

“A Man of Very Superior Abilities”:

Francis Stoughton Sullivan and the
Lectures on the Constitution and Laws of England

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Francis Stoughton Sullivan, lawyer and lecturer, exemplifies the complexities of both English law and Irish life in the eighteenth century. Sullivan was born in 1719 in county Galway, in the west of Ireland, the son of Francis Sullivan, an army lieutenant. The Sullivans, members of the Ó Súilleachán Mór branch of the O’Sullivan family, are linked to County Kerry and, with the unusual Stoughton name, presumably to England. A protestant of the established church in a country still largely catholic, the jurist spoke Irish and took great pride in his link to native Gaelic culture. Indeed, he maintained a deep interest in the ancient constitutions of both Ireland and England. He was also a jurist of considerable breadth. Professor of Civil law at the University of Dublin, he held its first chair in Feudal and English law while simultaneously practicing in the admiralty and ecclesiastical courts. His lectures, reprinted here from the annotated second edition, remain an overlooked and invaluable resource for the history of the Common law. Placed in its Irish context, the text is more interesting and rewarding still.

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It was only in the eighteenth century that university education in national law, as opposed to Civil and Canon law, was established in any meaningful sense in France, Spain, or America. In England, education for future barristers had long centered on London’s four Inns of Court. The Inns had once been seen as collegial and

* I am indebted to Jonathon Armstrong, librarian at King’s Inns, Dublin for his assistance. An expanded discussion of Sullivan and the University of Dublin is forthcoming as Donlan, “‘The places most fit for this purpose’: Francis Stoughton Sullivan and legal study at the University of Dublin’ in Michael Brown (ed.), *Universities and the Common Good in Early Modern Europe* (forthcoming Dublin: Four Courts Press, 2003).

humanistic, a 'third university' of the Common law alongside Oxford and Cambridge's instruction in the Civil law. Already in decline, education at the Inns was interrupted by the wars of the seventeenth century and never fully recovered. By the next century, criticism of English legal education, both at the Inns and the universities, was commonplace. At the Inns, the performance of legal exercises and requirements of residence and 'keeping terms' had become mere forms. Law students were, in effect, required to educate themselves by self-directed reading or attendance in chambers and the courts. On neither island were efforts to affect improvement in the study of English law wholly successful. Having secured Oxford's Professorship of English law, William Blackstone began the first formal university lectures on the Common law in 1758. In his lectures, he sought to provide a more liberal or enlightened education in the law, balancing an understanding of legal principles with the practical education of the Inns. A more lasting legacy was his success in putting the Common law into a reasonably organized, even 'institutional' form mirroring the more methodical structure of the Civil law.

The Oxford effort was not entirely isolated. In 1762, the Inns attempted to standardize the conditions required for a call to the bar and to induce gentlemen to become barristers. This included waivers of two years on the required terms for students of Oxford and Cambridge, a grant that did not apply to the University of Dublin. It only received the same privilege in 1793, though King's Inns, the so-called Irish 'Inn of Court' made allowances for all three. Additional reform of the English Inns was attempted sporadically, but unsuccessfully, throughout the century. In the early 1760s, the University of Dublin established a Regius Professorship in Feudal and English Law, the first such position after Blackstone. The successful candidate could be elected for either a set term or for life, though if already a university fellow he could only be elected for life and was required to vacate the fellowship. The applicant was required to be a barrister of two years standing, given a salary of £360 per annum, and would lecture twice weekly during term.

It was in this climate that Francis Stoughton Sullivan began his lectures in law at the University of Dublin in 1761. Sullivan first entered the university's sole college, Trinity College, in 1731/2. Founded at the end of the sixteenth century, the university had long served as a bastion of the established church. There, Sullivan was a 'scholar' and graduated B.A. in 1736. He was made a jurist 'fellow' at a very young age and his vote at a Trinity parliamentary election was set aside because he was still a minor. He subsequently graduated

M.A. (1739), LL.B. and LL.D. (1745). Study at the English Inns of Court was then required, at least formally, for those intending to practice in the Irish courts. Sullivan was registered in London's Middle Temple in 1742 and called to the Irish Bar four years later. At the university, he was professor of Civil law (1750-66), senior lecturer in Greek (1755-8), and lecturer of history and oratory (1759-60) as well as serving in a wide variety of administrative positions. A barrister, he was better known as a civilian. There was no Irish equivalent to the English 'Doctors' Commons', but he was an advocate in the admiralty and ecclesiastical courts (c.1762-6). Both at Oxford and Dublin, the Chairs in Common law were designed for university educated lawyers so that the choice of a civilian is less surprising than it might first appear.

In preparation for his lectures, Sullivan drew up and published a 'Plan for the study of the feudal and English laws in the University of Dublin' in 1761. This study was, he noted, "intirely new."¹ Fortunately,

The Publication of Mr. *Blackstone's* excellent Analysis of the *English Law*, and the universally acknowledged Success of his Lectures, do in a great Measure obviate this Inconvenience, and seem to call upon every Professor in the same *Branch*, to tread in the Steps of so great a Master²

The Oxford and Dublin situations were, however, different. Required to study in London, Irish students could not combine study both in Ireland and the Inns simultaneously. Instead of the four or five years of "a comprehensive Course taking in the whole Compass of the *English law*", the Irish had only "two Years, or a little more" in which to prepare.³ Like Blackstone, Sullivan planned the course both for young students "designed for the Profession of the Law" as well as a general audience of "Gentlemen" who could "more easily and agreeably ... [acquire] a general Insight into the Law of their Country, as is necessary for their Rank."⁴

As had been the practice of the Inns, Sullivan instituted 'moot courts' to test his students' legal skills and speaking abilities. His assigned readings included the standard works of Common law pedagogy (Littleton and Coke), but they were to supplement the *Jus fedale, per aphorismos strictim explicatum* of the Dutch civilian, canonist,

1 'Plan for the Study of the Feudal and English Laws in the University of Dublin' (Dublin: Printed by G. Faulkner, in *Essex-Street*, 1761)', 3.

2 'Plan', 3.

3 'Plan', 4.

4 'Plan', 5.

and feudalist Arnoldi Corvini (Corvinus, c.1582-?). This was “the shortest and plainest book on the subject” of feudalism.⁵ In the lectures, Sullivan noted “that every other nation in Europe hath admitted the profession of their municipal laws into their universities,” but recognized the unique challenge of the Common law.⁶ This was

that want of method, so obvious to be observed, and so often complained of in its writers of authority, insomuch, that almost all of them, and lord Coke particularly, are too apt to puzzle and bewilder young beginners; whereas other laws, the civil, the canon, the feudal, have books of approved authority, (and none other but such should be put into the students hands,) calculated purposely for the introduction of novices; wherein the general outlines of the whole law are laid down, the several parts of it properly distributed, its terms explained, and the most common of its rules and maxims, with the reasons of them, delivered and inculcated.⁷

When Sullivan began, Blackstone’s *Commentaries on the Laws of England* (1765-9) was not yet published. In fact, the Irishman’s broad legal training might have suggested that he, rather than Blackstone, was more likely to present English law in a systematic fashion.

While Sullivan emphasized the implicit reasonableness of the Common law, however, he did not press English law into civilian forms or adopt even Blackstone’s method. Instead, he complimented Corvini’s treatise with “an historical method ... more entertaining to Beginners, and better adapted to shew the Reasons for the original Law, and of its several subsequent Alterations.”⁸ This approach was especially well-suited to the feudal relationship between land law and government. Sullivan then turned to a more general outline of the law and an extended discussion of the Magna Charta. His choice reflected, at least in part, the widespread influence of Montesquieu’s *Spirit of the Laws* (1748). A similar approach found favor among the Irishman’s contemporaries in the ‘Scottish enlightenment’. In the early 1760s, for example, Adam Smith’s lectures on jurisprudence and moral philosophy combined the naturalism of his *Theory of Moral Sentiments* (1757) with an historical method. Though far less elaborate than Smith or his protégé John Millar, whose Glasgow lectures in the Civil law

5 ‘Plan’, 5.

6 *Lectures*, 7.

7 *Lectures*, 13.

8 ‘Plan’, 6.

began the same year as the Dublin lectures, Sullivan suggested a similar connection between “the common feelings of human nature” and their expression in human law and society.⁹ This combination of natural and historical jurisprudence, a reviewer later wrote of the published lectures,

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 interests and passions of mankind.¹⁰

In his lectures, Sullivan celebrated the spirit of the English laws while situating them in a wider European context.

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Law and history have always been essential elements in the complex rhetoric and reality of Irish life. In the early seventeenth century, Ireland’s national or (more properly) native system of Brehon law was largely extinguished by the force of arms. English critics, most notably Sir John Davies (1569-1626), had long argued that Irish law and manners, their social mores, practices, and institutions, prevented social and economic progress, leaving the Irish “little better than cannibals.”¹¹ His *Discovery of the True Causes why Ireland was Never Entirely Subdued* (1612) celebrated the practical control of the country achieved in the aftermath of the Nine Years’ War (1594-1603). But it also illustrated the complicated relationship between customary and positive law, between consent and command. Davies’ *Irish Reports* (1615) are often cited for the proposition that English law was “nothing else but the *Common Custome* of the Realm.”¹² But this was clearly not true in the Irish kingdom. Davies’ actions in the Irish administration helped, in fact, to secure a judicial conquest of the Brehon customs. His critique remained a standard weapon of debate on Irish law, manners, and history well into the eighteenth century. As Sullivan noted, referring to Montesquieu dichotomy between laws and

9 *Lectures*, 49.

10 1772 *Annual Register* 235 (second pagination).

11 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, 1969), James P. Myers, Jr (ed.), 163.

12 ‘Preface’ to *La primer discours des cases et matters in ley* (1615), translated anonymously as *A Report of Cases and Matters in Law* (Dublin, 1762), 3.

those customs “which supplied the place of positive laws”, the importance of such a distinction was not limited to Ireland.¹³

On the other hand, Davies’ *Discovery* could also be read as a plea for the ‘rule of law’ in Ireland, though this was invariably the rule of the Common law. Sullivan, with many native and catholic writers, often followed Davies’ analysis. The size and discretion of Irish palatines awarded after the Anglo-Norman invasion was so excessive, they argued, as to prevent good government for centuries. Irish ‘barbarism’ could thus be explained institutionally as the *weakness* of English government, coupled with the concomitant failure to incorporate the native Irish into the protection of English law. After the elimination of the Brehon laws, the numerous wars, confiscations, and plantations of the seventeenth century marked a shift from colonial to more clearly confessional differences. The eighteenth century received as an inheritance the Irish penal or ‘Popery’ laws, restricting in various ways the religious practice, education, and property ownership of Catholics and dissenters alike. If many of these statutes quickly passed into desuetude, much of the public sphere remained off-limits to the majority of the country. As Sullivan began his lectures, however, the country was experiencing a period of great intellectual and political possibility. Protestant historians had begun to draw from native sources and increasingly viewed the ancient history of Ireland, safely removed from more contemporary controversies, as their own. Catholics, too, began to protest more vigorously their loyalty to the British state. To many, a ‘patriotic’ rapprochement of Ireland’s communities seemed possible.

These forces seem to converge in Sullivan and may provide an important context for the lectures. Although Ireland is rarely mentioned in his Dublin lectures, Sullivan had a considerable interest in its language and culture. He augmented Trinity’s collection of Gaelic manuscripts, may have belonged to both the Physico-Historical Society and the Dublin Society, and was in contact with the more progressive of the city’s social circles, including the publisher George Faulkner, the catholic historian Charles O’Conor of Belanagare, the Rev. Dr. Thomas Leland of Trinity, and perhaps even the young Edmund Burke. Each of these men was involved in the recurring disputes about the role of Irish law and manners. British and Irish protestant historians had been largely dismissive of both past and present Irish culture, a view buttressed by Sullivan’s contemporary David Hume. The Scottish philosopher-historian’s *History of England*

13 *Lectures*, 2.

(1754-62), drawing heavily on Davies' account, viewed the native Irish as savages civilized by the Anglo-Normans. To the frustration of O'Connor and Burke especially, Hume uncritically repeated the more offensive and prejudicial portrayals of the Irish. O'Connor, who suffered personally the effects of the penal statutes and sought to secure their reform, argued that with the invasions of Norsemen and Normans only native manners had kept the nation from barbarism. Indeed, he pointed out the irony of a critique of the Brehon laws for inhibiting progress when the penal laws did so by design, while placing so many Irish once more outside of the protection of English law.

As Sullivan was lecturing on English law, he was actively involved in projects related to Irish law and history. Employing several well-known Gaelic scribes as early as 1742, he began a critical edition of the *Lebor Gabála Éirenn* (the *Book of the Taking of Ireland*), a mytho- or pseudo-history of the ancient Irish. Following Burke's suggestion to ensure the preservation of Irish materials, O'Connor encouraged Sullivan to embark on a translation of the *Annála Ríoghachta Éireann* (*The Annals of the Kingdom of Ireland*) into Latin. Better known as *The Annals of the Four Masters*, it was the most extensive digest of ancient Irish scholarship. The project failed, however, to attract the attention or investment of the necessary patrons in the Dublin Society. Sullivan may even have begun an Irish history, forming the basis of Leland's *History of Ireland* (1773). Sullivan presented the uncompleted work on the *Lebor Gabála Éirenn* to O'Connor (1764) and corrected the topographical descriptions for the second edition of the historian's *Dissertations on the History of Ireland* (1766). O'Connor, perhaps the most knowledgeable Gaelic scholar of the eighteenth century, called Sullivan "a gentleman, whose merit with the public must not be concealed, as he has, at great expence, made the best private collection of ancient manuscripts now in the kingdom, and none knows the use of them better."¹⁴

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This interest in Irish legal history is especially interesting given the focus on England's 'ancient constitution' in Sullivan's lectures. The belief in the ancient constitution, associated with Lord Coke and seventeenth-century Whigs, was poor history, but an essential element in eighteenth-century legal and political debate on both islands. In its

14 Charles O'Connor, *Dissertations on the History of Ireland* ((2nd edn) 1766), xi.

rhetoric of English or British exceptionalism, Whig and Tory alike found a rich and resourceful vocabulary of critique against 'arbitrary' government. Blackstone and, arguably, Montesquieu, were not immune. Even O'Connor, employing contemporary language of commonwealth and republican language, projected English models of government, complete with "glorious revolutions" and "patriot kings", into the *Irish* past. In Sullivan's lectures, too, there are repeated raptures on the Common law and the English constitution and, more surprisingly, the clichéd slurs against the Civil law. But his 'whiggism' is not without its subtleties or complications. He disagreed, for example, with both Sir Edward Coke's defense of English insularity and challenged Sir Matthew Hale on the details of English legal history. More generally, while not uncritical of the Normans, Sullivan saw feudalism as "a kind of *jus gentium*" throughout Europe.¹⁵ He placed early feudalism, with its consensual, personal obligations and limited monarchy, in a continuum between the libertarian Germanic traditions and the more authoritarian forms of late European feudalism.

The elements of Irish law most criticized by Davies and other English jurists were 'tanistry' and what they referred to as 'gavelkind', a legal term borrowed from an analogous Kentish practice of paritable inheritance. In essence, tanistry was an elective system of kingship, whereby a 'tanist' or heir-apparent was chosen by the king or tribe to succeed, often resulting in violent competition between rivals. Discussing European systems of kingship and the development of primogeniture and hereditary succession, Sullivan wrote that

the usual practice was for the king himself, before his death, to appoint the successor; generally with the consent and approbation of his states, and sometimes merely by his own act, which was almost universally allowed, and obeyed by the people. But if no such disposition had been made, the states assembled, and chose the person themselves; and these appointments generally falling on the eldest son, paved the way for lineal hereditary succession, though the case was not always so.¹⁶

"In England," he wrote, "the practice was antiently the same."¹⁷ Sullivan even presents ecclesiastical selection as developing in a similar manner. Irish 'gavelkind' involved the equal division of

15 *Lectures*, 25.

16 *Lectures*, 137.

17 *Lectures*, 137.

property between all male children, both within marriage and without. More generally, gavelkind was, Sullivan said, “the antient feudal law, and the law of England in the Saxon times ... and remained in the last century in many, if they do not still in some of the principalities of the empire.”¹⁸ This division was true, too, of kingdoms, but “the frequent wars, occasioned by these partitions, at length abolished them, and made kingdoms to be considered as indivisible inheritances.”¹⁹

On matters like the Magna Charta, Sullivan was as whiggish as his contemporaries. The charter was not merely to correct existing feudal arrangements, but was “partly to assert and restore the ancient liberties of the nation, which had been invaded; partly to alter the old law, in such particulars as had been the engines of oppression.”²⁰ The Irishman also presents English history as a continual combat with the papacy. Its kings had often acted in concert with the popes, that was how the conquest of Ireland had begun. Common lawyers had, however, “for a succession of ages, proved themselves true friends to a rational civil liberty in the subject, and to reasonable power and prerogative in the king.”²¹ But Sullivan also qualified the role of the Saxon ‘lawgivers’ and the antiquity of the Commons, stressing instead perennial, if extraordinarily pliable, principles at the core of the Common law. He highlighted throughout the lectures the development of England’s limited monarchy and mixed government, noting, for example, the necessary multiplicity of laws attending this progress.

This sense of progressive development was fundamental to Sullivan’s pedagogical method as well. In words that echo or parallel both Blackstone and Henry Home, Lord Kames’ *Historical Law Tracts* (1758), he argued that it was

hard to imagine a study more improving, more agreeable, or better adapted to a liberal mind, than to learn how, from a mere military system, formed and created by the necessities of a barbarous people, for the preservation of their conquests, a more extensive and generous model of government, better adapted to the natural liberties of mankind, took place; how, by degrees, as the danger from the vanquished subsided, the feudal policy opened her arms, and gradually received the most eminent of the conquered nation to make one people with their conquerors; how arts and commerce, at first

18 *Lectures*, 135-6.

19 *Lectures*, 136.

20 *Lectures*, 154.

21 *Lectures*, 314.

contemptible to a fierce and savage people, in time gained credit to their professors, and an admittance for them into the privileges of the society; and how, at length, with respect to the lowest class of people, which still continued in servitude, its rigour insensible abated; until, in the end, the chains of vassalage fell off of themselves, and left the meanest individual, in point of security, on an equal footing with the greatest.²²

This was a glowing tribute to the vitality, the modernity, of the ancient constitution of England. The significance, too, of creating 'one people' of conquered and conquerors would not be lost on the students of eighteenth-century Dublin. For Sullivan, the equal application of the laws may have been an English accomplishment, but an Irish aspiration.

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Not yet fifty, Sullivan died on 1 March 1766 after a long illness.²³ The date is important as numerous commentators, believing he died a decade later (1776), have read the second edition of his *Lectures* in light of an American war he never saw approach. The lectures were, in fact, first published posthumously as *An Historical Treatise on the Feudal Law of England* (1770). In notes on the history of Trinity College, John Hely-Hutchinson, provost of the university, gave a complex, contemporary Irish impression of Sullivan and his work. The jurist was, he wrote

a man of very superior abilities, of singular simplicity of manners but of invincible indolence. In the common law courts he made no progress. In the ecclesiastical courts he had better success, but [tho] in his lifetime he was more regarded as a civilian than a common lawyer, yet his *Treatise on the Feudal Law* had reflected great honour on his character.... On the posthumous publication of this work, it was coldly received, little read and never quoted in any of the courts of Ireland, but having been mentioned from the Bar and Bench in Westminster Hall as a treatise on Government, which it certainly is, his countrymen discovered their error and joined in the general approbation of this performance.²⁴

²² *Lectures*, 17.

²³ See *Faulkner's Dublin Journal* (8 Mar-11 Mar 1766) 1, *Pue's Occurrences* (4 Mar-8 Mar 1766) 2, and *Dublin Exshaw's Magazine* (1766), 312. See also 'A catalogue of books consisting of miscellanies, canon, civil, and common law, to be sold by auction, by Michael Duggan. Being the library of Francis Stoughton Sullivan' is in the National Library of Ireland, *Irish sale catalogues 1737-68*.

²⁴ John Hely-Hutchinson, *MS History of Trinity College, Dublin* (1771), 92.

A second edition of Sullivan's work—that reprinted here—was published as the *Lectures on the Constitution and Laws of England* (1776), subsequently going through numerous additional printings in Britain, Ireland, and America.

This second edition was edited by Gilbert Stuart (1743-86), jurist, journalist and a minor, colorful member of the Scottish enlightenment. In 1768, he was awarded an LL.D from Edinburgh for *An Historical Dissertation Concerning the Antiquity of the English Constitution*, published two years later. He reviewed the first edition of Sullivan's lectures.²⁵ "[I]t is obvious from his details," Stuart wrote, "that history is the best interpreter of law."²⁶ Not content with adding the footnotes and indexing of the second edition, he also included his own 'Discourse concerning the laws and government of England'. True to character, Stuart believed the unashamedly whiggish 'Discourse' to be "excellent, & of more worth than the whole book."²⁷ Among his best-known publications are *A View of Society in Europe* (1778) and *The History of Scotland* (1780), each in significant respects are histories of both laws and manners. His works, highly politicized and polemical, "integrated the English and Scottish whig traditions within a pan-European perspective on the progress of manners and institutions from rudeness to refinement."²⁸ For this, Sullivan may be partly responsible. Stuart would engage in numerous, sometimes acrimonious, literary and political debates before his own early death in 1786 at the age of forty-three.

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When Blackstone stepped down in 1766, having held his Chair at Oxford for less than a decade, lesser men followed. The number of university students attending the Inns increased throughout the century, but the Oxford experiment was rarely repeated. It was not until the next century that university education was firmly established and only in the twentieth century that it became commonplace. The Irish experience is little different. After Sullivan's death, also in 1766, his immediate successors included both the ordinary (Patrick Palmer)

²⁵ (June 1772) 46 *Monthly Review* 584 and (July 1772) 47 *Monthly Review* 38.

²⁶ (July 1772) 47 *Monthly Review* 38, 39.

²⁷ Cited in William Zachs, *Without Regard to Good Manners: A Biography of Gilbert Stuart 1743-1786* (Edinburgh, 1992), 59.

²⁸ Colin Kidd, *Subverting Scotland's Past: Scottish Whig Historians and the Creation of an Anglo-British Identity, 1689-c.1830* (Cambridge, 1993), 240.

and the bigoted (Patrick Duigenan). Sullivan's lectures had a different purpose and a considerably different method than Blackstone's *Commentaries*. They remain, however, an invaluable resource for the history of the Common law, both during and before the eighteenth century. Stuart's original review of Sullivan's lectures concluded,

We have only farther to remark, that those of our Readers who have perused the excellent Commentaries of Blackstone, and the Honourable Mr. Barrington's most learned and ingenious observations on the statutes, chiefly the more ancient, will do well to turn likewise their attention to the present very valuable publication.²⁹

Our readers will find that this remains true.

Limerick, Ireland
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²⁹ (July 1772) 47 *Monthly Review* 38, 46-7.