in abundance, "the people, more simple, and of a less mercurial cast, judge of an ill principle in government only by an actual grievance;" but in the American colonies, where lawyers are a dominant force, "they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted

breeze.” Parliament was wrong to apply “the ordinary ideas of criminal justice to this great public contest,” Burke observed, and then stated one of his most famous and often quoted aphorisms: “I do not know the method of drawing up an indictment against a whole people.” Burke objected vigorously to an act of Parliament that would send to England for trial any rebel in Massachusetts, “under an act of Henry VIII.” This “mode of criminal proceeding” would inflame rather than restore tranquility. In opposition to treating the colonies by laws of criminal justice, Burke appealed to constitutional law and in practice to his principle of prudence: “Ideas of prudence and accommodation to Circumstances prevent you from taking away the charters of Connecticut and Rhode Island,” Burke recognized that the king’s ministers thought in terms of ideological abstract theories of government, that this was what led them to affirm the absolute “right” of Parliament in governing the colonies. In sharp opposition to such political assumptions, Burke set forth his own political method: “Man acts 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.”<sup>27</sup> Burke concluded his *Speech On Conciliation* by condemning the materialistic basis in the politics of many of the members of Parliament; he described them as

the profane herd of those vulgar and mechanical politicians who have no place among us: a sort of people who think that nothing exists but what is gross and material—and who, therefore, far from being qualified to be directors of the great movement of empire, are not fit to turn a wheel in the machine.... Magnanimity in politics is not seldom the truest wisdom, and a great empire and little minds go ill together.<sup>28</sup>

Burke’s prophetic vision of the issues involving the conflict with America was rejected by Parliament, which voted to send six

thousand more troops to New England to enforce its petty legalisms.

Between 1777 and 1779, Burke's legal erudition and practical politics combined to strongly oppose several legislative acts of Parliament regarding the American colonies, in its attempts to compel colonial obedience to its statutes. He noted that Parliament revived such tyrannical legal bodies of past ages as "the High Commission Court and the Star-Chamber" of the Tudors, all of which were repealed as unconstitutional in 1641. The jurisdiction of such courts substituted criminal law for constitutional law in settling colonial resistance, and thus disordered the whole normal and traditional frame of jurisprudence, by putting Americans out of the protection of civil laws under the British constitution. For Parliament to declare criticism and resistance to its innovative acts as "high treason," and to invoke an obsolete statute of Henry VIII in order to justify sending rebellious Americans to England for trial, destroyed the prescriptive freedoms in common law, nullified *Habeas Corpus* and trial by jury, and in practice legalized judicial murder. When Parliament closed the Port of Boston, and revoked the Massachusetts Charter, Burke responded: "We have made war on our colonies, not by arms only, but by laws." The British Empire, he reminded his colleagues, was "a vast, disconnected, infinitely diversified empire," in which the colonial legislatures had evolved constitutional powers to pass laws in accordance with their Royal charters. By assuming that statutes by Parliament took sovereign precedence over long-established charters, the British government violated moral prudence by ignoring the changes in empirical circumstances which had led to colonial self-rule in internal affairs. Burke perceived that "this double constitution" created a conflict over legal sovereignty that involved Parliament and the colonies in complex legal and political maneuverings more centered in international law than in constitutional differences.<sup>29</sup>

In 1777 Burke noted that in time of peace, only a nation that is recognized as legally established has any moral or legal claim to make international treaties and to declare war. By treating

Americans who resisted Parliamentary decrees as outlaws and criminals, rather than as citizens dissenting from imprudent or arbitrary rule, and then by using military power to compel obedience, Parliament made it impossible to settle colonial conflicts under constitutional law, and in practical effect put the colonists in possession of the law of nations: “Whenever rebellion really and truly exists...government has not entered into...military conventions, but has ever declined all intermediate treaty which should put rebels in possession of the law of nations with regard to war.” In 1778, Burke objected to the plan of Parliament to have American Indians make war on the colonies, and to incite rebellion among Negro slaves. He regarded this plan as a violation of international law. “He insisted that the proclamation for that purpose was directly contrary to the common statute law of this country, as well as to the general law of nations.”<sup>30</sup>

In December, 1779, Burke contended that the American colonies were within their moral and legal rights to form a political and military alliance with France, which had been formally signed on February 4, 1778:

Mr. Burke entered into an ample investigation of the propriety of America joining with France, and contended that in all ages and in all countries, it was perfectly natural for revolted subjects to form an alliance with that power known to be most inimical to the state from whose supremacy they had withdrawn, and to whom the destruction of the interest of the former parent state was obviously a matter of desirable advantage.<sup>31</sup>

Since the first law of nature was the right of self-survival, in this passage, reported by the Commons clerk as indirect discourse, Burke’s contention that the alliance was “natural” rested upon an appeal to legal precedents among nations. The utility or “desirable advantage” to the colonies and France of destroying Britain’s sovereignty over the colonies was not the legal basis for their alliance, but rather a political result of following a legitimate self-interest for survival, consistent with moral natural law.

But Burke's most severe attack on violations of international law by Britain, during its struggle with the American colonies, occurred on May 14, 1781, during his speech on "Inquiry into the Seizure of Private Property in St. Eustatius." At a time when Holland and Britain were not at war, and as a member of the League of Armed Neutrality, Holland adhered to Grotius' principle that neutral ships have free access to world trade, this tiny West Indies Dutch island was seized by Britain's Admiral Rodney and General Vaughan, and in the name of the British Crown all of the private property of every Dutch, American, Jewish, and even British resident and merchant was confiscated. Burke condemned this confiscation as "a most unjustifiable, outrageous, and unprincipled violation of the law of nations."<sup>32</sup> He considered the confiscation of the property of the Jews as particularly unjust, because they had no nation to which they could look for material compensation or legal redress.

In his speech, as reported by the Commons' clerk, Burke contended that the rules of war and conquest among civilized nations were based upon international law, which derived from moral natural law.

Mr. Burke entered largely into the investigation of that right which a conquerer attained to the property of the vanquished by the law of nations.... He declared that the general confiscation of the private property found upon the island was contrary to the law of nations, and to that system of war which civilized states...by their consent and practice, thought proper to introduce. Perhaps it might be said, there was no positive law of nations, no general established laws framed and settled by acts in which every nation had a voice. There was not indeed any law of nations established like the laws of Britain in black letter, by statute and record; but there was a law of nations as firm, as clear, as manifest, as obligatory, and indispensable.... There were certain limited and defined rights of war recognized by civilized states, and practiced in Enlightened Europe.... They were established by reason, in which they had their origin...by the convention of parties...by the

authorities of writers, who took the laws and maxims...from the consent and sense of ages; and lastly, from the evidence of precedent. Mr. Burke...said that a king conquered to acquire dominion, not plunder; that a state does not go to war with individuals, but with a state; and in conquest, does not take possession of private property. By this maxim the calamities of war are mitigated.... This law, therefore, directs that the property of individuals, in a territory surrendering at discretion, is not only to be spared, but to be secured.... When men surrender, they are entitled to protection. There is a virtual compact in conquest, by which protection arises out of, and accompanies, allegiance. Can the King of Great Britain seize upon the property of his subjects at his will and pleasure? No; nor can he in the instant of conquest seize on the goods and effects of the conquered.... Every monarch, however despotic, is bound by the very essence of his tenure, to observe this obligation.... The king who should receive the surrender of a people, thereby admitting them within the pale of his government, and afterwards strip them of their property, must, in so doing, forfeit his royal authority, and be considered only as a robber.... This is a principle inspired by the Divine Author of all good; it is felt in the heart; it is recognized by reason; it is established by consent.... By the convention of parties, this law of nations was established and confirmed.<sup>33</sup>

The recorder of Burke's speech does not supply the rich empirical details of his argument, but states categorically that "Mr. Burke...in a variety of most beautiful and forcible arguments, enforced the doctrine of the law of nations."<sup>34</sup> To Burke, British violations of international law merely confirmed his belief that in dealing with the domestic conflicts with her American colonies, Parliament had made its statutory will paramount to both constitutional law and to the legal rights of colonial charters as exercised by colonial legislatures.

In Burke's final important statement on the Anglo-American conflict, to his Bristol constituents, in *A Letter to the Sheriffs of Bristol* (May 16, 1777), his legal erudition in constitutional and

international law was consciously extended to include his principle of moral prudence, which he stated was “in all things a virtue, in politics the first of virtues.”<sup>35</sup> To Burke, prudence is the spirit of God’s moral natural law fulfilling itself in practice through the principles of true politics. Six years before this letter to his constituents, in defense of his party politics and his own private character regarding the American Revolution, in a very long and complex letter to his friend Dr. William Markham (9 November, 1771), Burke set forth some of his most important personal and public political beliefs as principles:

My principles enable me to form my judgements upon men and actions in history, just as they do in current life; and are not formed out of events and characters, either present or past. History is a preceptor of prudence not of principles. The principles of true politics are those of morality enlarged, and I neither now do or ever will admit of any other.<sup>36</sup>

This vital statement, which includes his view of human nature, history, prudence, and the moral basis of true politics, all bound indissolubly together in an organic unity, so characteristic of Burke’s eclectic mind in all its complexity, far transcends the ambitions and policies of political parties. “The principles that guide us in public and in private, which as they are not of our devising but moulded into the nature and essence of things, will endure with the sun and moon, long very long after Whig and Tory, Stuart and Brunswick, and all such miser-able bubbles and playthings of the hour are vanished from evidence, and from memory.”<sup>37</sup> Moral prudence differed radically from the intellectual calculations of expedient party politicians; it took empirical circumstances into full account in order to fulfill the true purposes of the state “within history,” so that “the rules of prudence ...are formed upon the known march of the ordinary providence of God.”<sup>38</sup> Contrary to John Morley and the utilitarian and positivist scholars of Burke, prudence is not an intellectual virtue but a moral virtue. Intellectual calculation could justify corrupt

political behavior on the score of utility. Burke distinguished carefully between utilitarian expediency and moral prudence: “Our love to the occasionalist, but not server of occasions,” and he concluded: “God forbid that prudence, which is the supreme guide, and indeed stands the first of all virtues, should ever be the guide of any of the vices!”<sup>39</sup> His final reflections on the American Revolution are best understood in terms of a valid understanding of his principle of prudence.

To Burke, the primary cause of the American Revolution was the violation of moral prudence by the British Parliament and monarchy:

So truly has prudence (constituted as the god of this lower world) the entire dominion over every exercise of power committed into its hands; and yet I have lived to see prudence and conformity to circumstances wholly set at naught in our late controversies, and treated as if they were the most contemptible and irrational of things.<sup>40</sup>

In passing ideological statutes that violated prudence and historical experience, the constant error of Parliament was its assumption that its legal power to rule was equivalent to the abstract right to pass whatever legislation it willed. In opposition to this assumption, Burke insisted that “till power and right are the same,” no ruling legislative body, no matter how legitimate, has any right to exercise power inconsistent with virtue as prudence. To him the one indisputable empirical fact was that “the disposition of the people of America is wholly averse to any other than a free government.” Therefore, he wrote:

Instead of troubling our understanding with speculations concerning the unity of empire, and the identity or distinction of legislative powers, and inflaming our passions with the heat and pride of controversy, it was our duty, in all soberness, to conform our government to the character and circumstances of the several people who composed this mighty and strangely diversified

mass. I never was wild enough to conceive that one method would serve for the whole; that the natives of Hindostan and those of Virginia could be ordered in the same manner.... I was persuaded that government was a practical thing, made for the happiness of mankind and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians. Our business was to rule not to wrangle: and it would have been a poor compensation that we had triumphed in a dispute, whilst we lost an empire.<sup>41</sup>

Burke believed that it was a form of metaphysical or ideological madness for politicians to ignore empirical facts and changes through historical experience, and to substitute for the complex diversity of society abstract speculations about the nature of government.

It is significant that in 1777, during the American crisis, he criticized Richard Price, a Non-conforming dissenting minister, for engaging in such ideological speculations about liberty regarding the conflict with America. This was the very same man whose sermon at the Old Jewry in November, 1789, provoked Burke into writing his *Reflections on the Revolution in France* (1790), "There are people 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." All such speculations, Burke held, are destructive to all civil authority.

Prudence (in all things a virtue, in politics the first of virtues,) will lead us rather to acquiesce in some qualified plan that does not come up to the full perfection of the abstract idea, than to push for the more perfect, which cannot be attained without tearing to pieces the whole con-texture of the commonwealth.... In all changes in the state, moderation is a virtue, not only amiable, but powerful. It is a disposing, arranging, conciliating, cementing virtue.... Moderation (which times and situations will clearly distinguish from the counterfeits of pusillanimity and indeci-

sion) is the virtue only of superior minds. It requires a deep courage, and full of reflection, to be temperate when the voice of the multitude (the specious mimic of fame and reputation) passes judgment against you. The impetuous desire of an unthinking public will endure no course, but what conducts to splendid and perilous extremes. Then to be fearful, when all about you are full of presumption and confidence, and when those who are bold at the hazard of others would punish your caution and disaffection, is to show a mind prepared for its trial; it discovers, in the midst of general levity, a self-possessing and collected character, which, sooner or later, bids to attract everything to it, as to a centre.<sup>42</sup>

In the pursuit of prudence, reason was important for understanding, but Burke believed that reason was but a part of human nature, and by no means the most important part. Prudence was a moral virtue because it looked to “right reason,” and the natural law, and to historical experience as a preceptor to guide statesmen to pursue the right and not the expedient. Thus, prudence to Burke was the spirit of God’s moral law fulfilling itself in society throughout history.

Although this study is severely restricted to Burke’s legal erudition and practical politics regarding the penal laws against Irish Catholics and the ideological rule of Britain over the American Colonies, the same general principles and critical methods he employed in these subjects apply with infinite variations in his management of the impeachment trial of Warren Hastings and India and in his famous attacks on the Jacobins of the French Revolution. Without mentioning any of Burke’s specific political principles, Woodrow Wilson, in *Mere Literature* (1896), wrote: “He was applying the same principles to the case of France and to the case of India that he had applied to the case of the colonies.”<sup>43</sup> It was typical of Burke’s reverence for law as the basis of society that the moment he was made manager of Hastings’ impeachment trial, he read widely in Oriental jurisprudence and culture. He studied the *Koran*, the *Shasta*, and the

*HeYada*. He extracted quotations from Tamerlane's *Institutes*, recently translated by Major Davy, Hastings' former secretary. He used Joseph White's translation of the *Institutes of Timour* (1783), and Jean Baptiste Tavernier's *Travels into Persia and the East Indies* (1677). His legal erudition in Oriental jurisprudence enabled him to condemn Hastings' claim that the morality of the East was deficient or non-existent, and that as British governor of Bengal he could rule by his arbitrary will. In all of Burke's major political concerns during his twenty-nine years in the House of Commons, his legal erudition provided him with the weapons he needed in the practical political issues he encountered.

Peter J. Stanlis  
Rockford College

#### NOTES

1. *Private Papers of James Boswell* (New York: Mount Vernon Press, 1928-37) XVII, 100.
2. Peter J. Stanlis, *Edmund Burke and the Natural Law* (New Brunswick: Transaction, 2003) 34, 35.
3. Edmund Burke, "Report from the Committee of the House of Commons, Appointed to Inspect the Lords' Journal in Relation to their Proceedings on the Trial of Warren Hastings, Esquire," in *The Works of the Right Honourable Edmund Burke* (London: J.C. Nimmo, 1887) XI, 68.
4. Burke, *Reflections on the Revolution in France* (London: J. Dodsley, 1790) 223.
5. Burke, *An Essay Towards an Abridgement of the English History*, in *Works*, VII, 482.
6. *Ibid.*
7. Edward Gibbon, *The Decline and Fall of the Roman Empire* (New York: Modern Library, 1995) I, 60.
8. Peter J. Stanlis, *Edmund Burke: The Enlightenment and Revolution* (New Brunswick: Transaction, 1991) 64-67.
9. Burke, *Three Letters to a Member of Parliament on the Proposals for Peace with the Regicide Directory of France, Letter II*,

*Works*, V, 344.

10. Burke, *The Annual Register* (1760), reprinted in Peter J. Stanlis, editor, *The Best of Burke: Selected Writings and Speeches of Edmund Burke* (Washington, D.C.: Regnery, 1963) 108-109.

11. Stanlis, *Edmund Burke and the Natural Law*, 40-41.

12. Burke, "Letter to Sir Hercules Langrishe, on the subject of the Roman Catholics of Ireland," *Works*, IV, 305.

13. Burke, *Fragments of a Tract Relative to the Laws against Popery in Ireland*, *Works*, VI, 312-13.

14. *Ibid.*, 325.

15. *Ibid.*, 336.

16. *Ibid.*, 328.

17. Burke, "Letter to Sir Hercules Langrishe," *Works*, IV, 252

18. Burke, "Letter to a Peer of Ireland, On the Penal Laws Against Irish Catholics," *Works*, IV, 223.

19. Burke, "Letter to the Sheriffs of Bristol, on the Affairs of America," *Works*, II, 199.

20. Stanlis, *Edmund Burke: The Enlightenment and Revolution*, 22.

21. Burke, *Observations on a Late Publication, Intituled, "The Present State of the Nation,"* *Works*, 272.

22. *Ibid.*, 322.

23. Stanlis, *Enlightenment and Revolution*, 8-9.

24. Burke, *Speech on American Taxation*, *Works*, II, 37-38.

25. Burke, *Speech on Moving Resolutions for Conciliation with America*, *Works*, II, 140-41.

26. *Ibid.*, 106.

27. *Ibid.*, 170.

28. *Ibid.*, 181.

29. Burke, "Letter to the Sheriffs of Bristol," *Works*, II, 203.

30. Stanlis, *Edmund Burke and the Natural Law*, 90-91.

31. *Ibid.*

32. *Ibid.*, 91-92.

33. *Ibid.*

34. *Ibid.*

35. Burke, *The Works and Correspondence of the Right*

*Honourable Edmund Burke* (London: F. & J. Rivington, 1852) I, 564.

36. *Ibid.*, 165, 166.

37. Burke, *Works and Correspondence*, I, 332, 333.

38. Burke, *Three Letters to a Member of Parliament on the Proposals for Peace with the Regicide Directory of France, Letter II*, *Works*, V, 343.

39. Burke, "Speech in Opening the Impeachment of Warren Hastings, Third Day," *Works*, X, 49.

40. Burke, "Letter to the Sheriffs of Bristol," *Works*, II, 201.

41. *Ibid.*, 201-202.

42. Burke, *Works and Correspondence*, I, 564-65.

43. Woodrow Wilson, *Mere Literature* (Port Washington, NY: Kennikat Press, 1965) 156.