Chapter 1

The Laws in Ireland, 1689–1850:
A Brief Introduction

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Essentially, the tale was trivial. A scoundrel named Siobharán stole a cockerel, which had been bought at a fair by Father Aengus. A local court quickly denounced the theft and a warrant for his arrest was promptly issued. It was a local drama, a conflict within a community that was replicated across the countryside and across rural societies everywhere. But the poet and scribe Aogán Ó Rathaille (1675–1729) found something emblematic, drawing from its mundane universality a tense political specificity that twisted the tale away from the ordinary and placed it into the mythic world of the symbolic. The poem he composed, ‘Ar Choileach a Goideadh Ó Shagart Maith’ (A Good Priest’s Stolen Cock) metamorphosed the event from the banalities of local spite into a profound parable of cultural, religious and political conflict.

Blending the English and the Irish language, the opening stanza revealed Ó Rathaille’s intent. The simple inclusion of the word ‘whereas’, as well as demanding the reader’s attention, placed the case in a court where Anglophonic law encountered Irish-speaking communities:

Whereas Aonghus fáithchliste,
Sagart cráifeach críostaithcheach,
Do theacht inniu im láthairse
Le gearán cáis is firinne

Whereas the learned Aengus
A pious Christian priest
Came today before me
To make a sworn complaint

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1 An earlier version of this introduction was presented to the Toronto Legal History Group (14 January 2009).
So too, in an intriguing subversion of the reader’s expectations, the perspective taken is that of the court official; yet the bulk of his declaration is written in Irish. The confrontation is at once between the demands of the Catholic priest and the Gaelic thief and between the two linguistic worlds that uncomfortably jostle for space in the inhabitants’ cultural imagination.

This second theme in many ways trumps the first, for while Siobhán is condemned and law maintained, the thief has disappeared, leaving the complainant to declare him some ‘síofra dráíochta’ (druid phantom) – the cultural resonance of the term ‘druid’ is significant – and forcing the judge to inaugurate a search.³ The geography of this hunt again replicates the cultural divide, with the highways that traverse the landscape and provide access to the order of the state signifying the civilised terrain, while the stranger, esoteric, mythic world beyond is captured in the term ‘lios’ – a historic meeting place such as a ring fort – and in the reference to the fairy world. Thus, to find the miscreant the judge directed:

A bháílí stáit mo chúirte-se,
Déinidh cuartú ardshlite,
Is sin le diograis dúthrachta.

Ná fágaídh lios ná síchnocán
Ina gcluinfidh sidh glór na gliogarnaíl

State bailiffs of my court,
Examine every highway
And that with earnest care

Omit no lios or fairy hill
Where you hear cluck or cackle⁴

In this vignette, Ó Rathaille captured the everyday structural contentions that characterised much of the experience of the Catholic community in the early eighteenth century. That a Catholic priest was forced to throw himself upon a Protestant court for legal recompense indicated the dilemma in a precise and explicit fashion. And that the genre of the barántas, or warrant poem, of which this is an example, was sprinkled with legal English jargon – Ó Rathaille also included the word ‘wheresoever’ and the phrase ‘for your so doing’ – at once enabled a

³ Ibid., pp. 146–7.
⁴ Ibid., pp. 148–9.
parody of contemporary legal formulas and a commentary on the impotency of Gaelic culture to take control over its own affairs. But the poem suggested a problem which faced the state in turn. Until the Famine, the Irish state was confronted by a population that failed to assimilate to the linguistic, confessional and cultural demands of the polity, the political nation. Alternatively, we might say that the polity failed the people. In this introduction, we present in general terms the context in which the contributions to this collection, each attempting to add to our understanding of the uses and abuses of the many 'legalities' in Ireland, should be placed. In doing so, this collection will explore the reach of the rule of law in Ireland, in the period from 1689 to 1850.

I: English Laws and Irish Manners

The gulf between a nation's laws and its culture suggested by Ó Rathaille's poem became increasingly problematic, both in theory and practice, over the course of the eighteenth century in Ireland, running against the presumption of increasing consonance of the two that informed Enlightenment writers. In his *L'Esprit des Lois* (1748), Charles de Secondat, Baron de Montesquieu suggested a vision of a functioning state in which law was in significant respects unique, and appropriately specific, to each nation. His broad descriptive analysis gave central place to 'manners', the mores and social practices of particular peoples. It was, in fact, commonplace to note that law arose out of manners and was central to the development of Europe's civilised society. Montesquieu added a practical admonition and prescriptive directive, insisting that the state or government most comfortable to nature is that which best agrees with the

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6 In contrast to law narrowly understood, '[l]egality ... is a condition with social and cultural existence; it has specificity, its effects can be measured, its incarnations investigated. In their Foucauldian sense, legalities are the symbols, signs, and instantiations of formal law's classificatory impulse, the outcomes of its specialized practices, the mechanisms through which law names, blames, and claims. But legalities are not produced in formal legal settings alone. They are social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest'. C.L. Tomlins and B.H. Mann (eds), *The Many Legalities of Early America* (Chapel Hill, 2001), pp. 2–3.

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humour and disposition of the people in whose favour it is established.\(^8\) An obvious corollary was that law 'should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another'.\(^9\) While such an idea should not be confused with popular self-government, the Montesquieuan dilemma was of tremendous imaginative power. This was certainly true in Ireland where English law had been slowly received over centuries. *L'Esprit des lois* thus carried heightened significance for Irish political and philosophical thought. Indeed, *The Spirit of Laws*, translated into English in 1751 by the Irish litterateur Thomas Nugent, suggested the potential of transposing Montesquieiu's masterpiece into a dialogue about law and governance in Ireland.

The terms of the engagement were long common currency in Ireland where English law had been imposed or received from at least the twelfth century.\(^10\) The English jurist Sir John Davies, solicitor general and attorney general in Ireland in the early seventeenth century, had made a similar correlation between laws and manners, going so far as to suggest that English law was 'connatural' to the people.\(^11\) This strong claim was, at least, ironic coming as it did in an introduction to Irish law reports. In fact, English critics had long argued that both Irish law and manners — including the Irish language — prevented social and economic progress. In its most humanist form, legal and cultural anglicisation would civilise the Irish. Davies made this same argument in his *Discovery of the True Causes why Ireland was Never Entirely Subdued* ... (1612). This cultural-linguistic exceptionalism was long-lived. Over a century later, in 1740 in the midst of famine, Sir Richard Cox noted in charging a grand jury that '[i]t cannot escape any man's notice, that where-ever the English language and customs altogether prevail, the good effect is instantly visible by a peaceable demeanour, improving conversation, and courteous polite behaviour, accompanied by frugality and industry'.\(^12\) Davies' account, and his actions

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\(^8\) Montesquieu, *Spirit of Laws*, i.3.
\(^9\) Ibid.
\(^12\) Sir Richard Cox, *A Charge Delivered to the Grand-Jury at a General Quarter Sessions of the Peace held for the County of Cork at Bandon-Bridge, on the 13th of January, 1740* (Dublin, 1741).
in the Irish administration, helped to secure the marginalisation of Ireland's native Brehon tradition.\(^{13}\) This was itself part of a wider tendency towards legal consolidation in Britain and Ireland and if Davies' *Discovery* could be read as a plea for the 'rule of law' in Ireland, it was invariably the rule of *English* law.\(^{14}\)

Paradoxically, some constitutional and legislative uniformity was copper-fastened by an act of republican, rather than monarchical, conquest. At the end of the 'Eleven Years War' (October 1641–April 1652), the invasion of Oliver Cromwell's New Model Army and the imposition of English rule on Ireland erased many of the theoretical anomalies and ensured the destruction of residual Gaelic legal practices.\(^{15}\) Along with the deaths of a fifth or more of the Irish population from war and famine, the aftermath of the Cromwellian conquest brought a revolutionary shift in property ownership. Far from combining the state and its people in beneficial harmony, Cromwell's actions contained many of the characteristics that Montesquieu later depicted as being integral to despotism. The Commonwealth flattened out local differences, crippled or replaced the established aristocracy, confiscated large tracts of Catholic-owned land, and governed the population by military diktat and fear:

> *fear* must beat down everyone's courage and extinguish even the slightest feeling of ambition ... In despotist states the nature of the government requires extreme obedience, and the prince's will, once known, should produce its effect as infallibly as does one ball thrown against another ... there men's portion, like beasts', is instinct, obedience and chastisement.\(^{16}\)

While some property was returned following the Restoration of monarchy, the Irish Act of Settlement (1662) largely reinforced the new order. Yet soon after the Cromwellian conquest, local networks of power, privilege and negotiation

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\(^{16}\) Montesquieu, *Spirit of Laws*, Part 1, ix–x. pp. 28–9. It is worth noting that Montesquieu proceeded to argue that 'there is, however, one thing with which one can sometimes counter the prince's will; that is religion ... The laws of religion are part of a higher precept, because they apply to the prince as well as to the subjects. But it is not the same for natural right; the prince is not assumed to be a man.' Ibid., part 1, x, pp. 29–30.
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began to send up new shoots. As in centuries past, a dynamic, complex ecology of governance developed, suggesting the hardy nature of local institutions.\(^{17}\)

Ireland’s constitutional condition as a kingdom was reasserted by the Restoration and defended in the wake of the ‘War of the Two Kings’ (1689–91). Neither event saw a return to an ancient Irish constitution, however loosely that was understood.\(^ {18}\) Instead, Williamite victory over the Jacobites further secured Protestant control of Irish property and politics. But the Irish Protestant community, old and new, rejected and resented any implication that Ireland was a mere dependency of its British neighbour. William Molyneux gave this antagonism classic expression in his 1698 polemic, *The Case of Ireland being Bound by Act of Parliament in England Truly Stated*. There Molyneux plainly asserted how, since the grant of the country to King John:

> Ireland was most eminently set apart again, as a separate and distinct kingdom by itself from the kingdom of England; and did so continue until the kingdom of England descended and came unto King John after the death of his brother Richard the First, king of England, which was about 22 years after his being made King of Ireland.\(^ {19}\)

In other words, Ireland could claim independent and equal status with England as a fully cohered kingdom conjoined to its neighbour solely by the accident of hereditary succession. As a result, the *legislature* of England could not claim authority over Ireland.

‘Poynings’ law’, originally initiated by Sir Edward Poynings in the Irish parliament in 1494, is central to this argument. By requiring that the Irish parliament consider only that legislation requested by the Irish executive and Privy Council and approved by the king and English Privy Council, it effectively established English legal supremacy over Ireland through the king’s ministers. This had been contested both before and after Protestant hegemony. In the eighteenth century, the contest became more heated as the parliaments of both islands became regular and financially significant institutions.\(^ {20}\) This dispute


continued into the eighteenth century, but the passage of the 1720 Declaratory Act in Westminster confirmed the British parliament's pre-eminence and the British House of Lords as the final court of appeal for Irish cases. While a separate kingdom, Ireland had, as a consequence, less political autonomy than did many of England's colonies. The Irish chief executive, the lord lieutenant, represented the crown, but was in practice responsible to the British executive. The lord lieutenant was advised by the Irish Privy Council and assisted by the chief secretary and the 'lords justice' (typically the lord chancellor, the speaker of the Irish House of Commons, and the established Church's Primate of All Ireland). Until 1767, the lord lieutenant was not permanently resident in Ireland; until the appointment of Richard Wellesley in 1821, no Irishman held the office. Like the colonies, Ireland's commerce was subservient to that of England. And if a standing army of thousands, supported by Irish taxation, was obnoxious to much British and Irish thought, Irish Protestants accommodated themselves throughout the long eighteenth century in exchange for the security it entailed.

II: The Spirit of the Common Law

By the eighteenth-century, as with its political institutions, Ireland's legal system and judicial structures looked little different from those of England. Indeed, if anything, it was comparatively simplified, though hardly simple (see Figure 1.1). Ireland's superior courts of common law and equity - king's bench, common pleas, exchequer, and chancery - exercised jurisdiction from Dublin's 'Four Courts.' The assizes brought the state to the farthest corners of the country. As in England and Wales, there were numerous narrower jurisdictions: admiralty and ecclesiastical, local and manorial, urban and commercial courts. The inferior courts were probably more important for most people most of the time. Justices of the peace, sheriffs and grand juries all played vital roles exercising functions


frequently as administrative as judicial. As Christopher Robinson, then on the court of king’s bench, put it in 1760, ‘grand juries are our constitutional censors!’ 24 This ‘low’ justice, often exercised by laymen, was far more permissive of juridical discretion than the ‘high’ justice of the superior courts. 25 And local and manorial courts were almost certainly the only place in which genuine native custom – as opposed to the jurisprudence or custom of the courts – could enter into the law. 26

But Ireland’s confessional complexities meant that it differed in significant respects from England. There, the exhausting events of the seventeenth century had brought, by its end, a limited monarchy, a much-strengthened parliament, and the hegemony of the common-law courts over its rivals. Widespread belief in the ‘ancient constitution’ and English exceptionalism suggested for many a critical connection between England’s laws and manners. Protestantism, the religion of the great majority of the people and the crown (by the Act of Settlement) was central. By the next century:

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24 A Charge Given to the Grand Juries of the County of the City of Dublin and County of Dublin ... (Dublin, 1760), p. 17.


26 It is even possible that Brehon custom or Catholic canonical practice was admitted in this way. R.B. McDowell, The Irish Administration, 1801–1914 (London, 1964), p. 118.
Englishmen congratulated themselves on enjoying rights and benefits in law that could not be overridden at the whim of kings and ministers... These... stood in sharp contrast, they believed, with the oppressed condition of other European peoples. Or at least that is what they were told time after time, as judges and magistrates trumpeted the good news about liberty under the rule of law in their charges at the regular meetings of assizes and quarter sessions.27

This was not unproblematic; England suffered from its own internal dissension. But this vulgar whiggism remained a central element of Anglophone thought on both sides of the Atlantic. If many in Ireland participated in perpetuating such views, the island was arguably, or at least more obviously, 'torn by the contradiction of ideals and reality' in a way that England was not.28

In Ireland at least two problems persisted into the new dispensation after the Williamite wars. First of all, the various articles of treaty ending the military conflict simultaneously set forth a proposed legal context for the re-establishment of civil governance.29 The guarantees of the best known of these, the 'Treaty of Limerick' (1691), had ostensibly secured Jacobite property, pardoned treason, and prohibited lawsuits.30 Yet these guarantees were ostentatiously ignored by the Irish Protestant parliament. The failure to legislate for the Articles of Limerick in full (in 1697 a modified version was ratified by the parliament) ensured they retained a controversial character throughout the century. As late as 1788, the jurist and legislator Arthur Browne argued that the treaty negotiators had only promised that they would endeavour to have the articles ratified by parliament and could never have promised successful passage of the terms of treaty. This put the burden of risk onto the Catholic signatories who, he reasoned, must have known they were unlikely to proceed safely onto the statute book:

They acceded to the articles at their peril; and if their necessities had not been such, as to make these articles desirable, even conditional as they were, and subject to parliamentary revision, they would have sustained a siege until a parliament could be called, and have waited for its definitive ratification. If it be said they

27 Lemmings (ed.), *The British and their Laws*, pp. 1–2. Cf. ibid., p. 3.
confided in the king, and that he deceived them by persuasions that he had more
influence with his parliaments than he really possessed, it may throw a stain on
the memory of King William, but can never discredit the public faith. That was
the conduct of an individual, not of the nation. 31

The view Browne expressed was common among Irish Protestants.

The second, and more significant, problem was the application, by the post­
war Dublin parliament, of penal laws restricting in various ways the religious
practice, education, and property ownership of Catholics and dissenters. In
1759, John Bowes, Baron Bowes of Clonlyon and the lord chancellor of Ireland,
said from the bench that ‘[t]he law does not suppose any such person to exist as an
Irish Catholic’. 32 While many of the penal laws passed effectively into desuetude
over the course of the eighteenth century, they were never entirely a dead letter. 33
In his unpublished, but privately circulated, Tracts on the Popery Laws (c.1759–
1765), Edmund Burke wrote that the statutes were a ‘departure from the spirit
of the common law’. 34 The political ramifications of the penal code were equally
immense. 35 Through its enactment, the Irish parliament effectively declared
itself incapable of representing, even virtually, the nation as a whole. The test
clause of 1704, which was appended to the popery bill of that year, ostracised
the dissenting community from corporations and public office more widely.
The 1728 Disenfranchising Act denied all Catholics the vote. Paradoxically,
while the penal code placed immense psychological pressure on the Catholic
community, its strictures perpetuated their increasingly hopeless loyalty to the
Jacobite exiles. So too, the Anglican confession was invested with a nightmarish
vision of Catholic vengeance while admitting its incapacity to fulfil its mission

31 Arthur Browne, A Brief Review of the Question whether the Articles of Limerick have
been Violated? (Dublin, 1788), p. 40. The work was written in response to the accusations
of John Curry’s Catholic apologia, An Historical and Critical Review of the Civil Wars in Ireland
(Dublin, 1786).

addressed by JKL to a friend in England (Dublin, 1825), p. 135. Doyle was the Catholic
bishop of Kildare and Leighlin.

33 On the conversion legislation and its impact, see the essays by Charles Ivar McGrath,
James Kelly, Michael Brown, and David Fleming, all in Michael Brown, Charles I. McGrath
and Thomas P. Power (eds), Converts and Conversion in Ireland, 1650–1850 (Dublin, 2005).

34 Edmund Burke, Tracts on the Popery Laws in Paul Langford (gen. edn), The Writings

35 John Bergin, Eoin Magennis, Lesa Ní Mhunghaile and Patrick Walsh (eds), New
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In confronting a recalcitrant Catholic population, it withdrew behind the legal barricades of anxious exclusion.

With regard to the state itself, the penal code crystallised and articulated what might be seen as the central conundrum faced by legislators in the modern period: was it their task to reform the manners of the populace through the laws or to reshape the laws to better reflect the manners of the wider society? The test clause stood in the statute book alongside a limited Toleration Act (1719); the penal code was left largely unenforced and tacitly moribund. Throughout the period, parliamentary policy oscillated between the desire to change the people (by converting Protestant), as with the penal code, and, to a lesser extent, the determination to change the state (to modernise its mechanisms). By mid-century an impasse had been reached. The 1745 Jacobite rising in Scotland was met with insouciance by Lord Chesterfield’s administration, while the reforming impulse was met with governmental opposition in the 1753 Money Bill dispute.

Reform slowly rose into the ascendant, accelerating its rise in the late 1770s. While rooted in classical republican thought and political opportunism rather than in law or, later, liberalism, both Protestant political ‘Patriots’ and the Volunteers pointed towards notions of political, if still propertied, sovereignty. The latter’s extra-parliamentary and extra-constitutional appeal at Dungannon in 1782 for an independent parliament, an independent judiciary and reform of the penal laws brought significant change to Ireland. As a result of the apparent widespread support of the Volunteers at the end of Britain’s unsuccessful American war, and the implicit threat they represented, Ireland received legislative independence. But ‘Grattan’s parliament’ was only to last from 1783–1800, a mere 18 years.

III: Reform and Revolution

Legal reform slowed in the 1780s. In parliament, Irish Patriots were effectively split, managed and marginalised through much of the period of legislative independence. Like their English Whig counterparts, they focused their critique on the centralising power of the Irish executive, especially through its control of the army and Dublin’s professional police force.\(^{37}\) Renewed agrarian ‘disturbances’ also proved a serious distraction, complicating significantly any

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alteration in the laws. Such rural violence is probably best seen as taking place within Ireland’s ‘moral economy’, in which non-state actors applied physical force within broadly accepted limits. The Whiteboys may be seen as motivated by economic concerns rather than representing the disaffected and disenfranchised residue of a lost Jacobite cause. But in the wake of European revolution, tensions dramatically accentuated in the 1790s. Ireland’s ‘moral economy’, grounded in an inherently conservative and communitarian ancien régime sensibility, arguably ended, undermined by politicisation and an emerging ‘political economy’.39 Frustrated by the lack of reform, Edmund Burke wrote to his son Richard Burke, then agent for the Catholic Committee. He echoed Montesquieu in writing:

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.40

But the expansion of the political nation to include Catholics, designed to prevent both radicalism and rebellion, was not to culminate for more than three decades. Irish Whigs sympathetic to reform could neither command parliamentary majorities nor assuage the demands of more radical reformers. The recall of William Wentworth-Fitzwilliam, Lord Fitzwilliam, lord lieutenant of Ireland for just a month, because of his open support of more radical reform marked a turning point in strategies on both sides of the Irish Sea.41 In the twilight of legislative independence, the Protestant interest or ‘ascendancy’ was to be guaranteed or destroyed by physical force. Martial law

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and the Indemnity Acts of the 1790s suggest the limits of due process under the threat of significant rebellion.

Instead of reform, the Irish parliament in its last years sought to impose order, bending or breaking the law to do so. Irish radicals, especially the United Irishmen, responded by accelerating their demands and, ultimately, resorting to violence. The failed rebellion of 1798 involved the possibility of changing the constitutional character of the state into a republic; it contained a commensurate programme for the regeneration of the people into tolerant and virtuous citizens. Similarly, while the legislative union with Britain was driven by the need to incorporate a wider Protestant people in the demographic calculations governing the country – subsuming the Catholics in a wider Protestant community – it was only to be facilitated by a dramatic widening of the state. This unionist ambition was given pithy expression in Maria Edgeworth’s comment in the preface to Castle Rackrent (1800) to the effect that ‘when Ireland loses her identity by an union with Great Britain, she will look back with a smile of good-humoured complacency on the Sir Kits and Sir Condys of her former existence.’ In other words, the legal solution would impact on Irish manners, calming a volatile, combustible, mixture.

Post-union, the oscillation between legal and cultural reform moderated, but the polarities still invested a visceral energy to political debate. The ambush and assassination of the chief justice, Arthur Woulfe, Lord Kilwarden, in the subsequent, aborted revolution of 1803 marked an inauspicious beginning to the nineteenth century and political union. But even Irish revolutionaries seldom rejected English law in Ireland tout court. In his famous ‘Speech from the dock’, the United Irish leader Robert Emmet justified his response to the court by remarking that:

My lords, will a dying man be denied the legal privilege of exculpating himself in the eyes of the community from an undeserved reproach thrown upon him during his trial, by charging him with ambition, and attempting to cast away


for a paltry consideration the liberties of his country? Why then insult me, or rather why insult justice in demanding why sentence of death should not be pronounced against me? I know, my lords, that the form prescribes that you should put the question; the form also confers a right of answering. This no doubt may be dispensed with, and so might the whole ceremony of the trial, since sentence was already pronounced at the Castle before your jury was empanelled. Your lordships are but the priests of the oracle, and I submit, but I insist on the whole of the forms.

Arguably, this Irish use of English legal forms was not meant to suggest their authority, but to reveal their limitations, an insistence more practical than philosophical. Further, English political and legal forms were, throughout the nineteenth century, models throughout revolutionary Europe. Even Irish radicals could see the substance of English law as desirable. With more moderate reformers, however, they insisted that the same laws in England and Ireland were, in practice, applied differently.

Nor were the penal laws entirely abolished. The barrister and political activist Denys Scully wrote, in 1812, that:

the law, to others an object of attachment, gratitude and pride, is to the Catholic only a dark and gloomy barrier in life: exciting new struggles, new defeats: producing heavy injury, and loud complaints. The law, in fine, bids him despond, and sink, hopeless of freedom, unrespected, in mute unavailing regret and chagrin.

The first half of the century saw repeated attempts by the new united parliament to solve the Irish problem. It did this first, by a succession of reforms aimed at altering Ireland’s policing practices, largely by wresting management and administration of the police from Protestant control. Even more importantly, emancipation was finally achieved in 1829, thanks in significant part to the efforts of the lawyer and parliamentarian Daniel O’Connell. Although the property qualification for suffrage was simultaneously raised, the result was meaningful influence for Irish Catholics in British politics, an influence that steadily increased over the century.

Problems remained. While there continued to be agrarian violence, Irish Catholics were largely committed to constitutional reform of the same sort the Protestant political nation had pursued in the previous century. O’Connell’s

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44 Quoted in Patrick M. Geoghegan, Robert Emmet: A Life (Dublin, 2002), pp. 251–2.
45 Denis Scully, A Statement of the Penal Laws, which Aggrieve the Catholics of Ireland (2nd edn, Dublin, 1812), pp. 362–3.
Catholic emancipation campaign can, for example, be coupled with his actions in the parliament. In both, he sought to bring the Irish more fully into the British polity. Along with British Whigs or Liberals, there was a belief that:

The law had to be seen to be administered fairly, and measures promoted which would improve the material condition of the mass of the population. To this end the police system was reformed to create a centralised, non-partisan force, and Catholics were appointed to positions of responsibility in both local and central government.

These new bodies removed a central plank in the construction of local magistrates' power.

In 1841, with O'Connell's removal from power in a general election that gave the Tories an outright majority, he swiftly moved back to the other end of the spectrum, reviving a suspended campaign for the repeal of the Act of Union. Indeed, his actions are broadly representative of Irish reformers across the long nineteenth century, as 'although Irish nationalists engaged in abortive rebellions in 1798, 1803, 1848, and 1867, the dominant tradition in modern Irish nationalism has been constitutionalist'.

O'Connell was not alone. The Irish MP Sir Henry Parnell sought a special parliamentary committee to look into Irish affairs in the 1820s. Reversing and revising Montesquieu's formulation, he argued, in discussing the Insurrection Act of 1823, that:

[All] experience, and the authority of all the best writers on government, establish this maxim, that the manners of a people are always formed by the laws under which they live. To the laws, therefore, the noble lord should look for the sources of the existing manners of the people of Ireland; and to an alteration of these laws for that amelioration in the condition of that people. 49

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If this significantly overstated the power of law, legal reforms remained important, many based on information provided in the numerous parliamentary committees of the nineteenth century. On the back of the 'wars' of 1831–1836, for example, there finally occurred a modest reform of tithes in 1838. In the same year, the English system of poor law was extended to Ireland. But nationalists, largely Catholics, still had significantly limited roles in Irish self-government and legal affairs. Within the decade, the poor laws were overwhelmed by the Great Famine of 1845–1847, in which a fifth to a quarter of the Irish population would die or emigrate. And, in a year of European rebellion, Ireland experienced its own, 'Young Irelander' or 'Famine' rebellion. Another minor uprising, it was pre-empted by yet another suspension of habeus corpus and the transportation of its leaders to Van Diemen's Land.

IV: Old World Colony?

At the heart of Montesquieu’s dilemma lay a deep and insoluble problem over the legal and political character of Ireland. Contemporaries and historians have both struggled to conceptualise the country. In the last century, historical ‘revisionism’ in British and Irish historiography reacted against teleological English ‘whig’ and Irish nationalist histories respectively. More recent arguments concern whether Ireland is best understood as an ancien régime society akin to a common corporate and confessional European model or, alternatively, as a colony closer to the dominions of the British Empire. Even if Ireland is seen as the former, it may be that the social and political divisions common to other parts of Europe take on greater significance given its confessional divisions. S.J. Connolly has written that:

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51 See Sinead Collins, Balrothery Poor Law Union, County Dublin, 1839–51 (Dublin, 2005).
52 Alexis de Tocqueville noted, after attending the Waterford Assizes in July 1835, that ‘the position of the accused would be infinitely better than with us, if under the magistrate’s robe were not found an English Protestant, and if the political and religious passions did not often do violence to the impartiality of the judge ... ’. Emmet Larkin (tr.), Alexis de Tocqueville’s Journey in Ireland: July–August, 1835 (Washington, 1990), p. 54.
it could be argued that the key feature of eighteenth-century Ireland was in fact its ambiguous status: too physically close and too similar to Great Britain to be treated as a colony, but too separate and too different to be a region of the metropolitan centre; inheriting an undoubted division between settler and native, yet without the racial distinctions that could make these absolute.  

Much of the legal structure and inheritance from England suggests that this is so. As noted, with the ‘bringing’ of English law to Ireland in the twelfth century and the slow reception and expansion of that law, Irish courts from 1687–1850 were little different from those of England or Wales, yet the confessional demography laced the political life of the polity with a deadly toxin.

As should be further recognised, the distinction between state law and other methods of social regulation are not easily disentangled in the period under review. There were a number of institutions and norms operating in the shadow of the established legal order. Such extra-judicial and extra-legal standards – sometimes presented as an alternative ‘law’ – were not unique to Ireland or to this period. They may have particular significance, however, where, as Henry Brooke wrote in his fictional Tryal of the Roman Catholics (1762), ‘the Irish looked on the English as invaders of their natural rights and properties; and the English, under colour of the said gifts, looked on Ireland as lawful prize, and on any opposition, to their will, as rebellion’. In this context, a simple institution such as Irish ‘hedge schools’, existing as they did outside of state-sanctioned structures and curricula, could take on a radical hue. More obviously problematic, at least until the 1760s, an alternative (royal) court system existed in Jacobitism. Numerous Irish exiles gathered around James II and his heirs on the continent; he engaged directly in the nomination of the Catholic hierarchy. Moral authority is also thought to have been exercised by the old Catholic landed gentry who, now dispossessed, repositioned themselves as middlemen and constituted a subversive caste – an ‘underground gentry’ in Kevin Whelan’s evocative phrase – to which the Catholic community could look for leadership.

\[\text{\textsuperscript{56}}\text{Cf. Heather Laird, \textit{Subversive Law in Ireland 1879–1920: From 'Unwritten Law' to the Dail Courts} (Dublin, 2005).}\]
\[\text{\textsuperscript{57}}\text{[Henry Brooke], \textit{Tryal of the Roman Catholics} (Dublin, 1762), p. 38.}\]
\[\text{\textsuperscript{58}}\text{Antonia McManus, \textit{The Irish Hedge School and its Books, 1695–1831} (Dublin, 2004).}\]

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Both Catholics and dissenters also utilised ecclesiastical or congregational mechanisms for resolving disputes outside of Ireland’s formal legal institutions. This is not to suggest a ‘hidden Ireland’ fundamentally at odds with the political nation, but rather a complex culture of accommodation and collusion. Indeed, as in England, there were numerous ‘often contradictory systems of normative ordering’ that intruded on legal rules. Among these was interpersonal violence, including the resistant strain of duelling that characterised noble behaviour well into the nineteenth century.

These informal types of mediation and arbitration have left few records. Of the people of Ireland, Anglophonic Protestants were most likely to have left public and private records of their sense of the law’s authority or authoritativeness. The Catholic majority, especially where illiterate and Irish-speaking, were less likely to have done so. But alongside a printed world of periodicals, law reports and jurisprudence, there existed an oral culture that has largely evaded record keepers. This is a common historiographical problem. As Rudy Chaulet has written in a very different context:

Any historical study must run the risk of distorting or failing to capture as accurately as possible the subject of its investigation. This problem is particularly acute when investigating the mentalité of those who have left little by way of written material behind and whose actions and statements are only accessible through the descriptions offered by those outside of their cultural milieu.

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60 One of the primary concerns of the local presbyteries and sessions of Ulster was the resolution of local arguments and deliberation over church and social discipline. Patrick Griffin, *The People with No Name: Ireland’s Ulster Scots, America’s Scots Irish, and the Creation of a British Atlantic World*, 1689–1764 (Princeton, 2001), pp. 37–64; Andrew R. Holmes, *The Shaping of Ulster Presbyterian Belief and Practice, 1770–1840* (Oxford, 2006).


This subaltern society is frequently portrayed as confrontational in a variety of modern schools of Irish history associated with post-modernist, post-colonial or 'post-nationalist' literary theorists and cultural critics. Irish 'courts' of poetry, for example, used the legal forms of the state, and poets regularly mimicked legal formularies in framing their poetic utterances; a trend that culminated in Brian Merriman's extravagant *Midnight Court*.\(^{65}\) The significance of these complaints, even in Jacobite poetry, is, however, difficult to judge.\(^{66}\) Such poetry could reflect a belief in the fundamental illegitimacy of the state; it might instead have merely employed a convenient language of critique. In either event, it was not uniquely Irish. But the oral, often ephemeral, nature of Irish-language materials creates considerable historiographical challenges.\(^{67}\) The absence or vagueness of existing court records and the subsequent destruction of so many public records in the twentieth century exacerbate these problems.\(^{68}\) It cannot be emphasised enough how much is lost and how many questions remain. This is no doubt true of the 'plain people' throughout Europe's *ancien régimes*, but Ireland's confessional differences may further complicate the significance of these historical lacunae.

Ireland has often been portrayed as a uniquely rebellious and violent place.\(^{69}\) In 1759, Lord Chief Baron Edward Willes wrote that 'the greatest evils' of Ireland were 'a disobedience and resistance of the lawes ... [and] a resistance with armed force of the civil process and magistrates'.\(^{70}\) But such hostility to the law was not limited to the Irish. The English themselves have been portrayed as an 'ungovernable people'.\(^{71}\) So too, the Scots have recently begun to shake off...
a reputation as quiescent.\textsuperscript{72} If Ireland does not appear to have been peculiarly violent as a society, crime may have carried more political and subversive overtones than in England.\textsuperscript{73} Criminal activity carries a heavy symbolic and interpretive load. Law-abiding contemporaries were quick to see subversive intent lying beneath crime of almost any kind: outlawry, agrarian agitation, and urban riots. Underpinning fear of both Jacobitism and later republicanism was often the Protestant nightmare of Catholic resurgence, articulated, for example, in Sir Richard Musgrave's conspiratorial compendium of 1798 atrocities.\textsuperscript{74} Forcible and widespread transportation to the colonies encapsulated the sense that there was a recalcitrant and irredeemable criminal element in the society for which the only solution was exile; mimicking in global terms Cromwell's excoriating desire to push Catholics 'to hell or to Connaught'.\textsuperscript{75}

This is not to suggest that Ireland was merely ruled by superior force. 'Eighteenth-century Ireland, despite its recent history of warfare and military conquest, was not a society ruled either by terror or by arbitrary power.'\textsuperscript{76} But the various arms of the state (local law enforcement, the militia, the yeomanry, and the army) and their actions, from tolerant collusion to martial law, did not resolve the low-grade legitimacy crisis that warped social and political relations on the island throughout the two centuries interrogated here.\textsuperscript{77} And political and social concerns were often expressed through concepts of criminality. Fear frequently shaped the attitudes of Protestants, who were quick to interpret domestic disturbances as political and sectarian in nature. Alongside this was the sense that the largely Catholic Irish manipulated the law, either through


\textsuperscript{74} Sir Richard Musgrave, \textit{Memoirs of the Different Rebellions in Ireland from the Arrival of the English ...} (Dublin, 1802).


\textsuperscript{77} For an economic variant of this, see Jürgen Habermas, \textit{Legitimation Crisis} (London, 1976).
interpretation, evasiveness, or flight. William Henry Curran noted numerous attempts ‘to succeed on a question of civil right by the aid of a criminal prosecution.’ Gerald Griffin, in his best-selling *The Collegians* (1829), wrote of a character that ‘[h]is answers where given in the true style of an Irish witness, seeming to convince the utmost frankness, and yet invariably leaving the querist in still greater perplexity than before he put the question.’ Irish trials had symbolic importance far beyond their immediate confines. The eighteenth-century trials of James Cotter or Nicholas Sheehy, for example, exemplified the fear among Catholics that, however legitimate, the legal system could prosecute them on concocted and politically inspired evidence and punish them for imagined crimes. Similar cases exposed the rift between the populace and the legal system in the nineteenth century.

Alongside the difficulties embedded in the conceptual frameworks of ancien régime and colonial modelling of Ireland’s condition, significant changes

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78 Cf. the stories (1899–1915) of Edith Somerville and Violent Martin about an English resident magistrate in Ireland. See also John Millington Synge, *The Playboy of the Western World* (1907).


80 Gerald Griffin, *The Collegians, Or the Colleen Bawn: A Tale of Garryowen* (Maryland, 2009), p. 316. The work was based on the infamous ‘Colleen Bawn’ murder in County Limerick in 1819. O’Connell served as defence lawyer in the resulting trial of John Scanlan.


occurred in the nature of the state in the two centuries after 1650. European states generally were to become increasingly centralised, their laws ever more uniform. With these changes came fundamentally different relationships between individuals and the state. In particular, the law was increasingly, if slowly, understood to articulate rights which were shared by all citizens. It was no longer the compilation of specific privileges accorded to particular individuals or institutions. The progressive formalisation of law satisfied in some measure a more general demand for greater levels of equality before the law and the necessity of clearer laws for political stability and economic growth. In criminal law, too, jurisprudence slowly moved away from expressing the power of the state in the punishment of offenders towards a concern for the recantation and rehabilitation of the criminal. In effect, the mediating institutions of the old regimes gave way to a more atomistic liberalism of the nineteenth century. This movement was what the English jurist Sir Henry Summer Maine later characterised as that from 'Status to Contract', from the traditional societies of the past to the individualistic – and 'progressive' – societies of his day.

The movement towards legal centralisation was accelerated by the revolutions which rocked the intellectual and institutional foundations of Europe's ancien régimes from the end of the eighteenth century. Where the early-modern state was fundamentally organised around the distribution of power through the ranks and orders of society, the modern state that succeeded it tended towards the centralisation of power within its territories: into a capital, a congress, or unified courts. This was seen as effecting a more uniform application of law. The legal complexity that had characterised Europe for centuries was largely

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This led, in the aftershocks of the revolution in France, to the twin unitary programmes of nationalism and legal positivism. The first assumed that the offices of state were best occupied by people sharing an ethnic character with the populace it governed, creating an ideal unity of rulers and ruled. The second considered the defining element of law and sovereignty to be the ability of the sovereign to enforce rules uniformly through state sanctions. Thus the state was a homogeneous ethical whole expressing itself in a uniform and unitary legal schema. Together the people and the state were to be brought into ethnic fraternity through jurisprudential decree. To this was joined a more general impulse towards popular government and popular accountability. Ironically, the movement towards liberalism, economic if not social, was made possible by the expansion of the boundaries of the state and the marginalisation of more traditional, customary approaches of social ordering.

Outside Irish rebellions, the British state did not experience the traumas of revolution and the subsequent legal codification of the continent. But it was not untouched by demands for legal and political rationalisation. Nineteenth-century legal positivism, exemplified by Jeremy Bentham and John Austin, echoed the concern for legal uniformity and clarity, British parliamentary supremacy, and the rise of statute law. Law reporting and legal education improved in both Britain and Ireland. A clearer appellate hierarchy of courts was established with, by mid-century, professional law lords at their head. Over the course of the century, precedent hardened into stare decisis – in which a single judicial decision was binding, rather than merely persuasive, on inferior courts – while the writ system was relaxed in favour of general pleading. Common law and equity were fused; England's multifarious jurisdictions were enveloped by the courts of common law. This brought a new focus on substantive, rather than procedural, law, and an attempt to limit judicial subjectivity. Even the union of Britain and Ireland could be seen as an early part of the movement where legal uniformity promised

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88 On legal pluralism generally, see Brian Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global,' *Sydney Law Review*, 30 (2008): pp. 375–411. Note that social scientists typically use 'legal pluralism' or 'normative pluralism' to refer to complex relationships of both state laws and other norms; lawyers and legal historians often use the same phrase more narrowly, excluding norms not usually identified as laws.


both equality and political stability. In his work on legal study, Samuel Warren
closed a brief discussion on law in Ireland in 1845 'by citing the words used
by Sir Edward Coke in speaking of Ireland, - "UNION OF LAWS IS THE BEST
MEANS FOR THE UNION OF COUNTRIES"'. All of these trends were mirrored in
Ireland. Law provided a language and logic through which claims of positivism
and parliamentary supremacy, natural rights and popular sovereignty, national
identity and the nation-state could all be articulated and disputed.
Yet the contrast between the 'rule of law' in the expansion of the state and the
rule of men, the 'squirarchy' in Irish local government, was arguably more vexed
than in England. Many of the conflicts that pockmark the early decades of the
nineteenth century were given life not through the antagonism of nationalism
and unionism that marred post-Famine Ireland, but were more intricate
negotiations concerning the level of authority that resided at the various tiers
of an increasingly centrifugal power-system. Local government was defended as
vigorously as in England, but coloured by confessional conflict. Clashes between
the centre and periphery informed arguments concerning the standardisation
of jurisprudential practice, encompassed such wide ranging concerns as court
structure, the professionalisation of the legal community and the remodelling of
the tiers of the administration of justice, while they foreshadowed the massive
reorganisation of the courts which was to come in the 1870s.  

V: The Boundaries of the State

Beginning the collection, T.C. Barnard investigates the local courts in later
seventeenth and eighteenth-century Ireland. Along with towns and manors,
these courts were introduced 'as part of the process of Anglicisation and
pacification' of the island. But the few surviving records of these courts are
suggestive of considerable flexibility, the incorporation of customary practices,
and reasonably wide participation, including the families of former Brehon
lawyers. Barnard reveals institutions of some popularity across the middling
and lower orders, including those outside the political nation or civil society.
Dublin's urban courts, for example, provided access to the 'relatively humble',
where confession 'was not a bar'. Where 'gladiatorial combat between aggrieved
Catholics and overbearing Protestants' existed, those battles were conducted in
the courts of common law rather than the local courts.

91 Samuel Warren, *A Popular and Practical Introduction to Law Studies ... with an
Account of the State of the Law in Ireland, and Scotland ...* (London, 1845).
92 R.B. McDowell, 'The Irish Courts of Law, 1801–1914', *Irish Historical Studies*, 10
At the other end of the legal hierarchy, James Kelly reviews the central role of the Privy Council of Ireland, ‘a key agency in the exercise of executive power in Ireland during the long eighteenth century’. Composed of the great and the good of Ireland, the Council scrutinised and put into order legislation emanating from the legislature prior to its transmission to the English/British Privy Council. In an era of increasingly important parliamentary government, it also possessed the right to initiate law and the power to issue proclamations crucial to the administration of statute law and permitting new rules and regulations with precedence or overruled existing statutes. This diminished from the 1730s and was reduced to formality with the constitutional changes agreed in 1782. Ireland’s complex institutions were mirrored by an equally complex set of authentic sources of law. Niall Osborough reviews the existence of a ‘legislative deficit’ in eighteenth-century Ireland. ‘Irish statute law as such’, he writes, ‘was not confined to measures enacted by the Irish parliament’. A standing committee of the Irish House of Lords explicitly examined English/British legislation that might be fit for Ireland and there were numerous individual instances in which legal lacunae were filled by English law. Indeed, ‘[i]t is a short enough step from availing of English or British state law to plug some gap in the Irish statute-book … to borrowing such statute law tout court where an Irish statute law provision may have existed but in the time available could not be found’.

There were considerable informal borrowings and formal receptions of English law in Ireland. But the same laws might have different effects in the Irish context. In his contribution, Neal Garnham examines the influence and application of English law and legal precedents. There were extensive legislative, judicial and doctrinal similarities between Ireland and England. But, he writes, the criminal law in Ireland was ‘a most imperfect replication’, evolving in distinctive ways. For example, the law relating to toryism, the banditry that emerged in mid seventeenth-century Ireland, developed a unique system of apprehension and punishment that vested a disproportionate amount of power in the hands of grand jurymen. Indeed, the courts ‘seem to have been marked out by their comparative irregularity and informality’. Examining grand and petty jury verdicts, Garnham suggests that something of a dichotomy emerges. Grand jurymen were prepared to act perfunctorily in condemning and transporting men without a full trial while, at the same time, displaying apparently high levels of mercy when dealing with many serious criminal cases.93

Niamh Howlin sees similar trends in the growing divergence of English and Irish jury laws in the nineteenth century. She discusses the controversial

use of the ballot for selecting jurors randomly for jury panels. Although this practice was introduced in England with considerable success and approbation, its unpredictability was undesirable in the Irish context. Attempts to introduce an Irish Jury Act in the wake of the English Act of 1825 failed. The Irish Jury Act that eventually passed in 1833 was shaped, in significant part, by the Irish bench and practical and political considerations unique to Ireland. In a slightly later period, Richard Mc Mahon examines the exercise of the prerogative of mercy in pre-Famine and Famine Ireland. The prerogative is viewed in the context of wider changes in penal policy with particular reference to the decline in the use of capital punishment, the reform of the prison system and the rise of alternative means of punishment in Ireland. Comparisons are also made with other jurisdictions. Its exercise reveals a complex relationship between the state, the law, and the mass of the people. Mc Mahon's analysis suggests that the flexible exercise of the prerogative allowed a balance between state authority and local conditions. It allowed 'the operation of the criminal justice system ... to assert the authority of the law ... in most cases at least, without provoking or encountering widespread and effective resistance. The law took its course'.

The laws in Ireland were not, of course, limited to statute and the precedent of the superior courts. Lisa Marie Griffith examines the curious case of the Ouzel Galley Society. The Society was arguably an arbitration body which emerged at the beginning of the eighteenth century to settle commercial disputes. Griffith provides a view of the commercial elite of the city attempting to provide justice for its own class and displaying the influence of the moralising middling sort. She notes, however, that the Society has been accused of being a selective drinking club for the rich commercial men of the capital for much of the century. Indeed, on the whole, 'there is little evidence to suggest that the body was a constant arbitration society and the extent to which it acted in the eighteenth century as a body for the resolution of commercial disputes is doubtful'. Remaining in Dublin, Jacqueline Hill follows the levying of tolls and customs in the city from 1720–1820. From medieval times, Dublin, like many other urban corporations in Ireland and elsewhere, enjoyed the privilege of levying tolls and customs on goods brought into it for sale. Revenue held up fairly well until the 1810s, when popular resistance to the payments resulted in a lasting collapse. From:

the 1790s the exclusively Protestant Corporation's emergence as one of the leading agencies in defence of the Protestant constitution earned it a divisive reputation ... That might not have mattered very much had the Corporation at the same time not found itself in considerable debt.
Hill examines the significance of this trajectory for relations between the corporation and its critics. She considers how and why, in view of ideological challenges to corporate monopolies, and confessional differences between corporation members and toll-payers, the system endured as long as it did.

The place of the law in Ireland's moral and political economies is also important. In this collection, Eoin Magennis offers a brief overview of the eighteenth-century Irish state's role in what today is called 'market intervention'. The area covered by these interventions was extensive, ranging from governance of the market and its operations to regulation of the labour force/market. By focusing on the regulation of bread, Magennis 'shows that the boundaries of the state in Ireland did not end at government finances and the internal order of the country'. In fact, he suggests that research is likely to reveal this expansion was consistent with other parliaments and assemblies of the period. It also suggests, however, the continuing importance of anti-Catholicism in policymaking. Martyn Powell reassesses the ongoing debates on Ireland's 'moral economy' through 'houghing'. A violent means of protest long favoured by rural agitators, it was imported into Irish towns in the late eighteenth century. Urban 'houghing', the cutting of the tendons at the back of the leg, was used primarily against the military. As Powell argues, it can be seen as more than a criminal or factional activity and sits uneasily with notions of legitimacy and restraint. The picture is complicated, but 'moral economy' analysis remains useful. Rather than indiscriminate violence, the houghers' credentials as representatives of popular feeling were bolstered by the role of ritual and ceremony, crowd interaction, and community sanction and protection. With houghing, 'there were exceptional features that belonged to [a] rather different kind of popular protest: one that was not only associational but also explicitly political'.

Irish lawyers often contributed beyond the country’s court rooms. Seán Patrick Donlan looks at Arthur Browne (1756?-1805), one of the most gifted jurists of eighteenth-century Ireland. Born in America of Irish parentage, Browne studied at Trinity College, Dublin, eventually becoming professor of civil law and publishing works on civil, admiralty, and ecclesiastical law. He acted as advocate and judge in both the common and civil law courts, and was the last ‘prime serjeant’. The polyglot Browne was also a member of parliament and a passionate, but generally liberal, Protestant. He famously switched his vote on the Act of Union, moving from opposition to approval. He also wrote political tracts, translations, and literary and antiquarian essays. Browne’s legal writings suggest the complexity of ‘English law’ in Ireland in the years between the French revolution and the Code Civil (1804). A still more successful legislator was Daniel O’Connell. But O’Connell was also a gifted barrister. Patrick Geoghegan writes about his involvement in the Magee Trials of 1813. Magee was the proprietor of
the *Dublin Evening Post* and was prosecuted for libel. His first trial is normally presented as one of O’Connell’s greatest legal triumphs. Geoghegan suggests that while it was a political success it was an absolute failure from a legal point of view. Abandoning his client, O’Connell launched a sustained attack on British rule in Ireland. Magee was found guilty and imprisoned. The trials provide an important insight into O’Connell’s political development in this period, while also providing a new perspective on his approach to legal as well as political theatre. As Geoghegan concludes, ‘O’Connell was well aware that his speeches often horrified his enemies and sometimes shocked his friends. But he believed it was necessary to confront the culture of defeat and show Irish Catholics that they could be more than slaves’.

Others not engaged in politics, legal education, or practice nonetheless used the language of the law in important ways. Michael Brown looks at Henry Brooke, a prolific writer, whose work contributed to the genres of novels, drama, history and politics throughout the Anglophone world. Brooke’s disparate oeuvre is characterised by the structural concern for the relationship between the manners of the people and the sentiments of the legislators that is typical of *ancien régime* Europe. Yet, in Ireland’s case, this relationship, symbiotic in the Montesquieuan model, was disrupted by the confessional and colonial character of the polity. This is exposed in Brooke’s thinking about the legal character of the state, in his own personal political trajectory, and within the variety of writings he offered to the public for consumption. Missing from much of the legal history of the period are the feelings of Ireland’s Catholic and Irish-speaking populations. Lesa Ní Mhunghaile explores the use of Irish in legal practice and the reaction of Irish speakers to the law in eighteenth- and nineteenth-century Ireland. Ní Mhunghaile emphasises the degree to which such sources can provide valuable information for ascertaining the level of participation by ordinary people in the legal system, particularly in the area of civil law.

The Irish courts could also find themselves engaged in debates on the constitutional relationship between Britain and Ireland. As Kevin Costello notes, only the rather obscure Irish Court of Admiralty received detailed explicit treatment in the Act of Union. In Article Eight of the Act, the legislature apparently intended to deal with the defective drafting of the Irish Admiralty Act of 1783. On one interpretation, that earlier Act contended that the Irish court had lucrative jurisdiction over prize captures (the processing of seizures of hostile vessels by privateers). The assertion by the court that it had this jurisdiction led to a series of conflicts from 1795–1799 in which the Irish court defied the instructions of both the Irish and English governments to refrain from accepting jurisdiction. These debates involved a number of talented
VI: Conclusion

Writing in opposition to the codification of German law, the nineteenth-century 'historical school of jurisprudence' revised Montesquieu's dilemma between law and manners. Associated with the jurist Frederick Carl von Savigny, it maintained that some laws were innate to a people; others were foreign and inappropriate. Coloured by nationalism, both descriptive and prescriptive, Savigny's celebration of the Volksgeist, the spirit of the people, resembled the vulgar whiggism of Anglophonic legal thought. But he had concluded that Roman law, through its early reception and long naturalisation in centuries past, had been so absorbed and assimilated that it – rather than earlier Germanic legal traditions – was connatural to the German nation and ought to be instantiated in the new German state. Indeed, many modern jurists argue that Montesquieu's dilemma is overstated, noting the ease and frequency of legal transplantation and borrowing. This has important implications for Ireland where the real dilemma was not strictly jurisprudential, but political and confessional. The origins of the laws mattered little. English laws, private and public, could become natural to the Irish. The Irish conundrum was instead how best to inspire or inculcate loyalty and trust in a recalcitrant and sceptical public. Central to this was both a genuine 'rule of law', law applied equally across confessional divisions, and the ability of the greater part of the Irish nation to have some sense of possession over the process of law-making, either in London or in a devolved Dublin government.

Denis Caulfield Heron (1824–1881), educated at Trinity College Dublin, was refused a scholarship there because of his Catholicism. This did not halt his

94 [I]n the earliest times ... the law will be found to have already attained a fixed character, peculiar to the people. Fredrick Carl von Savigny, 'Of the Vocation of our Age for Legislation and Jurisprudence' in Clarence Morris (ed.), The Great Legal Philosophers: Selected Readings in Jurisprudence (Philadelphia, 1959), p. 290.
95 See Alan Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh, 1974).
ascent. He was later appointed professor of jurisprudence and political economy at Queen's College, Galway and Queen's Counsel. He subsequently acted as a law adviser to the government, a bencher at King's Inns, a justice of the peace, a serjeant-at-law and won election to parliament in 1869, narrowly beating Fenian candidates. In his *Introduction to the History of Jurisprudence* (1860), published a decade after the Famine, he bemoaned both Irish poverty and the ignorance of the English language which cut the 'peasantry ... off from civilisation'. This certainly echoed earlier English critiques of Ireland. And in discussing Savigny, Heron also wrote that, while rare, ‘what originally was violence and injustice may gradually, through the power of attraction inherent in the legal condition, become a legitimate element in the state'. It is difficult not to think of England and Ireland here. Heron's *Principles of Jurisprudence* (1873), an abridged reworking of his earlier work, compared Prime Minister William Gladstone's attempts at land reform in Ireland to Russian and Prussian reforms. He wrote that, 'Great National Systems of Education under centralized governments are abolishing local dialects, and are aiding the union of mighty nations by the diffusion of the most advanced and noble languages'. This union was one in which the English laws and language, and manners were supreme.

In this system of moral demands and political determinations, both the courts and parliaments acted as conduits from state to the people and as auditoria in which the expectations of the populace might be aired and vented. Courts were, to that extent, not so much vehicles for reformation or protestation, but liminal spheres between the two. They enacted and performed the complex ritual of relating the sentiments of the legislators to the manners of the people, displaying the claims of, and limits to, the legitimacy of popular assertion and elite supervision. They were crucibles of contestation and compromise, just as Ó Raithaille depicted them in the macaronic poem with which we began. More generally, the law itself gave voice to these contests and conciliations, acting as the crucial frontier between the people and the polity. The law, in all in manifestations, provides historians with a substantial and sensitive barometer to the assumptions and attitudes that underpinned and shaped the history of the island. In what follows, we offer a series of case studies into the dynamics of these problems, taking law in its widest and narrowest of senses, exploring both the cultural and confessional framework in which it existed.

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We take it through the political formulation of its content, through to the chambers and courts in which the decisions of the state were actualised and agonised over by people for whom an encounter with the law was a life-altering, occasionally life-ending, episode.