‘The law touches us but here and there, and now and then’:
Edmund Burke, law, and legal theory

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

E Burke, Letters on a regicide peace, Indianapolis, Liberty Fund Press, 1999 [1795-7], 129.

Edmund Burke’s training in, knowledge of, and appreciation for, law is generally recognised. Indeed, as RB McDowell has written, while Burke may, during short bouts of irritation, have impulsively expressed intense exasperation with lawyers, their practices, procedures and prejudices, [but he] nevertheless remained convinced that the law, with all its limitations, must be regarded with reverence and that lawyers, with all their faults, performed functions of the utmost value to the community.

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1 This paper is an extended version of SP Donlan, ‘Burke on law and legal theory’ for C Insole and D Dwan (eds), The Cambridge companion to Edmund Burke (forthcoming, Cambridge University Press, 2012). Readers will find additional information in the notes there.

But the Irishman’s extensive use of legal language obscures how little he actually said or wrote about legal theory. As in other areas, the numerous volumes of Burke’s correspondence, writings, and speeches, cannot provide us with a clear and rigorous theory. His comments on the law typically took place in specific and complex, rapidly changing, political controversies: eg, the exclusion of John Wilkes from Parliament, the American war, the impeachment of Warren Hastings, the regency crisis of 1788-9, or the revolution in France. These reflections are often little more than the *obiter dicta* of political and public debates. They should not be confused with more formal treatise or commentaries on the laws. Instead of proscribing our interpretations to narrow limits, Burke’s texts have invited considerable special pleading. This cannot absolve commentators from reasonable evidentiary demands and coherence, but considerable interpretive liberties are inevitable. Burke’s words, whether in private correspondence or public commentary, require difficult choices to be made between literal and liberal interpretations, between letter and spirit. There are inevitably lacunae to be filled and reconstructed. Interpretive prejudices may be unavoidable. As a result, ‘Rescuing Burke’ from early interpretations is an ongoing affair.

As with English nationalists and political conservatives, Anglo-American lawyers have been quick to claim Burke as their own and to employ him in present debates. If these readings may be valuable in themselves, whatever their historical accuracy, they reflect at least two related problems. The first is an historiographical failure to appreciate the circumstances in which Burke wrote. The second is the hermeneutic problem of interpreting words from these past circumstances for present purposes. This approach seems quite foreign to Burke’s careful attention to context. It is, however, all too common for lawyers. Treated, insofar as is possible, in their own terms, Burke’s texts suggest a picture that is often at odds with common assumptions about him and the law. The Irishman’s opinion of English jurisprudence is, for example, complex and not wholly complimentary. Especially in his early pre-political writings, Burke’s jurisprudential asides presented a challenge to ‘vulgar whiggism’ and insular English and common law histories. His parliamentary statements also suggest that he emphasised the centrality of the legislature rather than, as is often suggested, the courts of common law. Perhaps most importantly, Burke’s frequent use of legal
terms – contract, partnership, prescription, rights – is largely rhetorical, built on his wider understanding of morals, manners, and history.

As there was then no place for legal training in his native Ireland, Burke left to study law at London’s Middle Temple at the goading of his father, himself a lawyer with the High Court of the Exchequer. The younger Burke did not take immediately to his studies. He flirted with the idea of a literary career before determining that he felt ‘comfort that tho a middling Poet cannot be endured there is some quarter for a Middling Lawyer’.3 As it turned out, Burke left his legal studies without entering the bar. He began instead a writing career. In 1756, he published *A vindication of natural society*, parodying Lord Bolingbroke, the ‘country’ tory historian and deist. 1757 saw publication of *A philosophical enquiry into the origins of our ideas of the sublime and beautiful*, an empiricist aesthetics providing, in effect, a ‘natural’ foundation for ‘artificial’ society. The same year, there appeared Burke’s collaboration – with William Burke, a friend he met at the Middle Temple – on *An Account of the European settlements in America*, a comparative history and ethnography of the new world. Elements of Burke’s thought are consistent with the ‘common law mind’, the corporate, cumulative development of law over time. But there were similar, equally important sources – the culture of politeness, latitudinarianism, civic thought, and comparative and philosophical histories – that Burke imbibed long before his legal studies. The progressive ‘wisdom of the ages’ was inherent in contemporary empiricism and what he called, in the *Enquiry*, a ‘more extended and perfect induction’.4 This resembles the adjudicative growth of common law, but has as much to do with the corporate growth of science. Here as elsewhere, abstract ideas and general principles played a guiding though falsifiable role, without which ‘all reasonings … would be only a confused jumble of particular facts and details’.5 This is not, however, the simple induction of principles from

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particular cases. Such principles, broader than the rules or rights of law and more flexible to circumstance, were one of the defining features of European, especially continental, jurisprudence.

Burke developed deep reservations about the narrowness of the legal training of the day and the quality of the public men it produced. Legal education amounted then to little more than attendance in the courts of Westminster and dining with practicing attorneys. It was, he later wrote, a ‘narrow and inglorious study’.6 A graduate of the University of Dublin’s Trinity College, Burke emphasized instead the importance of a liberal education for those entering the law. In this, at least, he appears to have been in agreement with William Blackstone, whose *A discourse on the study of the law* (1758) made a similar point. As editor and contributor to the *Annual Register*, Burke actually appears to have reviewed the *Discourse*. He thought it a ‘solid judicious and elegant oration … for putting the study of [law] under proper regulations, and spirited persuasive to make that study so regulated, a considerable part of academic education’.7 The *Discourse* served as Blackstone’s introduction to his Oxford lectures in 1758, the first in the English common law, and his subsequent *Commentaries on the laws of England* (1765-9). For Burke, an enlightened jurisprudence had to go beyond law, both pedagogically and philosophically.

By the late 1750s, in addition to his successful publications, Burke had begun to develop a rich web of friendships with many of the leading intellects and artists of the age. This included, for example, both Samuel Johnson and James Boswell in the ‘Literary Club’. The former secretly assisted Robert Chambers, Blackstone’s successor at Oxford, with his law lectures; the latter was trained as a Scottish advocate. Far more important for understanding Burke’s thoughts on law and legal theory, he wrote, but never published, two important works on history and law in the late 1750s and early 1760s. An *Abridgement of the English history* (c1757-62), completed through the Magna Charta, and a short fragment on English law (c1757) may be the most informative of his texts.8 Both show him deeply

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7 *Annual Register*, 1758, 452, 452.
8 These are included as ‘Fragment. – An essay towards an history of the law of England’ and *An Essay towards an Abridgement of the English history* in *Writings and speeches*, i.322-31 and i.332-552.
critical of English exceptionalism and insularity. Whatever the virtues of early England, the Saxons were a ‘rude and barbarous people’ – a trope long in use with the Irish – whose ‘liberty’ was license and anarchy. In a climate that glorified the insular and immemorial nature of English law, Burke wrote that

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

Against contemporary party histories, Burke highlighted English improvement through its social commerce or ‘communication with the rest of Europe’. It is important to note that Burke’s opinion appears solidly whig, though not ‘whiggish’. His view was firmly rooted in the establishment political whiggism of mid-century. These establishment whigs, like the Rockingham whigs, were moderns. They sought to undermine the potentially radical histories of tory writers who had themselves adopted the ‘vulgar whiggism’ of the ‘ancient constitution’. The country tory Henry St John, lord Bolingbroke, the target of Burke’s *Vindication*, was thus also among the most whiggish historians. Burke’s emphasis, with seventeenth-century jurists like Robert Brady and John Selman, is instead on the degree to which English law was European. Burke identified the ‘three capital sources’ of legal influence as the ‘ancient traditionary customs of the North’, the ‘Canons of the Church, and ‘some parts of the Roman civil law’. In this and other ways, he is, contrary to superficial analysis of his texts, at odds with Blackstone as well as the seventeenth-century English jurist Matthew Hale.

By contrast to the ancients, the liberty of the ‘moderns’ came from the increase of state powers, by the very distance of government from the governed. It eroded the power of local nobility, contributed to the modernisation of many feudal holdovers and an increased social mobility, particu-
larly as offered by greater levels of social and financial commerce. In jurisprudence, this is seen most clearly in the increasingly insistence on a distinction between ‘perfect’ juridical-political duties (or rights) backed by public sanctions and deemed indispensable for any constituent social order and the ‘imperfect’ demands and institutions left over, the organs of beneficence (or benevolence). This was a change of some significance to social thought. As an important source of self-understanding, the increased universalism of the state suggested a more subjective and autonomous, indeed legalistic, concept of the individual. By these developments, those social practices and institutions remaining outside the state were thrown into relief. Laws, with their attendant sanctions, were increasingly distinguished from manners and norms. The growing strength of commerce as a ‘power’ independent of the state only strengthened this tendency.

Where Blackstone, a ‘whiggish’ tory, blamed the Normans for the corruption of English liberty, Burke saw the conquest as joining England with the wider progress of society in Europe. The Irishman was specifically critical of Hale for failing to note ‘the great changes and remarkable revolutions in the law’ over time and for fostering the idea that it was simply ‘formed and grew up among ourselves’.13 Burke’s account was also not a mere jurisprudential history. With the Scots, he maintained that ‘the changes, … in the manners, opinions, and sciences of men … [are] as worthy of regard as the fortunes of wars, and the revolutions of kingdoms’.14 Linked to European manners, Burke saw the development of English, and European, law as progressive. ‘What can be more instructive’, he wrote:

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

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13 Ibid., i.323, 323.
14 Ibid., i.358.
and exalted by commerce, by social intercourse, and that great opener of the mind, ingenious science?15

Burke’s modern, evolutionary and progressive view was very different from that of many of his contemporaries. Even Montesquieu, ‘the greatest genius, which has enlightened this age’, was not above criticism in the texts.16 Burke suggested, too, that history and the historical method was an important element in a liberal education. The same idea was strongly advocated in Henry Home, lord Kames’ *Historical law tracts* (1758) in this period. Burke was, in fact, familiar with a number of leading Scottish jurists and thinkers, including: Lord Hailes, Hume, James Mackintosh, John Millar, and Adam Smith. Between them, Burke and the Scots exemplified the most pressing debates and developments of the century.

Burke also spent time in Ireland in the early 1760s, leading to the production of additional texts that shed light on his thoughts on jurisprudence. Much of his time was spent, however, engaged with more practical and sectarian politics. Burke was active in quieting the reaction of the Dublin government, dominated by the established church, to the so-called ‘Whiteboy disturbances’. These agrarian disturbances, mischaracterised as confessional, implicated his own catholic relatives. Burke was, in fact, nowhere more critical of the laws of Britain and Ireland than in his *Tracts relating to [the] popery laws* (c1765) written in the same period. There, he recognised the virtues of a more ‘regular, consistent, and stable jurisprudence’ were real, a mark of legal progress and foundation for social politeness.17 But the abuse of Irish Catholics by means of law struck him as particularly perverse. These Irish experiences are important to understanding much of his thought. This experience of the dispersal and destruction of a traditional aristocracy, of confiscations based on cultural and religious status, was a pattern Burke later saw repeated in British India and the revolution in France. We can also see his concern for the implications of legal and constitutional change. Legal reform was not easy ‘because laws, like houses, lean on one another, and the operation is delicate, and should be necessary’.18 Still, echoing Montesquieu, he wrote that

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15 Ibid., i.322.
16 Ibid., i.445.
17 Ibid., i.330.
18 Ibid., ix.453.
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.19

The *Tracts* also noted the necessity of an ‘interior history of Ireland’ which would show that Irish grievances were ‘not produced by toleration, but by persecution’ and ‘from unparalleled oppression’.20 Burke spent considerable time over the next four decades trying to ensure that such histories were written. Most of his allies in this were Irish catholic historians. It was often Irish manners, they all insisted, that carried the nation through the barbarous application of English law in Ireland. Burke also donated historical documents to Trinity and persuaded others to do the same. Francis Stoughton Sullivan, the first professor of common law at the University of Dublin, was one recipient. Sullivan, at Burke’s urging, sought to translate ancient Brehon law texts. And while Burke shared Hume’s skepticism towards England’s ‘ancient constitution’, he saw the Scot uncritically repeating the more offensive and prejudicial portrayals of Ireland. Burke sought unsuccessfully, with Tobias Smollet and Irish catholic historians, to persuade Hume to reconsider and rewrite his account.

Without appreciating these early texts and contexts, as well as Burke’s rich rhetoric, the meaning of his later works may be distorted. In the *Reflections*, for example, Burke wrote that English jurists from ‘[Lord Edward] Coke … to Blackstone, are industrious to prove the pedigree of our liberties….’, adding that ‘if the lawyers mistake the particulars, it proves my position still the more strongly; because it demonstrates the powerful prepossession towards antiquity’.21 We can see, however, from these early writings that Burke believed Coke and Blackstone had, with Hale and others, mistaken the particulars. When he observed that the English insisted on the continuity of their institutions, Burke did not maintain the truth of those claims.

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19 Ibid., ix.650.
20 Ibid., ix.479, 479.
21 Ibid., viii.81-2.
The appeal to the past created a useful continuity necessary for the progress of society in Europe. But it still remained myth, a point the Irishman would not forget. At its best, the appeal to history was, he said in the *Reflections*, to be ‘guided not by the superstition of antiquarians, but by the spirit of philosophical analogy’.22 Aware of the virtues of the British constitution, a belief widespread in Europe, Burke was equally aware of its vices, especially in Ireland, America, and India. And, as will be discussed below, comments of this sort were not a defence of common law adjudication against legislation, but of the British constitution against revolutionary radicalism.

Attempts by critics to link Burke with the so-called ‘Historical School’ of jurisprudence of the nineteenth century are also problematic. His influence on German thought is genuine, but simplistically equating his eighteenth-century hostility towards radical revolution with the opposition, especially by Frederick von Savigny, to the nineteenth-century codification of laws is quite seriously misplaced. Like Burke, Savigny emphasised the importance of the past to his present. Both were deeply critical of philosophical rationalism. But Savigny replaced reason with the mystical *Volksgeist*, the ‘spirit of the nation or people’ linking law and the people. The ‘Historical School’ was, in fact, linked to the insular nationalism of the nineteenth century and the hope for the creation of a German state. With Montesquieu and others, Burke recognised general differences in national character and culture, but these were extraordinarily fluid. European progress, in both manners and laws, was the result of the ‘communication’ or interaction of cultures. In the end, the *Volksgeist* resembles nothing so much as the Saxon ‘spirit’ of vulgar English whiggism. The often rowdy amalgamation of English and Celts, protestants and catholics, whigs and tories, that Burke sought to harmonise as a legislator bore little resemblance to such images. This attempt to recruit Burke to later English hostility is, of course, only one of many anachronistic errors made in wrenching Burke’s texts out of their contexts.

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22 Ibid., viii.84.
Not long after returning to England in the 1760s, Burke was working as personal secretary for Charles Watson Wentworth, Lord Rockingham. Shortly afterwards, he entered Parliament himself. For nearly twenty years, Burke would serve as the chief ideological spokesman of the Rockingham whigs. The commercial humanism they sought to maintain was a serious attempt at joining public honour and private interest, balancing the stability and corporate experience of a hereditary aristocracy with the energy and ambition of a ‘natural’ aristocracy. They were especially critical of crown influence and remained anxious, with their whig predecessors, about colonialism and ‘standing armies’. These long-standing civic languages of critique are very different from the legalist and liberal vocabulary that would come to dominant politics after the revolution in France. The latter have little application to Burke’s parliamentary career. Indeed, the reactionary nature of much contemporary populism, perhaps particularly in anti-catholic riots in Britain, is especially important to understanding Burke’s later responses to British radicalism and European revolution. At its best, Burke saw Parliament, as a body, independent of the vagaries of public opinion and the influence of the crown. He spent much of his career engaged in modest, meliorist reform. Best-known was his unsuccessful economic reforms designed to eliminate feudal holdovers and to reduce crown influence. But he championed religious tolerance, spoke against slavery, and was critical of many of the more Draconian aspects of contemporary criminal law. The ‘true genius’ of the British constitution, Burke once confided to Boswell, was ‘Tory Language and Whigg [sic] measure’.23

Burke’s views on the primacy of the legislature also appear to put him at odds with William Murray, lord Mansfield, with whom he is often associated. While Burke no doubt respected Mansfield’s abilities, and the judge was related to Rockingham, the two disagreed on a number of public issues, not least the American war. Mansfield also jailed John Wilkes who was supported by the Rockingham whigs. Perhaps most damning for Burke, Mansfield was, like Blackstone, a tory and was linked to John Stuart, lord Bute. Without descending to the anti-Scottish tirades of fellow whigs, Burke criticised Bute’s influence on the king (as well as the king’s on parliament). For his part, Mansfield suspected Burke to be the author of

23 Burke, Correspondence, v.35.
Junius’ Letters (1768-72), critical of him and around which another debate on libel arose. Indeed, while the former is credited with creating significant change in English law through the courts, the latter saw legislators rather than judges as the proper agents of legal reform. Given his parliamentary career, this is hardly surprising.

When Mansfield was denying the jury a role in determining questions of law, Burke wrote:

I have always understood, that a superintendence over the doctrines as well as the proceedings of the courts of justice, was a principal object of the constitution of this House; that you were to watch at once over the lawyer and the law; that there should be an orthodox faith as well as proper works: and I have always looked with a degree of reverence and admiration on this mode of superintendence. For being totally disengaged from the detail of juridical practice, we come something perhaps the better qualified, and certainly much the better disposed, to assert the genuine principle of the laws; in which we can, as a body, have no other than an enlarged and a public interest.24

The difficult duty of articulating the law – in light of general principles on one hand and the practical limits of local manners on the other – was, in large part, the responsibility of the corporate legislature. Parliament represented, at least ‘virtually’ and ideally, the public virtue of Britain in a way that the courts could not. In the jury debates, Burke stated

Juries ought to take their Law from the Bench only; but it is our Business that they should hear nothing from the Bench but what is agreeable to the principles of the constitution. The Jury are to hear the Judge; the Judge is to hear the Law where it speaks plain, where it does not he is to hear the Legislator.25

Neither English courts nor parliament were alone responsible for institutions like the jury. A development ‘so elaborate and artificial as the Jury was … brought to its present state by the joint efforts of Legislative

24 Works, ii. 137 (taken from the draft of the ‘Speech on the Jury Bill’ in Ibid., 137-46). Cf. Writings and speeches, ii.343-9, which contains only that part of the speech given, and from which those citations are taken.

25 Writings and speeches, ii.347.
authority and judicial prudence.'26 Burke would also continue to emphasise the civic commonplace that it was the rule of men, especially the public virtue of public men, on which justice depended.

Burke’s best-known opinion at this stage of his career was his strong opposition to the American war. In debates of the period, he articulated his rejection of legalistic formalism and declarations of abstract right. His objections were both philosophical and political. During the American Revolution, Burke chastised the English Parliament’s insistence on its formal, theoretical privileges. As with Ireland, what was essential for him were ties of mutual interest and affection. After Rockingham’s death in 1782, radical whigs became more vocal in their demands for extensive constitutional innovations, particularly in representation. British radicals, including religious Dissenters, were also critical to the losses of the Rockingham whigs in the electoral debacle of 1784. The fourteen-year impeachment of Warren Hastings found Burke arguing against any simplistic imposition of British laws and manners on India. Instead, he defended native civilisation and institutions.27 Burke also noted the ‘growing Melioration of the Law’ that sought justice beyond legal formalism. The close relationship of European culture and commerce ‘opened a Communication more largely with other Countries, as the Law of Nature and Nations … came to be cultivated; … antique Rigour and over-done Severity gave Way to the Accommodation of Human Concerns, for which Rules were made, and not Human Concerns to bend to them’.28

The uncertainty of succession in the ‘Regency crisis’ further exposed the widening divisions over constitutional theory and history. The increasing inflexibility of radical demands in ostensibly ‘natural’ rights, piqued Burke’s hostility. For him, ‘abstract principles of natural right – which the dissenters rested on, as their strong hold – were the most idle, because the most useless and the most dangerous to resort to. They superceded society, and broke asunder all those bonds which had formed the happiness of mankind for ages’.29 They threatened, as the revolutionaries would in France, civilisation itself. ‘Am I to congratulate an highwayman and

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26 Ibid., ii.347.
27 Ibid., vii.168.
28 Ibid., vii.163.
murderer, who has broke prison, upon the recovery of his natural rights?"  

His focus, he insisted, was instead on the ‘civil social man’, who in order to ‘obtain justice … gives up his right of determining what it is in points the most essential to him’.

For Burke, natural law was expressed or instantiated, however imperfectly, throughout history and a variety of legal orders. But the clarity of claims of natural right were a ‘confusion of judicial with civil principles’. They were epistemologically unsound and ontologically denied the inherently communitarian nature of human association. Politically, they risked the progressive, precarious articulation of political rights in European history.

Burke’s doctrine of prescription, which may be seen descriptively as early as the *Abridgement*, became a progressively more important normative requirement in his attempt to pursue and maintain moderate reforms. If Burke’s employment of ‘prescription’ is problematic, it is so because of its absence of rules for application. The legal analogy had little to do with any specific body of law. It may even be universal. Burke’s presumption in favour of established rules and institutions was not uncritical. It was a prudential consideration rooted, in part, on the essentially communal and non-rational nature of human social life and the ‘natural’, ie naturalistic, basis of human presumption, habituation, etc. This is related, too, to Burke’s critical view, with most of his contemporaries, of any strict doctrine of precedent. With his inherent philosophical-epistemological scepticism towards ‘precepts’ and ‘rules’, Burke was always wary of rigid legalism. He did not believe that legal precedent was a straightforward matter. Such rationalism runs contrary to the whole tenor of Burke’s thought. This should not be surprising. Nor was precedent, political or legal, simply binding. The acceptance of modern *stare decisis*, in which a single decision of a superior court is binding on inferior courts, is a product of nineteenth-century positivism. Indeed, ‘[p]recedents merely as such cannot make Law’, Burke wrote, ‘because then the very frequency of Crimes would become an Argument of innocence.’

Past decisions were

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31 Ibid., 150.
33 *Writings and speeches*, ix.502.
persuasive, as evidence of learned opinion of the law and a valuable source of legal stability, but they were not authoritative in themselves.

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It was in this context that Burke’s response to events in France must be understood. As constitutional reform turned to cultural revolution, the novelty and proselytising spirit of the revolution became ever more apparent. Approached by Thomas Paine, Burke was taken aback by his enthusiasm for an expanding European revolution. More immediately, a published sermon of the Dissenter Richard Price to English sympathisers of the revolution seemed to confirm a real threat to Britain. The *Reflections on the Revolution in France and on the proceedings in certain societies in London relative to that event* (1790) was largely aimed at this native audience. Paine and Price also seemed to confirm Burke’s belief in important political and philosophical links between British religious radicalism and French revolutionary thought. This revolutionary zeal appeared to him little different from the religious enthusiasm of the British, Irish and European wars of the previous century. It was not progress Burke dreaded, but the loss of the improvement that had already occurred in Europe over centuries. Even before the Terror in France he feared

first of all the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of the ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would no longer be studied.34

Even manners might lose all anchor and the historical progress of society in Europe endangered

No part of life would retain its acquisitions. Barbarism with regard to science and literature, unskillfulness with regard to arts and manufactures, would infallibly succeed to the want of a steady education and settled principle; and thus the commonwealth itself would, in a few generations, crumble away, be disconnected into the dust and powder of individuality, and at length dispersed to all the winds of heaven.35

34 *Reflections*, 193-4.
A defender of the modernity of the *ancien régimes*, including his own, Burke did not dread progress or change, but the loss of centuries of European civilisation and improvement. It was the slow, fragile development of European manners that ultimately supported both commerce and the laws. In the ‘shade’ of these manners, ‘commerce, and trade, and manufacture, the gods of our oeconomical politicians, are themselves perhaps but creatures; are themselves but effects, which, as first causes, we choose to worship. … They too may decay with their natural protecting principles’.36 Burke’s essential concern was for the corporate, mediating, process by which individual and popular will was balance by public reason.

In what may be his most famous passage, Burke wrote that ‘Society is, indeed, a contract’.37 The passage, which follows shortly after that quoted above, continues:

Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science, a partnership in all art, a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those whose are dead, and those who are to be born.38

But this extract shows, perhaps better than any, the mistake of applying to Burke any narrowly political or jurisprudential reading. It suggests the close connections between manners, history, and law. Burke’s point is precisely to deny that the language of ‘contract’ is sufficient to understanding or articulating the complexities of human community and history. For Burke, ‘society’, the civil or civilised society, was an entity wider than state or nation. It was the felt sociability and lived associations of men,

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36 Ibid., 173-4.
37 Ibid., 194-5.
38 Ibid., 194-5.
plural and corporate, enveloping all social practices and institutions. While these were based in natural human dispositions, they were not insignificantly altered by culture and historical circumstance. There are few points more important in understanding Burkean jurisprudence than the recognition that he does not collapse ‘civil society’ into the state, but the state into civilised society. The social practices and manners of a people, not least their economic structures, influenced the character and content of their laws and institutions. Modern legislators must be concerned with manners, and the mediating orders and institutions that moderate them, precisely because he may do so little to alter them.

Burke saw manners as both the source of the laws and practical limits to their efficacy. And manners had, of course, ‘natural’ sources. For all of the uniqueness of its mechanisms and sanctions, law was ultimately ‘beneficence acting by a rule’. The modern and enlightened cultures of pre-revolutionary Europe were historically progressive, as Burke saw it, precisely because they balanced the inevitable development of relationships of status with those of choice, including contract. This emphasis on manners and beneficence, on nature and culture, is Burke’s most serious challenge to the epistemological transparency and ontological subjectivism of the radical enlightenment, both secular and religious. It puts him closer to thinkers of the so-called ‘Scottish Enlightenment’ – and to Irish catholic historians – than to common lawyers in ultimately prioritizing manners (or culture) over law. Law was insufficient without beneficence, just as reason was without sentiment. The ‘spirit of our Laws’ were founded on ‘our own dispositions, which are stronger than Laws’. It is in this sense that

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

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39 Ibid., 149.
41 Ibid., 126.
Burke’s jurisprudence is imperfect, in both the general and eighteenth-century senses. For better and worse, he argued that manners and history continually reassert themselves in the face of a more perfect justice that neglected manners, other norms, and the mediating practices and institutions of society.

For Burke, the relationship of law, history, and manners was rooted in a naturalism based in the dynamic empiricism of his age, the legacy of the ‘culture of politeness’, and religious latitudinarianism. What he called, in the *Reflections*, the ‘moral constitution of the heart’, the formation of individual character, was a sublime amalgamation of native predispositions and cultural influence. It was on this ‘constitution’ that the history of European manners and progress was built. In articulating such a view, Burke was working in parallel, if not actually in partnership, with many of the most sophisticated historians and jurists of the day. A ‘civil economy’ of glory, he believed, continued to provide the social stability necessary for improvement and a link between private and public interest. A commercial humanism provided energy and ambition for social change and ‘communication’. Here as elsewhere, the ‘civic’ traditions, ancient and modern, leavened Burke’s faith in commerce and law. Finally, general principles of natural justice, with none of the clarity of revolutionary rights, continued to guide legislators. In the final analysis, law was itself only a highly formal, though critical, method of ensuring public virtue and private beneficence in light of manners and history.

Among the materials in the Burke archives is what appears to be a draft defence of his later, anti-revolutionary writings. There he wrote:

For the future, I shall stick to my profession. We lawyers do not always make the best hand of a Metaphor. I have burned my fingers with them. In future, I shall avoid all metaphors – I shall stick to my precedent Book … & my special Pleading … Oh. *Si sic omnia!*43

42 *Reflections*, 176.
43 F (M) A.xiv.12a-d in the Fitzwilliam (Milton) Burke Collection at the Northampton Record Office.
Burke made considerable and colourful use of legal metaphor throughout his life. We must be careful not to burn our fingers. Burke was not, of course, always imprecise. His early comments on law very clearly show him critical of insular English and common law histories that failed to acknowledge their external debts to the wider progress of society in Europe. While we must also be careful with his parliamentary statements, issued in the midst of major public debates, he consistently insisted that Parliament rather than courts should be at the centre of legal change. More generally, reading his work as a whole suggests that, for Burke, positive law was the imperfect application of natural principles significantly altered by historical circumstance. His use – or misuse – of the language of law was a rhetorical strategy that served as a critique of the thin legalism of revolutionary sloganeering. He defended the modernity of the old regimes, with all of their imperfections, for fear of the loss of centuries of cumulative, corporate progress. Readers, or at least scholars, must be more attentive to these contexts and less determined to rescue Burke for contemporary causes.

Oh, si sic omnia!