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# MULTICULTURAL RIGHTS? NATURAL LAW AND THE RECONCILIATION OF UNIVERSAL NORMS WITH PARTICULAR CULTURES

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This Article addresses a problem of legal reasoning that has particular importance for contemporary international law: how can lawyers promote universal human rights in a world of particularistic cultures? This problem is especially acute given international law's twin goals of effective defense of the rights of all people and avoidance of the brute imposition of Western values on non-Western peoples. First, this Article contends that contemporary international law has failed to provide an adequate conceptual structure through which to consider how one ought to apply universal standards to particular circumstances. Second, this Article proposes that the long-standing tradition of natural law reasoning offers an adequate conceptual structure. This Article makes the latter assertion through an examination of the natural law jurisprudence of eighteenth century writer and statesman, Edmund Burke.

This Article will argue that Burke's natural law is particularly useful to address the problem of international human rights in a multicultural world. Burkean natural law emphasizes the role of history in shaping cultures and guiding the application of universal norms. Burke understood local law as embodying both particular traditions and universal norms. Thus, in seeking to protect universal rights, he recognized the need to respect and maintain the coherence of ongoing cultures and societies, lest the people's expectations and rights be violated.

I begin by outlining international law's failure to express and apply universal standards to traditional cultures in a manner that protects

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human rights while also respecting indigenous ways of life. I then discuss natural law theory as a possible solution to this conundrum of international human rights. I argue against the position that natural law is inadequate to reconcile universal norms with particular circumstances. Critics of natural law maintain that natural law is relatively uninformed regarding the importance of history and historical circumstance. In arguing against this view, I turn in particular to the natural law jurisprudence of Edmund Burke. I argue that Burke integrates crucial elements of historical, moral, and political thinking. The result is a jurisprudence allowing Burke to work for greater protections of universal human rights, for example, in his opposition to slavery, while respecting and protecting indigenous cultures and societies.

### THE CONUNDRUM OF INTERNATIONAL HUMAN RIGHTS

International law increasingly is aimed at changing the practices of local cultures to bring them more in line with universal principles of human rights.<sup>1</sup> For example, the Report of the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) discusses conditions in Indonesia and argues that “cultural and religious values cannot be allowed to undermine the universality of women’s rights.”<sup>2</sup> Early on, the report notes that in all countries cultural and religious values are the most significant reasons for women’s reluctance to participate in public life.<sup>3</sup>

The opposition of international law to local culture manifests a serious conflict in contemporary legal discourse. Those advocating international human rights often posit universal standards in opposition to parochial

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1. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1416-17 (1999) (arguing that international law is enforced through institutional interaction, interpretation of legal norms, and internalization of those norms into domestic legal systems).

2. *Report on Indonesia*, U.N. COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, 18th Sess., U.N. Doc. A/53/38 Rev. 1, ¶ 282 (1998).

3. See *id.*; see also Radhika Coomaraswamy, U.N. Special Rapportuer on Violence Against Women, *Reinventing International Law: Women’s Rights as Human Rights in the International Community*, Edward A. Smith Lecture Delivered at Harvard Law School (March 12, 1996) (arguing that “the demands of the international women’s movement” to new and increased rights for women are “under challenge from alternative cultural expressions” and hoping “that the common values of human dignity and freedom will triumph over parochial forces” opposed to the view that every human should be permitted the same substantive rights, regardless of the culture in which that human resides), available at <http://www.law.harvard.edu/programs/HRP/Publications/radhika.htm> (last visited Mar. 28, 2002).

customs.<sup>4</sup> Others criticize this vision and assert that non-European peoples deserve greater respect, particularly in regard to their indigenous cultures.<sup>5</sup> Those seeking to spread a code of universal human rights must now reconcile the fact that the values they espouse are viewed by many as impositions on preexisting cultures, oppressed for generations in the name of European visions of what is right and what is legal.<sup>6</sup> This is particularly true in the case of Islamic nations, a number of which have entered significant reservations to compliance with CEDAW's Article Two, which requires the abolition of discrimination against women in laws, customs, and practices. Geraldine A. del Prado noted CEDAW's "unlimited scope" in its requirement that states "pursue by all appropriate means and without delay a policy of eliminating discrimination against women."<sup>7</sup> According to del Prado, such reservations, based on adherence to Sharia or Islamic law, undermine CEDAW's "requirement to abolish discriminatory laws, customs, and practices."<sup>8</sup> Thus, there is no universal agreement on the existence, let alone the content, of universal human rights equally applicable to all persons. Steve Redhead notes that, even among feminist legal scholars, there has been significant movement away from a "jurisprudence of equality" to a "jurisprudence of difference," from the desire to enforce

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4. See, e.g., Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 382 (2000) (discussing "abolitionist" feminist activism in non-European countries). Nyamu posits a necessary conflict between universal rights and particular cultures, arguing that "[p]roponents of gender equality must appropriate positive openings presented by cultural and religious traditions." *Id.*; cf. Lino J. Lauro & Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 67 (1996) (advocating a policy of building on Islamic law in seeking peace and cooperation in Sudan).

5. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 7 (1999) (arguing that international law was created by European colonialists to denigrate indigenous cultures in order to justify conquest and colonization).

6. See, e.g., J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 435-36 (1968). Verzijl states that one simply cannot question that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of European beliefs, and in both of these aspects it is mainly of Western European origin.

*Id.*

7. Geraldine A. del Prado, *The United Nations and the Promotion and Protection of the Rights of Women: How Well Has the Organization Fulfilled Its Responsibility?*, 2 WM. & MARY J. WOMEN & L. 51, 70 (1995) (citing CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, Analysis, Article 21, ¶¶ 93-101).

8. *Id.*

standards such as equal pay to a push to enforce standards such as working for a “feminine writing of the body-in-law.”<sup>9</sup>

Concomitant to the lack of moral consensus underlying claims to universal rights is the absence of a theory of law that would allow the enforcement of such rights in nations that do not accept them. Treaties intended to establish and enforce universal human rights, such as the 1948 United Nations Universal Declaration of Human Rights, constitute international law. Such international law, in Antony Anghie’s words, “is universal. It is a body of law that applies to all states regardless of their specific cultures, belief systems, and political organizations.”<sup>10</sup> However, it is important to note the inherent limitation of international law as currently constituted: “It is a common set of doctrines that all states use to regulate relations with each other.”<sup>11</sup> Because international law concerns relations among sovereign states, instruments of international law, such as the U.N. Declaration of Human Rights, are binding only on those who have consented to them – their signatories; they cannot be used as legal instruments by which to extend human rights to nations that do not accept them.<sup>12</sup>

This conundrum of human rights laws, which are inapplicable in nations that wish to engage in the practices legislators would outlaw, arises from a prevalent conception of law. Law today is primarily seen through the lens of positivism,<sup>13</sup> which “asserts, not only that the sovereign administers and enforces the law, but that law itself is the creation of sovereign will.”<sup>14</sup> As positivists view law as the will of the sovereign, law can be created only by sovereigns. Thus, international law, on positivist terms, can only be that to which sovereign states have agreed. If nation states do not agree to a code of universal human rights

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9. STEVE REDHEAD, *UNPOPULAR CULTURES: THE BIRTH OF LAW AND POPULAR CULTURE* 84 (1995).

10. Anghie, *supra* note 5, at 1.

11. *Id.*

12. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 84 AUSTL.Y.B.I.L. 82-108, reprinted in BRUNO SIMMA & PHILIP ALSTON, *HUMAN RIGHTS LAW* 3-8 (Philip Alston ed., 1996).

13. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1653 (1994). Berman points out that most of the multiplicity of contemporary legal approaches (e.g., law and economics, critical legal studies, and feminist theories) “fall unconsciously into the positivist category, sometimes with an unconscious admixture of natural law theory.” *Id.* at 1655 n.8. In Berman’s view, all of these approaches share hostility toward historical experience as a source of legitimacy. *Id.*

14. Anghie, *supra* note 5, at 10; see also Berman, *supra* note 13, at 1653 (“Positivism treats law essentially as a body of rules laid down (‘posited’) and enforced by the supreme lawmaking authority, the sovereign.”).

espoused by any particular writer, group, or organization, those rights cannot be enforced as law – at least in regard to those states that refuse to consent.<sup>15</sup>

Lawyers and jurists alike have sought to compensate for the inefficacy of international treaties in enforcing human rights by using the language of cultural norms as an aid in constructing customary law.<sup>16</sup> These advocates seek to create, through imaginative application and interpretation of certain documents and rhetorical statements, a proto-law that has been dubbed “instant custom.”<sup>17</sup> Bruno Simma and Philip Alston, commentators on the subject, note that the traditional manner by which customary law gains decision-making value is through actual practice within a given state; it develops into a legal norm through persistent use and eventual acceptance by domestic jurists.<sup>18</sup> Today, however, an increasing number of lawyers and jurists claim that customary law is created in the very process of working through international bodies, such as the United Nations, to draft language concerning state action in regard to human rights. Under this view, the process itself shapes general principles into law-like forms and provides them with the widespread acceptance necessary to treat these principles as customary law.<sup>19</sup> Such claims attach in particular to influential United Nations documents such as the U.N. Declaration of Human Rights.<sup>20</sup> Simma and Alston caution that this movement may undermine a lawyer’s ability to recognize what is truly customary, such as customs embedded in the practices of a given state; likewise, they caution that the movement may decrease a lawyer’s capacity to formulate and enforce specific,

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15. See Anghie, *supra* note 5, at 13 (describing how states could manifest sovereign will through consent to a set of customary laws).

16. See, e.g., Simma & Alston, *supra* note 12, at 7 (citing German and Australian cases in which judges refused to interpret domestic law as inconsistent with general rules of international law). On the limits of international customary law in the American context, see Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT’L L. 421, 427-29 (2000) (asserting that while the majority of courts have held that customary law has the status of federal common law, the existence of a private cause of action thereunder is limited to specifically enacted legislative provisions).

17. Simma & Alston, *supra* note 12, at 10-11.

18. See *id.* at 9-10 (quoting 2 HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 418 (1952)) (citing Kelsen’s dictum that “states ought to behave as they have customarily behaved”).

19. See *id.* at 10-11; see also M. Akehurst, *Custom as a Source of International Law*, 47 BRITISH Y.B.I.L. 1, 53 (1977) (arguing that words, texts, and votes, by encompassing reasoned argumentation, may replace the need for actual practice in establishing customary law).

20. See Simma & Alston, *supra* note 12, at 11.

useful rules in international law.<sup>21</sup> They also are concerned about American ethnocentricity in the norms deemed to have the force of customary law.<sup>22</sup>

Simma and Alston's critique of instant custom rests in part on the similarity they find between attempts to fit international declarations into the forms of customary law jurisprudence and natural law jurisprudence.<sup>23</sup> They argue that "general principles have not fared too well as a source of international law, mainly due to their natural law flavour and the uncertainties surrounding the ways in which they are to be established and applied."<sup>24</sup> Because they are seeking to impose principles that have little or no basis in the practice of the target state, creators of "instant custom" are simply trying to impose their own vision of propriety and legality on states that fail to act as the creators of the "instant custom" want them to act in regard to human rights.<sup>25</sup> Thus, the charge of cultural imperialism retains its basis through the conduct of human rights advocates.

Simma and Alston recommend avoiding the problem of a moralistic natural law by working toward a consensus in the interpretation and application of general principles regarding international human rights.<sup>26</sup> This suggestion, however, does not address the question of how an organization can win the consent of a state that does not wish to accede to international human rights standards as formulated in legal sources such as United Nations documents. Some international organizations have sought to work around this problem by breaking down the distinction between political and non-political spheres through the use of

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21. *See id.* at 12, 17.

22. *See id.* at 15-16 (noting the similarity between "universal" customary rights and those found in the U.S. Bill of Rights and noting that international customary law excludes certain rights that are not considered as important under U.S. law, such as the right to freedom of association).

23. *See id.* at 28.

24. *Id.* (advocating a consensual approach by which United Nations documents rooted in the 1948 Charter are afforded authoritative status in guiding further interpretation and formulation of customary law rooted in state practice).

25. *See id.* Note, for example, the emphasis on "education" as a means of changing long-held beliefs and customs regarding issues such as the proper role and rights of women in CEDAW. *See del Prado, supra* note 7, at 59-60. Within CEDAW's policy rubric, education and dissemination of information are considered imperative to the accomplishment of equality. Special importance is given to teaching equality to young children and mobilizing them to act as future leaders for change. Agents of the state, including the judiciary and the police force, must also be educated on gender equality and the special legal needs of women . . . .

*Id.* at 59. Contrary beliefs and structures constitute "[o]bstacles to development." *Id.*

26. *See* Simon & Alston, *supra* note 12, at 28.

non-governmental activist organizations.<sup>27</sup> Such attempts, however, actually exacerbate the basic problem. By seeking to foster remedies outside the law, these international organizations highlight the issue of culture. Attempts to impose universal human rights through positive law may eschew moral argumentation. On positive law principles, if it is the will of the sovereign that certain activities be protected or banned, and the sovereign enacts laws to that effect, the laws will protect or ban such activity.<sup>28</sup> The use of means or arguments beyond the law, on the other hand, must entail some kind of didactic element. When activist organizations attempt to persuade the target government of the rationality, profitability, or morality of acceding to universal notions of human rights, the organizations play the role of a teacher explaining to a presumably recalcitrant or ignorant student its own interests or the rules of morality. This is true whether the activist group is comprised of U.N. observers, Western lawyers, or local activists who have “bought into” universal principles of human rights. It seems clear, then, that the conflict between assertions of universal rights and the sanctity of local cultures is, at base, normative and encompasses cultural, historical, political, and legal issues.<sup>29</sup>

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27. See Abdullahi An-Na'im, *State Responsibility Under International Human Rights Law To Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, 167, 173-74 (Rebecca J. Cook ed., 1994) (seeking “a genuinely reciprocal global collaborative effort” involving local culture and international voluntary organizations in the promotion of rights for women). See generally Symposium, *The United Nations Family: Challenges of Law and Development*, 36 HARV. INT'L L.J. 267 (1995); Alasdair MacIntyre, *A Partial Response to My Critics*, in AFTER MACINTYRE 283 (1994) (arguing that moral norms must be formulated and enforced at the local level).

28. Berman, *supra* note 13, at 1653.

29. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1093-95, 1097 (1996) (providing a telling example of the conundrum into which multicultural approaches to positive law can fall). Coleman argues for a jurisprudence that balances what she deems to be two overtly liberal, progressive, and undeniably sound goals: granting subjective justice to each individual based on the accused's view of whether, and to what extent, he did wrong, and expanding legal protection of women and children. *Id.* at 1095. The problem situation Coleman addresses is that of crimes committed by immigrants who claim their home culture would not deem such conduct criminal. *Id.* at 1100-02. The problem is that these home societies often condone what American tradition deems unconscionable treatment of the very women and children in need of protection. *Id.* at 1095-97. Coleman's “balancing” of the interests of subjectivism and protectionism posits goals without justifying them morally, historically, or logically. By definition, the balancing cannot succeed because one cannot harmonize polar opposites; one can only choose between them. For a critique of attempts to recognize cultural differences as positing a “terrible choice between racial/ethnic solidarity and the struggle for gender equality,” see generally



Yet, despite a Western aversion to being labeled morally righteous, a working consensus sometimes arises regarding the morality or immorality of certain acts.<sup>30</sup> Ruth E. Gordon has argued that, in recent years, there has been relative international acceptance of short-term United Nations intervention aimed at ending large-scale killings of civilians and insuring the delivery of humanitarian assistance.<sup>31</sup> However, even in dealing with the application of international criminal law to gross violations of human dignity, the key to enforcement has been the willingness of officials in the target country to hold the accused responsible.<sup>32</sup> Indeed, both sides in disputes over the application of international law have been accused of interpreting the law and the concept of sovereignty so as to serve the targeted ends.<sup>33</sup> The United States, a founding, permanent member of the United Nations Security Council, has been notably reluctant to apply international law to itself.<sup>34</sup>

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Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1057 (1994).

30. See, e.g., Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AM. U. J. INT'L L. & POL'Y 375, 421 (1996). Chase recounted the dialogue between Tariq Modood, who proposes extension of British libel law to any statement found offensive by any minority religion, and Leonard Levy, who sees such communal libel rules as ultimately eliminating freedom of expression. *Id.* Chase sides with Levy, arguing that group libel protections, though aimed at eliminating intolerance, in effect, would work against a tolerant society by empowering minority religious groups to stifle open debate. *Id.* at 421-22.

31. See generally Ruth E. Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT'L L.J. 43, 46 (1996). But cf. Tara Sapru, Comment, *Into the Heart of Darkness: The Case Against the Foray of the Security Council Tribunal into the Rwandan Crisis*, 32 TEX. INT'L L.J. 329 (1997) (arguing that the U.N. Security Council acted *ultra vires* in setting up a tribunal to prosecute human rights abuses in Rwanda, potentially undermining the legitimacy of all international human rights efforts).

32. See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 238 (1998) (detailing inconsistencies of applications of international criminal law during times of war and peace alike).

33. See *id.* at 238. For a discussion of recent calls for a consolidation of American global hegemony, see Bruce P. Frohnen & Charles J. Reid, Jr., *Diversity in Western Constitutionalism: Chartered Rights, Federated Structure, and Natural-Law Reasoning in Burke's Theory of Empire*, 29 MCGEORGE L. REV. 27, 28-29 n.11 (1997) and citations therein. See also Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 960 (2000) (reviewing STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999)) (arguing that "sovereignty" is a term manipulated by powerful countries to serve their own interests, to impose their wills on weaker countries in the name of universal rules, and to prevent application of those rules to themselves on the basis their right to self-rule).

34. See, e.g., Curtis A. Bradley, Breard, *Our Dualist Constitution, and the International Conception*, 51 STAN. L. REV. 529, 529-30 (1999) (discussing *Breard v. Greene*, 523 U.S. 371 (1998), in which the Supreme Court refused to stay execution of a Paraguayan citizen convicted of murder and attempted rape in Virginia, despite the

To the extent that such proclamations aim beyond the conduct of relations between nations to cultural practices within nations, they constitute normative statements as to what laws should be promulgated in all nations.<sup>35</sup> Political, economic, or social action attempts to influence such sovereign decisions, whatever their philosophical or institutional bases. Such attempts are less “law like” than votes of an elected legislature or decrees from an unelected ruler.<sup>36</sup> To the extent that international law is part of an attempt to change the internal policies of any country, it must be used to motivate particular nation states to change their public policies and force broader changes in cultural traditions and practices.<sup>37</sup>

### IS NATURAL LAW INADEQUATE?

Positive law is not inherently self-justifying – particularly to those not already subject to it. Arguments must be made concerning why human rights should be defended through legal means if the goal is to establish those means other than by force. But on what basis can this be argued? One traditional approach is embodied in natural law. We might consider

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court’s acknowledgement that Virginia violated the Vienna Convention on Consular Relations by failing to advise Breard at the time of his arrest of his right to confer with his consulate, and notwithstanding the provisional order of the International Court of Justice ordering the United States to take all measures at its disposal to stay that execution).

35. See, e.g., James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, 36 HARV. INT’L L.J. 307, 307-28 (1995) (advocating the use of an international law of development based in formulations of general human rights principles to force states to allow non-governmental organizations to participate in all levels of government and help craft business regulations).

36. See Ratner, *supra* note 32, at 256. Ratner argued that “traditional” means of influencing sovereign behavior include not only treaties and other instruments of international law, but also publicity, diplomatic isolation, economic sanctions, and military intervention. *Id.*; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 8 (1995) (applying economic analysis of norms of behavior and their influence on law to the behavior of nation states).

37. See Nyamu, *supra* note 4, at 392 (arguing that the United Nations, in attempting to change gender-biased cultural practices, uses “state-centric, shaming techniques” in its effort to change government policies); see also Anghie, *supra* note 5, at 4, 10 (noting that international law during the nineteenth century shed its natural law origins in favor of a positivist view). This positivist view of international law “distinguished between civilized states and non-civilized states and asserted further that international law applied only to the sovereign states that composed the civilized ‘Family of Nations.’” *Id.* at 4. Even in instances where mutual interests might be seen as dictating universalist accommodation, such mutuality of interest can be hard to find. See, e.g., Jay Lawrence Westbrook, *Universal Priorities*, 33 TEX. INT’L L.J. 27, 27-45 (1998) (arguing that despite a consensus on the need for a uniform bankruptcy system to effect substantial economic reform, the United States is a minority in seeking universal bankruptcy filing while most countries maintain a territorial system in which local judges allocate assets only to local entities).

“[t]he naturalist international law that had applied in the sixteenth and seventeenth centuries [and that] asserted that a universal international law deriving from human reason applied to all peoples, European or non-European.”<sup>38</sup> Naturalist international law, itself based in reason and morality, provides a basis for universal rights arguments. As Harold Berman states, “[n]atural law theory treats law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience.”<sup>39</sup>

Legal positivism, so prevalent in current jurisprudence, developed in opposition to the natural law vision.<sup>40</sup> Beginning in the fourteenth and fifteenth centuries, followers of William of Ockham, who asserted the primacy of will over reason, in conjunction with followers of Marsilius of Padua, who asserted the coercive nature of all government and law, began to develop a positivist theory of law.<sup>41</sup> It was during the nineteenth century, however, that positivism came to triumph, particularly in the area of international law.<sup>42</sup> This Article contends that natural law provides a framework through which to view human rights issues that is superior to the positivism that has displaced it from the center of jurisprudential discourse.

Natural law has its roots in a religious conception of the human person and the rights and obligations flowing from that person’s relationship with his creator.<sup>43</sup> It provides a set of universal standards that transcend

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38. Anghie, *supra* note 5, at 4.

39. Berman, *supra* note 13, at 1653.

40. *See id.* at 1652-53.

41. *See id.* at 1654.

42. Anghie, *supra* note 5, at 1-2.

43. *See generally* MYRES MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 68-71, 73-75 (1980), *excerpted in* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 211-12 (3d ed. 2001) (arguing that natural law assumes that there are laws existing in nature – both theological and metaphysical – that confer rights upon individuals as human beings). McDougal et al. assert that the two sources of these rights are divine will and metaphysical absolutes, which constitute a higher law than is identified with humankind and requires protections of individual rights. *Id.*; *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 25-29 (1980) (positing that, according to naturalists, the basis of the validity of all legal systems rests on the will of the Supreme Being, God-created law, or the law of nature). *See generally* Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT’L L. 18 (1998) (tracing the natural law roots of international law). The inalienability and inviolability of certain rights and the natural law roots of these rights are also reflected in the language of the American Declaration of Independence, which proclaims the *self-evident* truth “that all *Men* are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE

particular cultural and historical circumstances, making it possible for disciplined observers to judge the conduct of both individuals and nations.<sup>44</sup> As such, it seems well suited to provide the basis for rules regarding the formulation and enforcement of human rights in the international arena. However, there is significant opposition to such arguments, particularly from legal academia.<sup>45</sup> Some critics, espousing feminist, multicultural, and other positions rooted in critiques of traditional Western institutions, argue that natural law is de-legitimized by its history and point to the injustices that natural law arguments have been used to defend.<sup>46</sup> At base, such criticisms assert that natural law is simply the name those in power give to the rules they happen to value or find convenient for their own ends.<sup>47</sup> Other critics have argued that

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para. 2 (U.S. 1776); see also CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 34 (1999) (arguing that natural law is exemplified by Sophocles' *Antigone*, which portrayed the law of Zeus, or Justice, as an override to man's law).

44. See RICE, *supra* note 43, at 35-39 (citing Aristotle, Cicero, Coke, Blackstone, Hamilton, and George Mason on this point); see also PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW 7 (1986) ("Natural Law was an eternal, unchangeable, and universal ethical norm or standard, whose validity was independent of man's will; therefore, at all times, in all circumstances and everywhere it bound all individuals, races, nations, and governments.").

45. See J. ROLAND PENNOCK, RIGHTS, NATURAL RIGHTS, AND HUMAN RIGHTS – A GENERAL VIEW IN HUMAN RIGHTS 3 n.8 (J. Roland Pennock & John W. Chapman eds., 1981) (noting that the doctrine of natural rights was criticized because of its association with metaphysical or theological doctrines). For a treatment of international legal issues rejecting the natural law rooted categories of Western jurisprudence, see Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35, 37 (1989-90) (arguing that the U.N. Charter concept of legal equality of all nations requires that the international definition of refugee be expanded to include a multicultural perspective rather than the more restricted Western view); see also Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 213 (1991) (applying feminist and Afro-centric theories to illustrate the cooperative and coercive aspects of state sovereignty).

46. See William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1111 (1999) (noting that natural law arguments were used historically by males to enforce "compulsory heterosexuality" and suppress women's desire for independence). For an extensive review of the arguments against natural law, see Robert P. George, *Natural Law and Civil Rights: From Jefferson's 'Letter to Henry Lee' to Martin Luther King's 'Letter From a Birmingham Jail'*, 43 CATH. U. L. REV. 143, 156 (1993) (summing up criticisms of natural law as the view that "'natural law' is a mere euphemism for legitimizing the status quo, thus reinforcing structures of domination and power").

47. See generally George, *supra* note 46; see also John T. Noonan, Jr., *Development in Moral Doctrine*, 54 THEOLOGICAL STUDIES 662, 671 (1993) (citing John T. Noonan, Jr., *The Philosophical Postulates of Alfred Loisy* (1948) (unpublished M.A. thesis, The Catholic University of America)) (asserting that according to modernist theologians,

natural law is too ahistorical; its normative statements lack any basis in the actual conduct of social and political life.<sup>48</sup> Thus, both sets of critics agree in asserting that natural law fails to take sufficient account of history – whether concerning past injustices or the historical context in which current conduct takes place.

It is precisely the element of historical consciousness that, according to Harold Berman, is missing in both contemporary natural law and positivist jurisprudence.<sup>49</sup> Contrary to modern, ahistorical jurisprudence, Berman notes that “[e]ver since the early formation of discrete modern Western legal systems in the twelfth century, it had been taken for granted that a legal system has an ongoing character, a capacity for growth over generations and centuries.”<sup>50</sup> This belief that legal systems, like cultures, have an ingrown mechanism for organic change underlies the jurisprudence of the historical school.<sup>51</sup> By the seventeenth century, a significant number of scholars were arguing that “the past history of a legal system embodies basic norms which not only do govern but also, because of their historicity, should govern subsequent developments and which bind the sovereign political authority itself.”<sup>52</sup> This emphasis on the integrity of authentic, historically-rooted practice is particularly relevant in debates concerning the imposition of universal standards of law upon varying cultures. It speaks to the need for culturally grounded rather than “instant” custom and to the need for an understanding of

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natural law and religious doctrine are the “projection of human needs, changing in response to those needs”).

48. Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 152 (1985) (“The natural lawyer’s philosophical method, like the romantic’s narrative method, is theoretically pure and willfully counterfactual. Only moral law is ‘true’ law. Experience does not ground the theory and method of the natural law tradition; innocence, faith, and reason do.”); see also Robert P. Burns, *Blackstone’s Theory of the “Absolute” Rights of Property*, 54 U. CIN. L. REV. 67 (1985) (arguing that only in the late eighteenth and early nineteenth centuries was there a sophisticated attempt to integrate the historical foundations of English property rights with natural law and that this attempt took place in radically distinctive ways); Berman, *supra* note 13, at 1655 n.8 (elucidating that most of the multiplicity of contemporary legal approaches (e.g., law and economics, critical legal studies, and feminist theories) “fall unconsciously into the positivist category, sometimes with an unconscious admixture of natural law theory”). In Berman’s view, all of these approaches share hostility toward historical experience as a source of legitimacy. See *id.*

49. See Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 780-82 (1988) (expressing that natural law as traditionally understood focuses exclusively on the moral groundings of law, to the exclusion of history and politics).

50. Berman, *supra* note 13, at 1654.

51. Berman, *supra* note 49, at 788-789 (tracing the history of the historical school).

52. Berman, *supra* note 13, at 1655.

universal rights recognizing that they will be formulated and applied differently depending on the circumstances and history of the culture involved. Respect for culture entails respect for history and thereby supports the classic distinction between natural law, as universal standards of right conduct, and civil law, as the particular laws of nations that put those standards into practice under historically and culturally contingent circumstances.<sup>53</sup>

A number of thinkers working within the Catholic tradition have argued that natural law is capable of accounting for and being applied in a manner consistent with historical circumstance.<sup>54</sup> John Cardinal Newman, writing in the nineteenth century on the nature of development in natural law doctrine, argued that ideas develop, not as pure exercises in logic or additive knowledge, but rather “through and by means of communities of men and their leaders and guides.”<sup>55</sup> Newman believed that history unveils new facts, which fallible individuals and groups then seek to address in a continuing effort to maintain an accurate and coherent moral vision.<sup>56</sup> Another way of approaching the problem of natural law’s applicability to historically contingent customs and circumstances is to recognize the necessary role of prudence in applying general principles to specific circumstances and to recognize the need to

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53. See STANLIS, *supra* note 44, at 7. The author states: “Whereas natural Law came from God and bound all men, various positive laws and customs were the product of man’s reason and will and applied only to members of particular political communities. This was the distinction between natural Law and civil laws.” *Id.* The author continues by quoting Blackstone and Bolingbroke to show that, during Burke’s time, an international law limited in authority to dealings among nations and civil or constitutional laws varying among peoples were understood as derivatives of the natural law. *Id.* at 86. For Burke’s description of what Stanlis calls “man’s natural moral unity and civil political diversity,” see *id.* at 99-100.

54. See Noonan, *supra* note 47, at 670-71 (citing seventeenth-century Spanish theologians who believed church teachings would improve over time as the magisterium worked out the logical implications of Scripture and John Cardinal Newman, who in the nineteenth century argued that doctrinal development corroborates rather than corrects its theological sources). Noonan seems to assume that the Catholic Church has actually changed its views concerning fundamental issues of moral right and wrong, but that issue is not the subject of this Article. For a telling critique of Noonan’s overstatements in this area, see Patrick M. O’Neil, *A Response to John T. Noonan Jr. Concerning the Development of Catholic Moral Doctrine*, FAITH AND REASON, Spring/Summer, 1996, at 59, 79 (arguing that Noonan incorrectly refers to the Church’s changes in judgment regarding circumstances as if they were transformations of morals themselves).

55. See Noonan, *supra* note 47, at 672.

56. *Id.*

understand that prudence dictates favoring historical continuity over radical change whenever morally possible.<sup>57</sup>

Philip Hamburger has shown that, during the founding era, Americans sought to base their constitutions and other civil laws on the natural law; thus, “they were building upon the medieval tradition that lawmakers should formulate civil laws in accordance with natural law.”<sup>58</sup> Following natural law was not, however, a matter of simply applying a preset formula to one’s circumstances. Hamburger states:

Not only did Americans tend to consider natural law a prudential or moral guide rather than a substitute for constitutional law, but also, typically, they assumed that natural law did not clearly direct adoption of a particular set of civil laws. Just as natural law usually was understood to prohibit injury but not to dictate an individual’s choice of noninjurious actions, so too natural law usually was understood to permit nations much freedom in forming their constitutions and laws. Congregational clergymen, who were inclined to emphasize the breadth of natural law’s moral implications and the importance of natural law as a moral foundation for civil law, acknowledged that constitutions and other civil laws had to vary according to circumstance. Such circumstances might require changes over time as well as from place to place.<sup>59</sup>

These arguments indicate that natural law is integrative – that it constitutes an understanding of moral principles that sees them as both universal and in need of historical and political judgment in their application. To illustrate and elaborate on this point, the focus of this Article now shifts to the thoughts of Burke, a statesman, faced with a

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57. See Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1041 (1994). Kirk states:

[N]atural law should not be taken for graven tables of Governance, to be followed to job and title; such moral law must be appealed to in different circumstances, and applied with prudence. We must remind ourselves that natural law is not a kind of inflexible code set up in deliberate opposition to the positive laws of every state.

*Id.*

58. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 937 (1993).

59. *Id.* at 940-41 (footnotes omitted). Hamburger argues that Americans considered some rights to be civil, rather than natural, in that they were formed by, and only needed in, civil government. See *id.* Burke argues against the applicability of any state of nature to civil government or to the formulation of natural rights. Some rights, such as due process rights, are both civil – in that they are formed by civil government – and natural – in that any government failing to provide them violates natural law. What saves this position from self-contradiction is the conviction that civil society is man’s natural state. See *infra* note 119 and accompanying text.

deep conflict of cultures, who sought to integrate historical, moral, and political principles so as to support universal rights as well as the rights of indigenous people to respect, follow, and enrich their own traditions. Burke wrote during a time when Britain's empire was achieving worldwide scope and its political system faltered under the weight of self-governance.<sup>60</sup> At a time when faith in Great Britain's imperial mission had not fully taken shape or solidified its hostility toward indigenous peoples, Burke sought to champion the rights of preexisting cultures and traditions.<sup>61</sup> Best known for his attacks on the radical innovations of the Jacobin rulers in revolutionary France,<sup>62</sup> Burke actually spent the bulk of his career defending colonial groups against what he believed were unjust policies imposed by Parliament, of which he was a member.<sup>63</sup> Of Irish birth, Burke opposed Britain's laws against Catholics and against the Catholic religion in Ireland.<sup>64</sup> Well-known in his youth as a defender of the chartered rights of American colonists, Burke later sought to revoke the charter of the British East India Company, which he charged had oppressed the people of India.<sup>65</sup> As a life-long supporter of inherited aristocratic privilege, he also devoted considerable energies to ending the

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60. See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES 1607-1788*, ix-xii (1986) (addressing the problems created by governing large territories under a confederated form of government).

61. See FREDERICK G. WHELAN, *EDMUND BURKE AND INDIA: POLITICAL MORALITY AND EMPIRE* 19 (1996) (explaining that, in the eighteenth century, "the almost unquestioningly positive imperialist spirit we associate with the Victorian empire was a thing of the future").

62. See Jerry Z. Muller, *Introduction to Edmund Burke, Reflections on the Revolution in France*, in *CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT* 78-80 (Jerry Z. Muller ed., 1997).

63. See *EMPIRE AND COMMUNITY: EDMUND BURKE'S WRITINGS AND SPEECHES ON INTERNATIONAL RELATIONS* 8-29 (David P. Fidler & Jennifer M. Welsh eds., 1999) (detailing Burke's involvement in issues concerning colonial treatment of the Irish, Americans, and Indians).

64. See Conor Cruise O'Brien, *Introduction to EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE* 41 (1968) ("The author of the *Reflections*. . . wrote in the *persona* of an Englishman. . . but was in fact Irish to the marrow of his bones."). On the importance of Burke's Irish parentage, see CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* 3-11 (1992).

65. See, e.g., FRANCIS CANAVAN, *THE POLITICAL ECONOMY OF EDMUND BURKE: THE ROLE OF PROPERTY IN HIS WORK* 72-73 (1995) (describing Burke's appeal to the natural rights of the people of India, rather than to the chartered rights of the company, in opposing the East India Company's actions); see also STANLIS, *supra* note 44, at 59-60 (expressing Burke's view that unlike the Magna Charta, the East India Company's charter was a grant of power, and that by abusing that power, the company in effect forfeited its right to it).



inherited practice of slavery, even writing a slave code intended to phase out slavery and face the inevitable cultural upheavals emancipation would bring.<sup>66</sup> Burke offers an example of jurisprudence in which the ethical norms of natural law apply to all humankind.<sup>67</sup> These norms demand recognition of a short list of fundamental rights — principally the right to stability, to the support of one's accustomed institutions, to respect for prescriptive property rights and the rights of the family, and to due process of law.<sup>68</sup> These norms, according to Burke, also demand a civil government that is responsive to the contingencies of circumstance and history.<sup>69</sup>

This Article will discuss the historical element in Burke's jurisprudence, building on his sketch of a history of the English common law through a discussion of his views concerning the duty to maintain cultural continuity. This Article then turns to the moral element in Burke's jurisprudence, concentrating on its most powerful expressions: his opposition to English laws punishing Irish Catholics for their religion and his opposition to any morally relativist judging of British conduct in India. Next, this Article turns to Burke's criticism of the East India Company's failure to translate the principles of natural law into appropriate political practice. This Article then highlights Burke's critique of Warren Hastings' conduct as Governor General of India, which focused on the proper limits of colonial power and the nature of the rights reserved even by conquered peoples. Finally, this Article will demonstrate the manner in which Burke sought to manage the need to eliminate slavery, which was both in violation of natural law and deeply ingrained in the relevant cultures.

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66. See EDMUND BURKE, *Sketch of a Negro Code*, in 5 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 524-44 (Bohn ed., 1854) [hereinafter 5 BURKE, *Negro Code*] (detailing rules for the treatment of slaves and emphasizing their education during a proposed period of gradual emancipation). For Burke's views on the limits of the aristocracy's claim to wield unquestioned power, see EDMUND BURKE, *Letter to a Noble Lord*, in 5 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 114 (Bohn ed., 1854) [hereinafter 5 BURKE, *Letter*] (explaining his objections to noble judges).

67. See, e.g., 5 BURKE, *Negro Code*, *supra* note 66, at 525 (explaining the application of true religious and moral principles to all "men").

68. See, e.g., 5 BURKE, *Letter*, *supra* note 66, at 116 (explaining English "survival" of the French Revolution).

69. See, e.g., EDMUND BURKE, *Reflections on the Revolution in France*, in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 295 (Bohn ed., 1854) [hereinafter 2 BURKE, *Reflections*] (reflecting that a state must adapt to survive).

## HISTORY AND LEGAL DEVELOPMENT

Common law was deeply ingrained in the theory and practice of law in Burke's Great Britain.<sup>70</sup> Moreover, it was to a common law understanding of rights – of their reformulation over time in accordance with the needs and circumstances of those affected by them – that Burke looked in seeking to protect and apply rights in varying cultures and political contexts.<sup>71</sup> Indeed, a primary reason for Burke's refusal to practice law, even after having satisfied the residential qualifications for the Irish Bar, was his dissatisfaction with what he deemed the ahistorical nature of legal training and practice in Great Britain.<sup>72</sup> According to Burke, English lawyers had wholly failed to grasp the importance of history and "historical jurisprudence" in understanding the practice of English law.<sup>73</sup> Thus, the lawyers of Burke's time had failed to grasp the true ground of people's rights in the application of general norms to particular circumstances. According to Burke, in Britain:

the law has been confined, and drawn up into a narrow and inglorious study; and that which should be the leading science in every well-ordered commonwealth, remained in all the barbarism of the rudest times. . . . [T]he study of our jurisprudence presented to liberal and well-educated minds, even in the best authors, hardly anything but barbarous terms, ill explained; a coarse but not a plain expression, an indigested method, and a species of reasoning, the very refuse of the schools; which deduced the spirit of the law, not from original justice or legal conformity, but from causes foreign to it, and altogether whimsical.<sup>74</sup>

The primitive state of legal studies in Burke's Britain prevented lawyers from defining and refining legal terms to find the spirit of the law in "original" principles of justice.<sup>75</sup> This methodological failure kept

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70. See EDMUND BURKE, *An Abridgment of English History*, in 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 412-14 (Bohn ed., 1854) (explaining the importance of the history of canon law).

71. See, e.g., EDMUND BURKE, *Articles of Charge Against Warren Hastings*, in 4 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 276 (Bohn ed., 1854) [hereinafter 4 BURKE, *Articles of Charge*] (charging Hastings with a common law violation for his actions with the Benares).

72. See Ian Crowe, *Under God and Law?*, 40 UNIVERSITY BOOKMAN 3, 49 (2000) (discussing Burke's attitude toward the study of law in the England of his time).

73. EDMUND BURKE, *Essay Towards a History of the Laws of England*, in 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 413 (Bohn ed., 1854) [hereinafter 6 BURKE, *History of the Laws*].

74. *Id.* at 414.

75. See *id.*

English lawyers from forming the integrative view of jurisprudence that Burke advocates, even in his early and fragmentary “Essay Towards a History of the Laws of England.”<sup>76</sup> In that fragment, Burke notes that “[t]here is scarce any object of curiosity more rational, than the origin, the progress, and the various revolutions of human laws.”<sup>77</sup> The historical progress of laws, punctuated by political revolutions and their effects, appeals to human reason – the source of our ability to discern natural law.<sup>78</sup> Thus, a student of law, such as Burke, might seek to pen an account of the moral justice of humankind in its attempt “to imitate the Supreme Ruler in one of the most glorious of his attributes” through lawmaking.<sup>79</sup>

For Burke, understanding historical circumstance is key to moral conduct; only through such understanding can humankind discern what is appropriate in the name of justice under given conditions.<sup>80</sup> Law’s organic natural capacity for growth and reformation over time means that it must be treated with care rather than undergo experimentation in pursuit of abstract goals such as uniformity.<sup>81</sup> Because law embodies the corporate wisdom of the people developed over time, respect for the people’s rights demands an attitude of reverence for the historically rooted, and therefore, tried and true political institutions and traditions handed down over the generations.<sup>82</sup> History, then, is intimately bound

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76. *Id.* Of the continuing importance of this fragment for understanding Burke, Crowe writes:

The few paragraphs that comprise this Essay, though, offer much more than an apology for a change of career. The reconciling of continuity and change, of the ancient and the modern, became a central thread in Burke’s political philosophy, and Burke’s brief critique of legal history contains reflections on the relationship between law, society and government that can be traced forward essentially unchanged through his writings on the Popery laws in Ireland to his attacks on Warren Hastings and on Jacobinism.

Crowe, *supra* note 72, at 49-50.

77. 6 BURKE, *History of the Laws*, *supra* note 73, at 412.

78. *Id.*

79. *Id.*

80. A detailed discussion of the role of history in Burke’s theory of virtue and prudential statesmanship can be found in BRUCE P. FROHNNEN, VIRTUE AND THE PROMISE OF CONSERVATISM: THE LEGACY OF BURKE AND TOCQUEVILLE 42-89 (1993).

81. See *id.*; see also RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 120-121 (7th ed. 1986) (arguing that law is capable of growth and self-correction but must not be disturbed through wholesale, radical reform lest individual rights and the fabric of society suffer).

82. See STANLIS, *supra* note 44, at 53 (discussing Burke’s opposition to claims that personal representation is a natural right based on the apprehension that those who mistake civil rights for universal natural rights end up viewing all existing governments as usurpations, thus undermining the legitimacy of these governments).

up with morals and politics and with the proper understanding of law. Unfortunately, in Burke's view, English jurisprudence failed in its essential task of explicating history and its implications.<sup>83</sup> For example, Burke stated that Lord Chief Justice Hale's *History of the Common Law*, the only "undertaking" of historical jurisprudence then existing, was inadequate:

The sources of our English law are not well, nor indeed fairly, laid open; the ancient judicial proceedings are touched in a very slight and transient manner; and the great changes and remarkable revolutions in the law, together with their causes . . . are scarcely mentioned.<sup>84</sup>

Burke argued that English lawyers lacked a historical understanding of the law because of two unfortunate misunderstandings: first, that English law had remained unchanged over the centuries, and second, that no foreign sources had any significant impact on that unchanging English law.<sup>85</sup> These mistaken opinions arose from a refusal to recognize that law develops over time, improving through the forces of reason and experience as well as through its own internal logic.<sup>86</sup> According to Burke, the law must be learned through its history,

[f]or what can be more instructive than to search out the first obscure and scanty fountains of that jurisprudence, which now waters and enriches whole nations with so abundant and copious a flood:—to observe the first principles of RIGHT springing up, involved in superstition, and polluted with violence; until by length of time, and favourable circumstances, it has worked itself into clearness:—the laws, sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power; then victorious over tyranny, growing stronger, clearer, and more decisive by the violence they had suffered; enriched even by those foreign conquests which threatened their entire destruction; softened and mellowed by peace and religion, improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenuous science?<sup>87</sup>

Overlooking this story of the development of English liberties, English lawyers fell into potentially disastrous mistakes.<sup>88</sup> Their refusal to

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83. See 6 BURKE, *History of the Laws*, *supra* note 73, at 413.

84. *Id.*

85. See *id.* at 413-14.

86. See *id.*

87. *Id.* at 413.

88. See *id.* at 415.

consider the evidence of history led lawyers to accept two views equally dangerous to English liberties: the first, that English liberties are in fact mere grants from the conquering Norman king, and thus revocable at his will; and the second, that the long line of victories won for liberty in documents such as the Magna Charta and the Bill of Rights are irrelevant because these documents merely restate historical practice.<sup>89</sup> This latter error would leave important victories, and the documents in which they were recorded, undefended in times of trouble and potential tyranny.<sup>90</sup> Both errors unveiled the danger to political liberty posed by historical ignorance.

Contrary to the unchanging, impregnable fortress so many English lawyers saw as their law, Burke argued for a nuanced understanding of the historical influences shaping the English legal tradition, stating:

[T]he present system of our laws, like our language and our learning, is a very mixed and heterogeneous mass; in some respects our own; in more borrowed from the policy of foreign nations, and compounded, altered, and variously modified, according to the various necessities, which the manners, the religion, and the commerce of the people have at different times imposed.<sup>91</sup>

Such impositions began at an early date and, in Burke's telling, formed a story of legal development.<sup>92</sup> In addition to writing down the customs of the people, the Saxon kings, under the influence of missionary clerics, had abrogated some of their more "odious" customs, spelled out others, and added a number of provisions with their sources in civil and canon law.<sup>93</sup> Through this process, "there is no appearance of a regular, consistent, and stable jurisprudence. However, it is pleasing to observe something of equity and distinction gradually insinuating itself into these unformed materials" chiefly through clerical influence.<sup>94</sup>

Thus, even before the Norman Conquest fundamentally changed English law, that law was in fact a combination of at least three sources: the customs of the Germanic inhabitants, the "canons of the church . . . [which] corrected, mitigated, and enriched those rough northern

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89. *Id.*; see also 2 BURKE, *Reflections*, *supra* note 69, at 294-96 (reasoning that Britain owed its liberties to the Glorious Revolution of 1688 not because of new ideas then propagated, but because reason and experience showed the people the need to confine the royal prerogative even further than before in order to protect inherited freedoms).

90. 6 BURKE, *History of the Laws*, *supra* note 73, at 415.

91. *Id.* at 416.

92. *Id.*

93. *Id.*

94. *Id.* at 420.

institutions. . . [and] some parts of the Roman civil law, and the customs of other German nations.”<sup>95</sup> The role of the clergy is particularly important in Burke’s view because of its long-term role in shaping the people and their law: “the clergy having once bent the stubborn necks of that people to the yoke of religion, they were the more easily susceptible of other changes introduced under the same sanction.”<sup>96</sup> In Burke’s fragmentary history of English law, we have a theory of legal development that acknowledges the role of history and the cumulative effect of cultural change. As the effects of one change are absorbed by the people, the resulting change in the people’s character makes them more receptive to further changes; in this case, further refinements and reforms make the laws they had inherited more just.

Burke’s view of history, however, is not a tale of the triumph of modern justice over more primitive customs. Rather, for Burke, history has its own logic and prescriptive power; it is the source of current freedoms and the repository of lasting wisdom, most particularly concerning the character of the people to be governed.<sup>97</sup> In part, Burke’s historical jurisprudence rests on simple prudence. According to Burke, the English are right to be “afraid to put men to live and trade each on his own private stock of reason[] because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bond and capital of nations and of ages.”<sup>98</sup> The wisdom of experience is of particular importance for Burke because it embodies changes in the character of nations and peoples that develops over time.<sup>99</sup> Society is produced by convention, and “[i]f civil society be the offspring of convention, that convention must be its law.”<sup>100</sup> This convention – over time – creates prescriptive rights based on rational expectations that in turn are based on particular social habits and traditions. It was these culturally rooted rights that Burke defended in opposition to abstract, ahistorical notions of universal rights, such as those put forward by the French revolutionary Jacobins.<sup>101</sup>

Institutions, public practices, and even rights must be appropriate to the historically grounded culture and character of the people involved.<sup>102</sup>

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95. *Id.* at 421-22.

96. *Id.* at 421.

97. *Id.* at 412-13.

98. 2 BURKE, *Reflections*, *supra* note 69, at 359.

99. See 6 BURKE, *History of the Laws*, *supra* note 73, at 412-13.

100. 2 BURKE, *Reflections*, *supra* note 69, at 332.

101. See KIRK, *supra* note 81, at 40-43.

102. See 6 BURKE, *History of the Laws*, *supra* note 73, at 416.

Conceiving of society as a compact among generations, Burke saw the real rights of men as bound by culture and embodied in institutions, beliefs, and practices developed over time.<sup>103</sup> No one person or generation has a right to radically alter these cultural legacies, as the result might well be disaster for generations to come. Borrowing from property law, Burke paints the generation currently possessed of cultural and political power as mere life-tenants, bound to preserve the value of their inheritance for succeeding generations:

[O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it among their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society.<sup>104</sup>

More generally, Burke brings a common law understanding of legal and cultural development to discussions of human rights. He saw it as the duty of lawyers and statesmen to defend the rational expectations of the people in regard to legal rules and their treatment by public authorities. Burke wrote within a tradition perhaps best known in America through the writings of William Blackstone. Blackstone differentiated the common law from the civil law, which “the emperor had once determined was to serve for a guide for the future.”<sup>105</sup> Under the common law, contrawise, people looked to decisions of courts of justice as evidence of the law, whereas the judges themselves looked to precedent and customary practice in deciding particular controversies.<sup>106</sup>

Unlike the French Jacobins, who sought to remake society in accordance with abstract human rights, Burke argued that society is bound together by various traditions and conventions that must be nurtured if any decent life is to be possible.<sup>107</sup> Law and legislation, in this

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103. *Id.*

104. 2 BURKE, *Reflections*, *supra* note 69, at 366-67.

105. 1 WILLIAM BLACKSTONE, COMMENTARIES \*71.

106. *Id.* at \*71-73. Of course, judicial decisions were not wholly self-justifying. *See id.* at \*69. Blackstone also spoke of the duty to maintain and expound upon existing law, rather than pronouncing new law, except “where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law.” *Id.* at \*69-70.

107. *See* 2 BURKE, *Reflections*, *supra* note 69, at 282. (reflecting on the destructive capacity of abstract principles and likening the French revolutionaries to madmen who, having escaped wholesome detention, would set about destroying concrete institutions in the name of abstract principles).

view, must be ruled by prudence and aimed at preserving social peace and cultural continuity. Burke stated:

The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.<sup>108</sup>

What, then, of rights? Clearly for Burke we may not usefully talk of abstract rights without reference to historical circumstances. In particular, the natural rights of pre-social and pre-historical man may mislead us in our political pursuits.<sup>109</sup> According to Burke,

in the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections, that it becomes absurd to talk of them as if they continued in the simplicity of their original direction. The nature of man is intricate; the objects of society are of the greatest possible complexity; and therefore no simple disposition or direction of power can be suitable either to man's nature, or to the quality of his affairs.<sup>110</sup>

Forms of government and even political rights must vary according to circumstance and history.<sup>111</sup> In addition to man's primary nature, Burke argues that man has a second nature formed by historical circumstances.<sup>112</sup> Thus, in Burke's view, wise legislators in ancient times recognized that they

were obliged to study the effects of those habits which are communicated by the circumstances of civil life. They were sensible that the operation of this second nature on the first produced a new combination, and thence arose many diversities amongst men, according to their birth, their education, their professions, the periods of their lives, their residence in towns or in the country, their several ways of acquiring and of fixing property, and according to the quality of the property itself, all

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108. *Id.* at 334.

109. *See id.*

110. *Id.*

111. *See* STANLIS, *supra* note 44, at 53 (illustrating that, according to Burke, the right to representation is properly conditioned by the nature and needs of one's political society).

112. 2 BURKE, *Reflections*, *supra* note 69, at 454.



which rendered them, as it were so many different species of animals.<sup>113</sup>

Such differing species could not all be treated with absolute equality; in any prudent society, people would be treated, not equally, but fittingly – according to each person’s character and needs – and it was each person’s right to be so treated.<sup>114</sup> Particular rights would vary among them, but this does not mean that, for Burke, there are no “real” human rights, or permanent standards by which to judge the conduct of political rulers. To the contrary, Burke maintained:

Far am I from denying in theory, full as far is my heart from withholding in practice. . . the *real* rights of men. . . . [C]ivil society . . . is an institution of beneficence; and law itself is only beneficence acting by a rule. Men have a right to live by that rule; they have a right to do justice, as between their fellows, whether their fellows are in public function or in ordinary occupation. They have a right to the fruits of their industry; and to the means of making their industry fruitful. They have a right to the acquisitions of their parents; to the nourishment and improvement of their offspring; to instruction in life, and to consolation in death.<sup>115</sup>

The real rights of man, in Burke’s view, are practical. They include the right to do justice through participation in a predictable legal system, to make an honest living through one’s own labors, to enjoy the goods of family life, and to experience solace in death.<sup>116</sup> Stated as generalities, these rights do not entitle particular people to specific objects.<sup>117</sup> Rather, history and custom endow Burke’s rights with form and context. These rights set out the principal goods of life – religion, family, property, and due process of law – and leave the particulars of liturgy, ancestry, occupation, and judicial culture to the workings of tradition and circumstance.

Burke asserted that reason should be used in pursuit of moderate improvements in society.<sup>118</sup> Even reason must bow to tradition, however,

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113. *Id.*

114. *See id.* at 455.

115. *Id.* at 331-32.

116. *See id.*

117. *See id.*

118. *See* EDMUND BURKE, *Speech on Economical Reform*, in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 65 (Bohn ed., 1854) (maintaining that reforms should be made in small steps so that their effects might be rationally examined in light of their goals).

for the expectations of tradition create prescriptive rights.<sup>119</sup> Each of us, according to Burke, has a right to be treated as we always have been treated; to a life stable on public, private, and social fronts; to a life in which historical continuity is strong and change is restricted by recognition of the need to avoid radical influences; and to a life in which rights are secure and valued as prescriptive and as a historical inheritance. Burke maintained:

Our oldest reformation is that of Magna Charta. You will see that Sir Edward Coke, that great oracle of our law, and indeed all the great men who follow him, to Blackstone, are industrious to prove the pedigree of our liberties. They endeavor to prove that the ancient charter, the Magna Charta of King John, was connected with another positive charter from Henry I., and that both the one and the other were nothing more than a re-affirmance of the still more ancient standing law of the kingdom. In the matter of fact, for the greater part, these authors appear to be in the right; perhaps not always; but if the lawyers mistake in some particulars, it proves my position still the more strongly; because it demonstrates the powerful prepossession towards antiquity, with which the minds of all our lawyers and legislators, and of all the people whom they wish to influence, have been always filled; and the stationary policy of this kingdom in considering their most sacred rights and franchises as an *inheritance*.<sup>120</sup>

#### BURKEAN HUMAN RIGHTS AND NATURAL LAW

In Burke's view, social and cultural stability are necessary to protect people's expectations and ability to plan for the future – both of which Burke deems so critical as to be natural rights.<sup>121</sup> The shape and content of particular rights should be formed by tradition.<sup>122</sup> A right remains

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119. See, e.g., CANAVAN, *supra* note 65, at 60 (acknowledging that Burke would have agreed with William Warburton's definition of prescription: "when a Man, by enjoying for a certain Course of Time without Opposition, the Property of another, but possessed by him *bona fide* and by a lawful title acquires in that others Property, a full Right"). Canavan continues that, for Burke, prescription is "a principle of the law of nature" that aims to secure people's "natural well-meaning ignorance" and to secure property rights "by the best of all principles, continuance." *Id.* at 62.

120. 2 BURKE, *Reflections*, *supra* note 69, at 305 (footnote omitted).

121. See CANAVAN, *supra* note 65, at 73; see also EDMUND BURKE, *Tract on the Popery Laws*, in 6 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 32 (Bohn ed., 1854) [hereinafter 6 BURKE, *Popery Laws*] ("[Y]ou punish [Catholics in Ireland] for acting upon a principle which of all others is perhaps the most necessary for preserving society, an implicit admiration and adherence to the establishments of their forefathers.").

122. See 6 BURKE, *Popery Laws*, *supra* note 121, at 32.

“natural,” in Burke’s view, if the right is respected everywhere.<sup>123</sup> As with natural law itself, Burkean rights are rooted in “moral principles that are derived ultimately from reason and conscience.”<sup>124</sup>

Concerned as he was to defend people’s expectations, particularly in terms of the laws by which they were governed, Burke counseled against wholesale reforms unless the law in question contradicted “the nature and end of law itself.”<sup>125</sup> Regardless, a law that is considered an offense “against common right and the ends of just government” and goes “to the root and principle of the laws” is not merely ill-considered; it is “void in its obligatory quality on the mind, and therefore . . . the proper object of abrogation and repeal.”<sup>126</sup> For Burke, following the natural law tradition, a truly bad law is not a law, but an abuse.<sup>127</sup>

In Burke’s view, laws against Catholicism in Ireland were examples of such an abuse. In order to encourage conversion from Catholicism to Britain’s established Church of Ireland, the popery laws sought “wholly to change the course of descent by the common law; to take away the right of primogeniture,” the right of fathers to control their sons’ inheritance until their own deaths and the right to dispense money through marriage.<sup>128</sup> These laws also imposed various economic and professional disabilities on Catholics and denied them access to education and various due process rights accorded to Protestants.<sup>129</sup> The

123. *See id.*

124. Berman, *supra* note 13, at 1653; *see also* STANLIS, *supra* note 44, at 232 (“Burke conceived of the Natural Law as an ethical norm by which to judge the social and political behavior of men.”).

125. 6 BURKE, *Popery Laws*, *supra* note 121, at 19.

126. *Id.* at 19-20.

127. *See, e.g.*, GRATIAN, THE TREATISE ON LAWS, DECRETUM DD. 1-20, WITH THE ORDINARY GLOSS 25 (Augustine Thompson & James Gordley trans., 1993) (arguing that natural law possesses greater dignity than other laws and that “no one is permitted to act contrary to natural law”). Gratian continued: “The ordinances of princes should not prevail over natural law . . . whoever refuses to obey imperial ordinances made contrary to God’s truth receives abundant reward.” *Id.* at 29 (citations omitted); *see also* 2 CICERO, LAWS, in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 51 (Clarence Morris ed., 1997). Cicero explained:

What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly . . . [T]herefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature’s standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good.

*Id.*

128. 6 BURKE, *Popery Laws*, *supra* note 121, at 7.

129. *See id.* at 13-18.

laws aimed to convert Catholics by punishing them for their faith, as the laws were designed to give preference to Protestants over Catholics in the recognition and distribution of basic social goods.<sup>130</sup> In Burke's view, the popery laws were not truly laws because "[p]artiality and law are contradictory terms."<sup>131</sup> According to Burke, "the essence of law" requires that particular laws be made "as much as possible for the benefit of the whole" rather than one particular faction, such as the Protestants in – what was after all – an overwhelmingly Catholic country.<sup>132</sup> The popery laws, in aiming to punish most Irish people, amounted to abuse of the natural law. Burke further explained:

A law against the majority of the people is in substance a law against the people itself; its extent determines its invalidity; it even changes its character as it enlarges its operation: it is not particular injustice, but general oppression; and can no longer be considered as a private hardship, which might be borne, but spreads and grows up into the unfortunate importance of a national calamity.<sup>133</sup>

Here lies the root of Burke's historical vision of natural law; communities – people with their own customs and culture – grow over time. Not even a democratic majority has the

right to make a law prejudicial to the whole community . . . because it would be made against the principle of a superior law, which it is not in the power of any community, or of the whole race of man to alter . . . I mean the will of Him who gave us our nature, and in giving impressed an invariable law upon it. It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness, of human society, than the position that any body of men have a right to make what laws they please; or that laws can derive any authority from their institution merely and independent of the quality of the subject-matter.<sup>134</sup>

If not on the will of the majority, then on what ought law be based? Burke argues that the only proper foundations of law are "equity and utility."<sup>135</sup> Burke defined "equity" in terms of natural justice and "utility"

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130. See, e.g., EDMUND BURKE, *Letter to Sir Hercules Langrishe*, in 3 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 300-301 (Bohn ed., 1854) (explaining that the "declared object [of the popery laws] was to reduce the Catholics of Ireland to a miserable populace, without property, without estimation, without education").

131. 6 BURKE, *Popery Laws*, *supra* note 121, at 23.

132. *Id.* at 22-23.

133. *Id.* at 20.

134. *Id.* at 21.

135. *Id.* at 22.

in terms of the common good. Equity “grows out of the great rule of equality, which is grounded upon our common nature.”<sup>136</sup> As “the Mother of Justice,” equity demands that all of us be accorded our fundamental rights.<sup>137</sup> Laws that give form to these rights must vary in accord with circumstance,<sup>138</sup> but “[a]ll human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice.”<sup>139</sup> Equity demands that our common rights based in our common nature be respected, and that our second nature, formed through inculcation into a particular society, be respected as well.<sup>140</sup> As for utility, it “must be understood, not of partial or limited, but of general and public utility . . . for any other utility may be the utility of a robber, but cannot be that of a citizen; the interest of the domestic enemy, and not that of a member of the commonwealth.”<sup>141</sup> Ruler and ruled alike must enact and obey laws seeking the good of the nation as a whole.<sup>142</sup> Burke does not construct a blueprint regarding what particular policies each nation should follow; instead, he recommends a general course of action, leaving it to the prudence of rulers and to those ruled to choose wisely in particular circumstances. Burke maintained, however, that “a constitution against the interest of the many is rather of the nature of a grievance than of a law . . .”<sup>143</sup> All governors, Burke asserted, have a duty to seek the public good while respecting the rights of all.<sup>144</sup>

Peter Stanlis notes that for Burke:

Civil society, patterned upon nature, man, and historical continuity, has . . . at least as rich and vast a variety of

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *Id.*

142. *See* THOMAS AQUINAS, TREATISE ON LAW 96 (Ralph McInerny ed., 1998) (explaining that laws are just when “they are ordained to the common good,” when the law “does not exceed the power of the lawgiver,” and when “burdens are laid on the subjects according to an equality of proportion and with a view to the common good”). One might also note the historical element in Aquinas’ formulation: unjust laws do not bind in conscience “except perhaps in order to avoid scandal or disturbance” or when disobedience would inflict “a more grievous hurt.” *Id.* The concern for preventing both disturbance and “more grievous hurt” would seem to indicate a concern to protect the order and continuity of society. *Id.*

143. 6 BURKE, *Popery Laws*, *supra* note 121, at 28.

144. *See* 2 BURKE, *Reflections*, *supra* note 69, at 399-401 (positing that a government’s effects on a nation can be measured according to the state of that nation’s population and wealth – good policies will increase both and bad policies will decrease both).

conditions and circumstances to shape its character as physical nature, and therefore nations are governed not by any abstract universal and eternal principles derived directly from Natural law, but indirectly, through man's corporate reason and free will, through the conditional forms of government.<sup>145</sup>

While it is necessary for civil governments to reform in the face of changing circumstances, there are ethical norms by which to judge each nation's conduct. According to Burke, "national constitutions modify the method of application, but they do not extinguish or even weaken the power of Natural Law."<sup>146</sup>

A central question of Burkean jurisprudence, and arguably of natural law jurisprudence as a whole, concerns how one can square the idea of universal rights with the particular customs and traditions of specific cultures. The key, for Burke, is the conviction that one does not have a natural right to a particular form of government or society. It is necessary for civil societies to develop their own unique structure so as to meet their particular circumstances while maintaining themselves, their people, and their people's natural rights. Burke argues, "If civil society be the offspring of convention, that convention must be its law. That convention must limit and modify all the descriptions of constitution which are formed under it. Every sort of legislative, judicial, or executory power are its creatures."<sup>147</sup> Natural rights themselves are a check on any "right" to absolute sovereignty, even of the majority; thus, "[g]overnment is not made in virtue of natural rights, which may and do exist in total independence of it . . . ."<sup>148</sup> That is, government concerns the distribution of political power, and while the government itself must not trample the real rights of men, the distribution of its powers is a matter of convention, not of right.<sup>149</sup>

Because Burke rejected the notion of a pre-civil "state of nature" in which all humans enjoyed absolute equality and rights, he saw civil society, itself, as the protector of fundamental rights, interpreted to fit the circumstances of place and time.<sup>150</sup> In particular, Burke rejected the French Revolutionary notion, embodied in the Declaration of the Rights of Man, "that all men are by nature free, are equal in respect of rights,

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145. STANLIS, *supra* note 44, at 99-100.

146. *Id.* at 100.

147. 2 BURKE, *Reflections*, *supra* note 69, at 332.

148. *Id.* at 332-33.

149. *See id.* at 332.

150. STANLIS, *supra* note 44, at 129-30 (citing Burke's rejection of the natural rights language of English and French revolutionaries).

and continue so in society.”<sup>151</sup> Such convictions, in Burke’s view, would result in the destruction of any society because no concrete actual set of institutions could maintain absolute equality and freedom.<sup>152</sup>

Natural rights must protect the continuity and integrity of the particular culture concerned. To make this point clear, this Article turns next to Burke’s defense of the rights of the people of India. Distance, differences in language and culture, and economic concerns produced great difficulty for Britain’s “attempt[ ] to govern India at all . . . . But there we are; there we are placed by the Sovereign Disposer: and we must do the best we can in our situation.”<sup>153</sup> Although Burke possessed a distaste for colonial power, he sought to utilize this power as wisely as possible. As P.J. Marshall has argued, “[e]ven if the British had acquired their superiority [in India] by ‘fraud or force, or whether by a mixture of both,’ duties inescapably followed.”<sup>154</sup> These duties, however, did not include forcing India to become a semblance of Britain or Britain’s American colonies in its government or culture. Burke noted:

I never was wild enough . . . to conceive, that one method would serve for the whole; I could never conceive that the natives of *Hindustan* and those of *Virginia* could be ordered in the same manner; or that the *Cutchery* Court and the Grand Jury of *Salem* could be regulated on a similar plan.<sup>155</sup>

India was neither Britain nor America. It had to be governed in a manner appropriate to its circumstances and in accordance with natural law. Burke castigated the East India Company, and its director, Warren Hastings, for putting forth the idea of a merely “geographical” morality. The notion that Hastings was forced by the character of the Indian peoples to use tyrannous methods of rule was corrupting, not only of government in India, but of the morals of anyone who would accept such a notion.<sup>156</sup> All human law, in Burke’s view, derives from a higher, natural law. The legal systems of Asia, no less than those of Europe, were aimed at the good of their people. Thus, it was wrong to speak as if Asian cultures were inherently slavish and governable only by “oriental

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151. *See id.* (quoting Burke’s statements regarding the incompatibility of natural rights and the civil state).

152. *Id.* at 130.

153. P.J. MARSHALL, *Burke and India*, in *THE ENDURING EDMUND BURKE: BICENTENNIAL ESSAYS* 43 (Ian Crowe ed., 1997).

154. *Id.*

155. *See id.* at 41.

156. EDMUND BURKE, *Speech on the Impeachment of Warren Hastings, Esq. Fourth Day*, in 7 *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 93-94 (Bohn ed., 1854) [hereinafter 7 BURKE, *Speech on the Impeachment*].

despotism.” Burke challenged “the whole race of man to show me any of the Oriental governors claiming to themselves a right to act by arbitrary will.”<sup>157</sup> The people of India, in particular, developed a great civilization worthy of respect from other nations, including the English, who happened to be in a position of authority over them at that time.<sup>158</sup> Throughout its long history, according to Burke, India’s traditions made “a people happy and a government flourishing’ under ‘the paternal, lenient, protecting arm of a native government.’”<sup>159</sup> Seeing past the many cultural differences Hastings had emphasized, Burke compared the nobility of India with that of Germany and did not find India’s nobility wanting in moral or political rectitude.<sup>160</sup> More generally, in discussing the nations of Asia, Burke asserted that “their morality is equal to ours as regards the morality of governors, fathers, superiors; and I challenge the world to show, in any modern European book, more true morality and wisdom than is to be found in the writings of Asiatic men in high trusts.”<sup>161</sup>

#### POLITICAL PRUDENCE AND NATURAL LAW

Indians, Burke asserted, like Britons, had natural rights that deserved protection – rights that Hastings had violated.<sup>162</sup> In discussing the Company’s charter from the crown, Burke freely admitted the company’s claim to administer an annual territorial revenue of seven millions sterling; to command an army of sixty thousand men; and to dispose (under the control of a sovereign, imperial discretion and with the due observance of the natural and local law) of the lives and fortunes of thirty millions of their fellow-creatures.<sup>163</sup>

However, the company evaded any exercise of Parliament’s imperial discretion and ignored its duty to observe the natural and local law.<sup>164</sup>

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157. See MARSHALL, *supra* note 153, at 43 (quoting 7 BURKE, *Speech on Impeachment*, *supra* note 156, at 105).

158. See *id.*

159. *Id.* at 42.

160. See *id.* at 41.

161. *Id.* at 43.

162. See *id.*

163. EDMUND BURKE, *Speech on Mr. Fox’s East-India Bill*, in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 177 (Bohn ed., 1854) [hereinafter 2 BURKE, *East-India*].

164. *Id.* at 224-25 (reporting that Burke accused Hastings of conducting a “revolution” against the “constitution” of the East India Company by removing any effective oversight of Hastings’ actions, including elimination of dissents to company decisions that might be read by Parliament).



First, Hastings had failed to provide fair and impartial trials for Indians under his political control or to provide accused Indians with the requisite specificity of charges necessary to meet natural law standards of due process.<sup>165</sup> Second, Hastings abused his right to make war and peace.<sup>166</sup> In fact, his company “never has made a treaty which they have not broken.”<sup>167</sup> Lastly, Hastings and the company had destroyed the landed interest and the public foundations that once provided public works for the province of Bengal.<sup>168</sup>

Bribery, extortion, false charges, denial of due process, and the intentional undermining of local institutions and laws characterized Hastings’ rule.<sup>169</sup> Through these actions, Hastings forfeited the company’s charter of special rights from the crown because such charters established a trust, “and it is of the very essence of every trust to be rendered *accountable*; and even totally to *cease*, when it substantially varies from the purposes for which alone it could have a lawful existence.”<sup>170</sup> In acceding to the East India Company’s charter, Parliament had entered into a contract with it. Burke stated that, “if the abuse [by the Company] is proved, the contract is broken; and we re-enter into all our rights; that is, into the exercise of all our duties.”<sup>171</sup> Parliament had a duty to protect all peoples in its empire, and this duty superceded any corporate charter.<sup>172</sup> Unlike the Magna Charta, “a charter to restrain power, and to destroy monopoly[, t]he East-India charter is a charter to establish monopoly, and to create power. Political power and commercial monopoly are *not* the rights of men . . . .”<sup>173</sup> The

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165. 4 BURKE, *Articles of Charge*, *supra* note 71, at 260, 258; *see also* 2 BURKE, *East-India*, *supra* note 163, at 208 (“[S]upposing the Rajah of Benares to be a mere subject, and that subject a criminal of the highest form; let us see what course was taken by an upright English magistrate. Did he cite his culprit before his tribunal? Did he make a charge? Did he produce witnesses? These are not forms; they are parts of substantial and eternal justice.”).

166. *See* 2 BURKE, *East-India*, *supra* note 163, at 192.

167. *See id.* at 186.

168. *See id.* at 220-22.

169. *See generally* 4 BURKE, *Articles of Charge*, *supra* note 71, at 220-533 (detailing the charges brought against Hastings in the English Parliament).

170. 2 BURKE, *East-India*, *supra* note 163, at 178.

171. *Id.* at 178-79.

172. *See id.* Parliament had sold to the company “all that we had to sell; that is our authority, not our control. We had not a right to make a market of our duties.” *Id.*

173. *Id.* at 177; *see also* 2 BURKE, *Reflections*, *supra* note 69, at 332 (“[A]s to the share of power, authority and direction which each individual ought to have in the management of the state, that I must deny to be amongst the direct original rights of man in civil society . . .”).

company's abuses bound Burke "to declare against those chartered rights which produce so many wrongs."<sup>174</sup>

To understand Burke's rejection of the company's charter, it is necessary to understand just what he thought it provided. The East India Company had been granted the right by charter to control not only British trade, but the actual day-to-day relations and governance of all British-dominated territories in that part of the world.<sup>175</sup> This control, in Burke's mind, made the company effectively a government of India, acting under the authority of the British Parliament and the natural law that rightly ruled all governments.<sup>176</sup> Like every other government, the company had no right to rule contrary to the interest of those it ruled.<sup>177</sup> The company, however, ignored its duties, and the result was devastation; the company, as bad governments often would, brought about drastic declines in the population, trade, culture, and revenue of the land it ruled.<sup>178</sup> Having shown themselves determined to ignore their chartered duties, Hastings and his supporters in the company had proved that the company was

totally perverted from the purposes of its institution . . . [and] utterly incorrigible; and because [the company's leaders were] incorrigible, both in conduct and constitution, power ought to be taken out of their hands; just on the same principles on which have been made all the just changes and revolutions of government that have taken place since the beginning of the world.<sup>179</sup>

By violating Parliament's trust, the company had forfeited its right to rule, thus making it Parliament's duty, as its superior, to end that rule.<sup>180</sup>

Although they lost political power to the British, the Indian people had not forfeited their natural rights. Rather, by acquiring power in India through the East India Company, "Great Britain made a virtual act of union with that country, by which they bound themselves as securities for

174. 2 BURKE, *East-India*, *supra* note 163, at 193.

175. *Id.* at 177.

176. *Id.* at 178.

177. See *supra* notes 134-44 and accompanying text; see also 2 BURKE, *East-India*, *supra* note 163, at 175-76 (stating that, should it be found impossible to govern India well without governing Britain poorly, this finding would constitute reason for separation, but not for sacrificing the people of India to Britain's constitution).

178. EDMUND BURKE, *Report of a Committee on the Affairs of India*, in 4 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 39-40 (Bohn ed., 1854) [hereinafter 4 BURKE, *Report on India*] (expressing that, under company rule, Madras, in particular, had lost population, trade, culture, and revenue).

179. 2 BURKE, *East-India*, *supra* note 163, at 236.

180. *Id.* at 178.

their subjects, to preserve the people in all rights, laws, and liberties, which their natural original sovereign was bound to enforce.”<sup>181</sup> By accepting power in India, as Francis Canavan observed, the company became bound

not only by laws of England, but by the charters through which they received powers from the Mogul Empire in India. By accepting those powers, [Burke observed that] “they bound themselves (and bound inclusively all their servants) to perform all the duties belonging to that new office, and to be held by all the ties belonging to that new relation.”<sup>182</sup>

Burke proposed a definite theory of empire, according to which Britain, the imperial power, had a duty to keep a close eye on colonial governors to prevent abuses and protect the rights of “dependent peoples.”<sup>183</sup> In addition, Burke was attempting to apply natural law reasoning consistently to his situation as a constituent part of a body, Parliament, which had attained political and military power over vast stretches of land and widely divergent groups of people all across the world. In seeking to fulfill his own duty to his country and to the natural law, Burke’s solution was to remind his Parliamentary colleagues of their duty “to conform our government to the character and circumstances of the several people who composed this [empire’s] mighty and strangely diversified mass.”<sup>184</sup> To make this possible, it was imperative that “[e]very person exercising authority in another country . . . be subject to the laws of that country; since otherwise they break the very covenant by which we hold our power there.”<sup>185</sup>

In Burke’s view, Britain could rightfully rule in India only by strictly adhering to the requirements of natural law, which protected the rights of the people, including the right to be governed in the manner and by the people to whom they were accustomed. Hastings, and any other Briton in a position of power in India, was bound to govern “the people

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181. MARSHALL, *supra* note 153, at 44.

182. CANAVAN, *supra* note 65, at 41.

183. See MARSHALL, *supra* note 153, at 42. Marshall explained:

Burke’s model of empire was the Roman one. In discussing the problem of ‘calling governors to a strict account’ in order to protect peoples who had ‘no distinct privileges secured by constitutions of their own and able to check the abuse of the subordinate authority,’ he gave the House of Commons a disquisition on Roman history . . . . Burke saw it as his duty to protect the rights of the dependent peoples throughout the empire.

*Id.*

184. EDMUND BURKE, *Letter to the Sheriffs of Bristol*, in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 28-29 (Bohn ed., 1854).

185. MARSHALL, *supra* note 153, at 43.

of India . . . according to the largest and most liberal construction of their laws, rights, usages, institutions[,] and good customs.”<sup>186</sup> This policy required that the Britons protect, rather than undermine, the pre-existing native aristocracy of India because it was a key component of the native culture, commanding the loyalties of the people and fulfilling key functions.<sup>187</sup> In general terms, Britain’s “job” in India was to protect its people from invasion and otherwise leave them to their own devices as much as possible.<sup>188</sup> This would be no easy task; it required that Parliament institute a judicial system in India that protected the rights of property and the inherited rights of various groups and classes from abuses of the East India Company.<sup>189</sup> Moreover, Burke insisted on certain specific measures, including the protection of Indians in their own laws, customs, and magistrates,<sup>190</sup> the extension to Indians of trial by juries of their peers in dealings with the British,<sup>191</sup> and the retention of local leaders in posts of authority when possible.<sup>192</sup> Because the company had abused the people’s natural rights, protection of those rights required Parliamentary legislation “intended to form the *Magna Charta* of Hindostan . . . . Whatever the great charter . . . [is] to Great Britain, these bills are to the people of India . . . and no charter of dominion shall stand as a bar in my way to their charter of safety and protection.”<sup>193</sup>

A charter aimed at clarifying the parties’ rights was necessary in order to preserve the natural rights of one set of people, now ruled by another, and to protect the integrity of the historically rooted culture of that people. Thus, Burke’s natural law reasoning integrated the essential elements of history, morality, and politics. Natural law could be served, even in the context of empire, and natural rights could be respected in light of the right to be governed in a manner appropriate to historically

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186. *Id.* at 44.

187. *See id.* at 46.

188. *See id.*

189. *See id.* at 42.

190. 4 BURKE, *Articles of Charge*, *supra* note 71, at 276 (emphasizing that Hastings committed an impeachable offense by depriving Indians of their own laws, customs, and magistrates).

191. 4 BURKE, *Report on India*, *supra* note 178, at 11.

192. EDMUND BURKE, *Eleventh Report from the Select Committee Appointed To Take into Consideration the State of the Administration of Justice in the Provinces of Bengal, Bahar, and Orissa, etc.*, in 4 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 142 (explaining that Hastings should have retained local authorities to the extent possible); *see also* 4 BURKE, *Report on India*, *supra* note 178, at 38 (stating that Hastings abused his powers and acted unwisely by putting British subjects in all honorable and lucrative posts, including the army, leaving nothing for the natives).

193. 2 BURKE, *East-India*, *supra* note 163, at 179.

contingent circumstances. However, only careful scrutiny of imperial governors could accomplish this ideal by ensuring that the governors acted with self-restraint and respect for the people and cultures they governed.

#### A HARD CASE: BURKE AND SLAVERY

One charge that remains to be made against Burke's vision of natural law is that it provides no means by which to rid any given culture of its own abuses. Put succinctly: what do we do if the historically authentic culture includes a practice observers find abhorrent? Burke expended a great deal of effort attempting to rid the world of one gross human rights abuse: slavery. His discussion of the issue casts light on how natural law jurisprudence may approach those deep, culturally ingrained abuses of natural law. In a 1792 letter to Henry Dundas, "one of His Majesty's Principal Secretaries of State," Burke included a "Sketch of the Negro Code" he had written twelve years before.<sup>194</sup> That code was intended to bring British slave-trading to a gradual end. According to Burke, "[i]f the African trade could be considered with regard to itself only, and as a single object, I should think the utter abolition to be, on the whole, more advisable, than any scheme of regulation and reform. Rather than suffer it to continue as it is, I heartily wish it at an end."<sup>195</sup> At the same time, Burke would allow the trade to continue for years, not because he desired it to continue, but because the market for which the slave trade existed continued to flourish in the British West Indies. Thus, "so long as the slavery continues some means for its supply will be found."<sup>196</sup> Burke observed that "the true origin of the trade was not in the place it was begun at, but at the place of its final destination."<sup>197</sup> This meant, in Burke's mind, "that the whole work ought to be taken up together; and that a gradual abolition of slavery in the West Indies ought to go hand in hand with anything which should be done with regard to its supply from the coast of Africa."<sup>198</sup>

Moreover, because British planters would not immediately surrender their slaves, it would be "better to allow the evil, in order to correct it, than by endeavouring to forbid, what we cannot be able wholly to

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194. EDMUND BURKE, *A Letter to the Right Honourable Henry Dundas, One of His Majesty's Principal Secretaries of State*, in 5 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 521 (Bohn ed., 1854) [hereinafter 5 BURKE, *Letter to Henry Dundas*].

195. *Id.*

196. *Id.* at 523.

197. *Id.* at 522.

198. *Id.*

prevent, to leave it under an illegal, and therefore an unreformed, existence.”<sup>199</sup> Thus, Burke’s plan sought to regulate the severity of the slave trade while attacking its sources in the economic and cultural systems in both the British West Indies and in Western Africa. Recognizing the abuse of natural law that slavery was, Burke would seek to end it

through a very slow progress, the chief effect of which is to be operated in our own plantations, by rendering, in a length of time, all foreign supply unnecessary. It was my wish, whilst the slavery continued, and the consequent commerce, to take such measures as to civilize the coast of Africa by the trade, which now renders it more barbarous; and to lead by degrees to a more reputable, and, possibly, a more profitable, [connection] with it, than we maintain at present.<sup>200</sup>

In Burke’s view, slavery corrupted, and even “crippled,” the minds of all parties involved.<sup>201</sup> Therefore, reform required careful regulation.<sup>202</sup> In addition, the need for stability in the lives of individuals and cultures meant that abolition of slavery must be gradual. On this point, the preamble to Burke’s Code is highly enlightening for its integration of principles of morality, politics, and the force of history. Burke elaborated:

Whereas it is expedient, and conformable to the principles of true religion and morality, and to the rules of sound policy, to put an end to all traffic in the persons of men, and to the detention of their said persons in a state of slavery, as soon as the same may be effected without producing great inconveniences in the sudden change of practices of such long standing; and, during the time of the continuance of the said practices, it is desirable and expedient, by proper regulations, to lessen the inconveniences and evils attendant on the said traffic and state of servitude, until both shall be gradually done away[.]<sup>203</sup>

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199. *Id.* at 523.

200. *Id.*

201. *See id.* at 523-24 (arguing that because slavery crippled the minds of both plantation owners and their slaves, the government would have to use force in teaching both to live in freedom).

202. *Id.* at 524 (“[R]egulations must be multiplied; particularly as you have two parties to deal with. The planter you must at once restrain and support; and you must control, at the same time that you ease, the servant.”).

203. *Id.* at 525.

Burke's Code begins with regulations applicable to the slave trade itself that would require inspection of slave trading vessels for fitness,<sup>204</sup> limitations on the number of slaves allowed on any given vessel according to its capacity,<sup>205</sup> and mandatory inspection of stores for sufficient food and drink.<sup>206</sup> In addition, Burke's Code would empower British officers to inspect ships during passage,<sup>207</sup> require provision of some means of entertainment among the slaves,<sup>208</sup> and provide a bounty for commanders of ships that adhered to the regulations and lost fewer than "thirty of their slaves by death" during the passage.<sup>209</sup>

Additionally, Burke's Code sought to protect the slaves from abuses of their masters once the slaves reached the British West Indies.<sup>210</sup> The code appointed the colonial attorney general as "protector of negroes within the island."<sup>211</sup> This protector would look into complaints made by slaves and protect their due process rights.<sup>212</sup> Inspectors would keep track of the "number, sex, age, and occupation[s]" of slaves on each plantation.<sup>213</sup> They also would oversee the state of slave trading ships.<sup>214</sup> Corporal punishment would be strictly limited,<sup>215</sup> "good and substantial" housing required,<sup>216</sup> and limits placed on hours of work for various reasons including pregnancy, a reward for years of steady service, and observance of the Sabbath.<sup>217</sup> More detailed protections would be provided for slave families, which would have to be sold together and

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204. *See id.* at 525-26.

205. *Id.*

206. *Id.* at 526.

207. *See id.* at 533.

208. *See id.* at 533-34 (referring to presents, musical instruments, and an allowance of alcohol to be mixed with water).

209. *See id.* at 534.

210. *Id.* The preamble to section IV of Burke's Code reads:

[W]hereas the condition of persons in a state of slavery is such, that they are utterly unable to take advantage of any remedy which the laws may provide for their protection, and the amendment of their condition, and have not the proper means of pursuing any process for the same, but are and must be under guardianship; and whereas it is not fitting that they should be under the sole guardianship of their masters, or their attorney and overseers, to whom their grievances, whenever they suffer any, must ordinarily be owing . . . .

*Id.*

211. *See id.* at 534-35.

212. *See id.* at 535, 543.

213. *See id.* at 535.

214. *See id.* at 536.

215. *See id.* at 543.

216. *See id.* at 542.

217. *See id.* at 541-42.

could not subsequently be separated by sale.<sup>218</sup> Also, property would be protected from seizure by masters, and slaves would even be able to bequeath their possessions as they saw fit.<sup>219</sup>

Burke's Code took particular care to spell out rights of religion and requirements for the provision of ministers to service the slaves, educating them in the Church of England or other religious denominations and keeping records of births, burials, and marriages.<sup>220</sup> These ministers would employ free black "clerks" to catechize the slaves.<sup>221</sup> Further, both individually and as a group, ministers were to assume responsibility for the schooling of a proportion of the slaves, as well as the compensation of owners for labor time lost and for the purchase of particularly intelligent slaves who would be freed and sent to England for further education.<sup>222</sup>

Toward the end of the Code, Burke reminds the reader of its purpose: "gradual manumission of slaves, as they shall seem fitted to fill the offices of freemen . . . ." <sup>223</sup> His Code would protect the families, churches, and schools in which free habits are learned while seeking to provide some form of due process and property rights within the slave system. Finally, those slaves fulfilling strict requirements in terms of church attendance and performance of their familial and other duties would be allowed to purchase freedom of themselves and their families at sub-market rates.<sup>224</sup>

Perhaps most controversial, but certainly most relevant to a discussion of the role of natural law in an international context marked by colonial power, is Burke's discussion of the slave trade in Western Africa. Burke's Code was intended to stamp out the practice of selling slaves,

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218. *See id.* at 537, 540-42 (emphasizing that marriage also would be encouraged – and even required – of able bodied slaves). Burke's Code recognized cohabiting individuals as married and granted them the right to a religious wedding, as well as time off from work immediately following the wedding; it also punished able-bodied male slaves who refused the proffer of a wife without naming a preferred alternative wife. *Id.* at 540-42.

219. *See id.* at 542.

220. *See id.* at 537-38.

221. *See id.* at 537.

222. *See id.* at 539.

223. *See id.* at 543-44.

224. *Id.* at 543. Burke stated:

Every negro slave, being thirty years of age and upwards, and who has had three children born to him in lawful matrimony, and who hath received a certificate from the minister of his district, or any other Christian teacher, of his regularity in the duties of religion, and of his orderly and good behaviour, may purchase, at rates to be fixed by two justices of peace, the freedom of himself, or his wife or children, or of any of them separately . . . .

*Id.*



not only in the British West Indies, but also in Western Africa.<sup>225</sup> Many may dislike Burke's statement of his determination to "civilize the coast of Africa by the trade, which now renders it more barbarous . . . ."<sup>226</sup> Burke, however, was convinced that the slave trade corrupted all whom it touched, and it would be more fitting to judge him by his proposals rather than by his choice of language.

What, then, did Burke propose in relation to trade in Western Africa? His code was intended

to provide against the manifold abuses to which a trade of that nature is liable, [and provide] that the same may be accompanied, as far as it is possible, with such advantages to the natives as may tend to the civilizing them, and enabling them to enrich themselves by means more desirable, and to carry on hereafter a trade more advantageous and honourable to all parties . . . .<sup>227</sup>

Of course, the trade had dishonored all parties, including the British. How would Burke "civilize" the native peoples of Africa? First, the slave trade would be restricted to specific towns and regulated by the British African Company.<sup>228</sup> Second, the African Company would provide for churches, schools, and hospitals, erecting and staffing them in each town in which the slave trade was practiced.<sup>229</sup> In addition, the African Company would subsidize craftsmen within each trading town, each of whom would take "two apprentices from amongst the natives, to instruct them in the several trades . . . ."<sup>230</sup> British traders and personnel were to be held to high standards of conduct so as not to cause scandal among the local peoples.<sup>231</sup> The slave trade itself would come under severe restrictions.<sup>232</sup> Company inspectors would be charged with seeing to it that no persons would be sold who were

above thirty-five years of age, or who shall appear, on examination, stolen or carried away by the dealers by surprise; nor any person, who is able to read in the Arabian or any other book; nor any woman who shall appear to be advanced three

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225. See *id.* at 522-23 (explaining that "a gradual abolition in slavery in the West Indies ought to go hand in hand with anything which should be done with regard to its supply from the coast of Africa").

226. *Id.* at 523.

227. *Id.* at 527.

228. See *id.* at 527-28.

229. *Id.* at 529.

230. *Id.*

231. See *id.* at 530.

232. *Id.* at 530-31 (detailing restrictions on who could be sold).

months in pregnancy; nor any person distorted or feeble, . . . or any person afflicted with a grievous or contagious distemper.<sup>233</sup>

In this way, Burke's Code would not only protect many classes of people from enslavement, including all those who had been hunted down by British traders themselves, but it also would make it much more difficult and expensive to engage in the slave trade. Moreover, British traders would come under severe restrictions and suffer banishment and other possible punishment for misdeeds, including capture, arson, or murder.<sup>234</sup>

Burke's plan to "civilize" the peoples of Western Africa thus amounted to severe restrictions on the activities of the British, the slave trade in particular, and the provision of churches, schools, hospitals, and apprenticeships for those who might seek them out in the British trading towns. Hoping to establish trade in goods other than slaves to help end the slave trade altogether, Burke sought reforms aimed at redirecting British interaction with African peoples and emphasizing the religious, educational, and economic benefits he thought the British, in turn, could bring to Africa.

#### CONCLUSION

Burke's approach to the abolition of slavery and the slave trade, a cause in which "Burke was ahead of his times,"<sup>235</sup> was consistent with his natural law jurisprudence. A very real evil was to be done away with, but slowly, so as not to cause undue disturbance to other institutions, laws, and customs. Moreover, as the British worked to reform their own economic and social system so as to eliminate slavery, they also would reform their conduct in Western Africa, promoting civilized arts as the proper replacement for a barbaric trade in human beings.<sup>236</sup>

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233. *Id.* at 531.

234. *See id.* at 531-32.

235. FRANCIS CANAVAN, SELECT WORKS OF EDMUND BURKE 253 (Francis Canavan ed., 1999).

236. *See* 5 BURKE, *Letter to Henry Dundas*, *supra* note 194, at 523. For parallels between Burkean and contemporary feminist notions of the role of modernization in shaping cultural practices, see del Prado, *supra* note 7, at 58. Perhaps the greatest distinctions between the two views are Burke's insistence on the need for a significant time period within which a particular cultural practice is to be changed, and his emphasis on general continuity even when the focus of current discussion is the need for change.

One should not forget the emphasis Burke placed on the Christian religion as a source of civilizing reform.<sup>237</sup> Some might object to Burke's desire to "impose" Christianity on other people. Nevertheless, while clearly believing his own religion to be both true and productive of many positive results, Burke nowhere proposes forcing the peoples of Western Africa to become Christians. Instead, Burke seeks merely to present Western African people with the opportunity to partake in a religion that he deemed was supported by wise and good men.<sup>238</sup>

Like most versions of natural law, Burke's was rooted in religion. However, it remained respectful of varying cultures and ways of life. Indeed, Burke's historical consciousness allowed him to formulate a natural law theory that recognizes a variety of means by which societies can fulfill universal norms in the face of particular and changing circumstances. Burke argued that all societies have a moral obligation to respect certain natural rights, principally due process of law, property rights, rights of the family, and the right to stable political and social structures. Recognizing the power of historical circumstance and the stabilizing role of tradition, Burke sought, wherever possible, to address violations of natural law through prudent actions aimed at maintaining cultural continuity while obeying the dictates of natural law. His natural law integrated morality, reason, and history to harmonize individual rights with the right of people to the integrity of their own culture. Indeed, his approach to egregious practices violating natural law was ameliorative rather than revolutionary, and thereby showed greater respect for people's actual ways of life than for abstract theories that could destroy long-valued cultures. Thus, African slaves who were brought to the New World would be, in essence, taught the habits necessary to succeed in their new environment, while Africans still living in their indigenous societies would merely be shown other means of making a living to replace slavery, leaving the bulk of their culture and society intact. Burke thus sought to redress violations of universal norms in a manner that would not undermine the people's ongoing way of life. Perhaps, then, we may find in the natural law tradition the respect for both cultural authenticity and universal rights that seem so elusive today.

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237. See 5 BURKE, *Letter to Henry Dundas*, *supra* note 194, at 523 ("I trust infinitely more . . . to the effect and influence of religion, than to all the rest of the regulations [of the Negro Code] put together.").

238. *Id.* at 530 (declaring that natives ought "to be led, by all due means, into a respect for our holy religion, and a desire of partaking of the benefits thereof . . .").