The Review of Politics 82 (2020), 459–483.

doi:10.1017/S0034670520000364

"The Low Principles of Jurisprudence": Legal Indeterminacy in Edmund Burke's Impeachment of Warren Hastings

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Abstract: Edmund Burke's impeachment of Warren Hastings for his conduct as governor-general in India represented the era's most serious internal challenge to British imperialism. But the impeachment's legal and institutional implications have been neglected. The central points of contention were the nature of impeachment in Britain and the nature of law in India. Burke insisted that impeachment must override the "low" and "mean" standards of the common law, yet he celebrated India for its dense judicial institutions. Hastings took the opposite position, demanding that the impeachment adhere strictly to the common law, yet defending his conduct in India by appeal to its political expediency, rather than its lawfulness. Each found himself in a "rhetorical contradiction," alternately arguing in praise of, and in critique of, legal reasoning and procedures. While Hastings attempted to surmount the contradiction through the discourse of realism, Burke turned to the discourse of natural law—a language of lawfulness without legalism.

In a charged passage on the second day of his opening speech in the impeachment trial of Warren Hastings, Edmund Burke imagines the defendant as a metaphysical fugitive from justice:

> Let him run from law to law; let him fly from the Common Law and the sacred institutions of the Country in which he was born; let him fly from Acts of Parliament, from which his power originated. . . . Will he fly to the Mahometan law? That condemns him. Will he fly to the high magistracy of Asia to defend the taking of presents? Pad Sha and the Sultan would condemn him to a cruel death. Will he fly to the Sophis, to the laws of

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I would like to thank Arash Abizadeh, Samuel Bagg, Michael Da Silva, Jacob T. Levy, Catherine Lu, Victor Muñiz-Fraticelli, Will Roberts, Alexandre Gajevic Sayegh, Christa Scholtz, Yves Winter, and the Research Group on Constitutional Studies at McGill University; participants in the 2019 Midwest Political Science Association and Western Political Science Association conferences; three anonymous reviewers; and the Review of Politics editorial staff.

> Persia, or to the practice of those monarchs? Oh, I cannot say the unutterable things that would happen to him if he was to govern there. Let him fly where he will; from law to law. Law, thank God, meets him everywhere.[1]

Here, Burke casts Hastings as the doomed villain of a morality play, vainly seeking refuge on the Day of Judgment. The trouble is that Warren Hastings was not a stock figure for the cardboard flames, and that his judge was not the Lord Almighty, but merely the House of Lords. With a slight shift of the light—with a shift from the moral clarity of Burke's outrage to the concrete work of doing justice—the defendant's bewilderment becomes the tribunal's. Burke cites five separate codes of law. How could one court coherently apply them all?

The confusion that comes to the fore in this passage represents one of the central dilemmas of the impeachment of Hastings, the first British governor-general in India, whose alleged crimes included violent oppression, extortionate tax farming, seizure of Indians' private property, and financial corruption. His pursuit by Burke, which resulted in a seven-year trial, amounted to the era's most serious and sustained internal challenge to British imperialism and its claims to arbitrary power over its subject populations.[2] But, as I show in this article, it would be a mistake to regard Burke's prosecution of Hastings as his attempt to "vindicate the rule of law" in any uncomplicated sense.[3] At least as the rule of law is commonly understood, Burke was revealed in the trial as both one of its most eloquent advocates and one of its most trenchant critics. The impeachment did not turn on the rule of law, but rather on the question, "The rule of *which* laws?" While scholars have generally neglected this question, I argue that it is absolutely central to any understanding of the impeachment and its place in Burke's broader political project. At the heart of the trial were the contested issues of which laws and rules applied to the process of impeachment in Britain, and of which laws and rules applied to imperial conduct in India. I sum up these issues under the heading of "legal indeterminacy," and I argue that Burke's controversial invocation of a further order of law—natural law—is best

[1]Edmund Burke, "Speech on Opening of Impeachment, 16 February 1788," in *The Writings and Speeches of Edmund Burke*, ed. Paul Langford, vol. 6, ed. P. J. Marshall (Oxford: Clarendon, 1991), 365.

[2]For disagreement with this claim, see Nicholas B. Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Cambridge, MA: Harvard University Press, 2006), 132. Nevertheless, Jennifer Pitts has argued convincingly that Burke "was arguably the first political thinker to undertake a comprehensive critique of British imperial practice in the name of justice for those who suffered from its moral and political exclusions" (Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* [Princeton, NJ: Princeton University Press, 2005], 60, 70).

[3]Frederick G. Whelan, *Edmund Burke and India* (Pittsburgh: University of Pittsburgh Press, 1996), 205.

understood as his attempt to resolve the legal tensions that his prosecution of Hastings provoked. Not only Hastings, but Burke and the Lords who sat in judgment, would "run from law to law" over the course of the trial.

As an uncompromising attack on imperial practices, Burke's impeachment of Hastings remains a flashpoint for political theorists and other scholars of empire and global justice. Yet their interest in the trial has dwelt, to a great extent, on Burke's strategies for rousing sympathy on behalf of colonial subjects who existed at such a geographical, cultural, and ethnic remove from the bulk of the British public.[4] That is still, of course, a question of lasting importance. But by turning to the trial's vexing procedural and institutional challenges, I recover a wide range of its other relevant implications. Reflecting on those challenges prompts us to consider the disputed procedural status of impeachment, which, today as in the eighteenth century, remains an uncertain mixture of criminal trial and political deliberation. It leads us to ask, as Burke did, whether deliberative or judicial modes of reasoning are best suited to confronting matters of large-scale injustice.[5] It directs our attention to the language of natural law and its rhetorical value for provoking political reflection. And finally, taking seriously the impeachment's disruptive consequences suggests that Burke's most "Burkean" commitments—his predispositions toward institutionalism, gradualism, and caution—were conditional rather than absolute, and could be overridden in cases of grave wrongdoing.

We can begin to make sense of the impeachment's legal indeterminacy by considering the trial as a proceeding played out across two alternating "scenes." In the records of the trial itself, these two scenes are tightly entangled, and the participants did not move between them in any clearly marked way; but for the purpose of analytical clarity, we ought to disentangle them.

In the British scene, the team of impeachment managers and Hastings's defense attorneys clashed over the status of impeachment as a political or a legal proceeding—or, to put it in related terms, as an occasion for deliberative or judicial rhetoric. This debate turned on the standards of evidence, procedure, and guilt appropriate to impeachment—on the question whether the impeachment should be modeled on a parliamentary deliberation on the

[4]David Bromwich, *The Intellectual Life of Edmund Burke* (Cambridge, MA: Harvard University Press, 2014), 10; Uday Singh Mehta, *Liberalism and Empire* (Chicago: University of Chicago Press, 1999), 170.

[5]This distinction is informed by Aristotle's *Rhetoric* (1.3), with which Burke was familiar. Deliberative reasoning is oriented toward future events that directly concern the deliberators, and so deals with probable outcomes of decisions. Judicial reasoning is oriented toward the past actions of the accused; while it also involves probabilistic arguments (e.g., when facts are disputed), it deals with actions that are in principle knowable. On the deliberative conception, an impeachment would largely ask, "What would be the likely consequences of convicting Hastings for the empire and its subjects?" On the judicial conception, an impeachment would largely ask, "Did Hastings commit high crimes and misdemeanors?"

future of the empire, or on the ordinary rules of a common-law criminal trial. In the Indian scene, the parties debated the propriety of Hastings's actions, and those of the East India Company, in Bengal and the neighboring regions. The central question here was whether India was essentially a realm of law or a theater of political necessity.

Each side made use of both legalistic and antilegalistic arguments: their arguments in praise of, and in critique of, legal reasoning and procedures shifted with the trial's context. Burke insisted that a British impeachment must be a political and not a judicial process, a trial "tried before Statesmen and by Statesmen, upon solid principles of State morality," subject to the principles of deliberative judgment rather than the strict but narrow standards of the lower courts.[6] But even as he urged the Lords to depart from the letter of the law, he celebrated the Indian states for their dense history of judicial institutions and stressed the minute details of the "Asiatic" law that Hastings had allegedly violated. Hastings and his attorneys took precisely the opposite orientation, demanding that the trial adhere strictly to the common law, yet defending his conduct in India by appeal to its political necessity and expediency, rather than its lawfulness.

The literature on the impeachment has often touched on these issues in isolation, but has rarely considered the difficulty they posed, in conjunction, for both Burke and Hastings.[7] Each side found itself in a "rhetorical contradiction": not a logical or a formal contradiction, but the condition of pressing two or more dissonant arguments before a given audience. Hastings attempted to surmount his version of the contradiction through the discourse of political realism and *raison d'état*.[8] Burke, for his part, turned to the discourse of natural law.

Burke's invocations of natural law have been criticized for their vagueness, or for their service of "theatrical impact" at the expense of theoretical rigor.[9] It is true that the Burkean natural law offers no clear rules for conduct or catalog of offenses. But for Burke, as I argue, this lack of specificity was crucial to the natural law's value as a tool for reflection: the language of natural law could speak to moral urgency without descending into the positive-law minutiae that Burke considered intellectually and emotionally dulling. Natural law, in his use, has the qualities of lawfulness without legalism: as a rhetorical weapon, it enabled him to raise the prosecution to a high pitch of indignation

[6]Burke, "Speech on Opening of Impeachment, 15 February 1788," in *Writings and Speeches*, 6:272.

[7]An important exception is Lida Maxwell, *Public Trials* (Oxford: Oxford University Press, 2014), 37–79; see sec. 4 below.

[8]Whelan, *Burke and India*, 188.

[9]Frank O'Gorman, *Edmund Burke* (London: Routledge, 1973), 121. See also Siraj Ahmed, "The Theater of the Civilized Self: Edmund Burke and the East India Trials," *Representations* 78 (2002): 41; Don Herzog, "Puzzling through Burke," *Political Theory* 19, no. 3 (1991): 339–40.

while avoiding the charges of arbitrariness invited by his frank insistence on a political trial.

This article consists of four sections and a conclusion. In the first section, I offer a historical outline of the impeachment. In the second section, I turn to the British scene of the trial, showing how its key procedural conflicts were driven by a clash between deliberative and judicial conceptions of impeachment. I conclude the section by arguing that Burke's stance on the nature of impeachment was linked to broader claims about the superiority of deliberative over judicial reasoning, especially in cases of systemic injustice.[10] In the third section, I address the Indian scene, considering Hastings's defense of his actions and explaining Burke's turn to legal minutiae, from *The Code of Gentoo Law* to "the known provincial constitutions of Hindoostan."[11] In the fourth section, I develop the notion of a rhetorical contradiction and consider the parties' attempts at resolving their reciprocal versions of the contradiction. And in the conclusion, I argue that the impeachment as conceived by Burke was potentially destabilizing on a number of counts. Burke's willingness to accept these destabilizing consequences in pursuit of justice for the empire's Indian subjects can be viewed as a considered sacrifice of the institutionalist commitments for which he is best known. But this sacrifice may also help us understand the trial's failure, as Burke saw it, to shift British public opinion on the empire.

1. Summary of the Impeachment

Originally an association of merchants, the East India Company had evolved into a "company-state" exercising political rule in its own right.[12] In 1783, amid news from India of military losses, revolts against the company's

[10]To be sure, Burke's insistence that impeachment ought to be both deliberative and targeted at injustice may appear to be in tension with one aspect of the classical judicial-deliberative distinction: that the criterion of *judicial* rhetoric is justice, while the criterion of deliberative rhetoric is expedience or utility. But the strand of "modern" or neo-Stoic natural law that most influenced Burke had taken on board Cicero's equation of the *honestum* and the *utile*. These concepts are similarly elided in Burke's case against Hastings, which treats his actions as both unjust and dangerous to British liberty. See David Armitage, "Edmund Burke and Reason of State," *Journal of the History of Ideas* 61, no. 4 (2000): 620; Christopher J. Insole, "Burke and the Natural Law," in *The Cambridge Companion to Edmund Burke*, ed. David Dwan and Christopher Insole (Cambridge: Cambridge University Press, 2012), 121; Richard Tuck, "The 'Modern' Theory of Natural Law," in *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1987), 105.

[11]Burke, "Opening of Impeachment, 16 February 1788," 364.

[12]Philip J. Stern, *The Company-State* (New York: Oxford University Press, 2011).

authority, and abusive revenue collection,[13] Burke drafted and spoke in support of Charles James Fox's East India Bill, which would have brought the company under stricter parliamentary regulation. The bill passed the House of Commons but, under the influence of King George III, was defeated in the House of Lords, triggering the fall of the Fox-North governing coalition and the elevation of William Pitt the Younger.

With this legislative failure, Burke turned to the procedure of impeachment as the best remaining hope for forcing reform. Hastings, in Burke's view, was the "captain-general in iniquity" in India, and his punishment was intended to be exemplary.[14] A longtime company official, Hastings had served as governor-general from 1773 until his resignation in 1784.[15] Acting with a group of opposition Whigs, Burke presented twenty-two articles of charge against Hastings to the Commons in April and May 1786. Hastings's statement of self-defense on May 1 and 2 was poorly received.[16] On June 13, Pitt's surprising announcement of support for the impeachment sealed Hastings's fate in the Commons.

At Hastings's trial before the Lords, Burke and his fellow managers largely confined their case to four main charges. Two were related to financial corruption: Hastings's acceptance of "presents" from Indians and the awarding of "improvident and corrupt contracts," mainly for tax farming.[17] Two others were instances of his "Acts of Oppression":[18] the violation of treaty obligations to the Raja Chait Singh of Benares, which provoked a revolt in 1781, and the confiscation of the property of the Begams of Oudh, major landholders neighboring the company's base in Bengal.[19] Even as early as 1785, Burke privately referred to Hastings's conviction as "a thing we all know to be impracticable."[20] Despite an enthusiastic public reception for his opening speech over four days in February 1788, Burke's pessimism was soon borne out.

While free to adopt any set of procedures, the Lords—under the influence of the judges who sat as members of the House—chose to closely model the

[13]P. J. Marshall, *The Impeachment of Warren Hastings* (Oxford: Oxford University Press, 1965), 17.

[14]Burke, "Opening of Impeachment, 15 February 1788," 275.

[15]Impeachment was not synonymous with removal from office; if convicted, Hastings would have been subject to sentencing by the Lords.

[16]Richard Bourke, *Empire and Revolution: The Political Life of Edmund Burke* (Princeton, NJ: Princeton University Press, 2015), 635.

[17]Edmund Burke, "Articles of Impeachment: Article Fourth," in *Writings and Speeches*, 6:164.

[18]Burke, "Article Eighth," 203.

[19]Marshall concludes that Hastings was likely guilty of the oppression and contracts charges, and possibly of the presents charge, but was unfairly singled out for practices that were widespread in British India (Marshall, *Impeachment*, 189–90).

[20]Burke to Philip Francis, December 23, 1785, in *The Correspondence of Edmund Burke*, vol. 5, ed. H. Furber (Cambridge: Cambridge University Press, 1965), 243.

impeachment on a criminal trial under the common law, hampering the managers' efforts to prove their case. Even with the outcome in little doubt, the trial dragged on for more than seven years. While both sides arguably bore a share of responsibility for the trial's protraction, much of the blame should fall on the tribunal's short and infrequent sittings—a total of just 145, at an average of three to four hours each. Had they sat continually and for full days, the Lords might have concluded the trial in roughly two months.[21]

By the time the court assembled for a verdict on April 23, 1795, public interest had waned considerably. Hastings was overwhelmingly acquitted. While Burke had anticipated that outcome, he had undertaken the impeachment in order to shape public opinion and to constrain the actions of future imperial administrators, and on this score he was largely disappointed—especially when Hastings was subsequently awarded an annuity for his service.[22]

In the following two sections, I turn to the trial's central paradox, tracing the shifting claims of legalism and antilegalism across its two scenes.

2. The British Scene

From the outset, Burke and Hastings were engaged in a running debate over the nature of impeachment that is likely to strike us as quite familiar. Among the disputed issues were impeachment's purpose within the system of representative government, the most appropriate procedural model for an impeachment trial, the varieties of evidence and argument that ought to be admissible, and the standard of guilt that must be met to secure a conviction.

Then, as now, impeachment was a liminal procedure, sitting uncertainly on the margins of the judicial and the deliberative. It took the outward form of a trial for "high crimes and misdemeanors." And yet, in Burke's view, the essential purpose of the impeachment process, which had lain dormant since its last use in 1746, was not to punish crimes, but to exert parliamentary control over ministers and other crown appointees—an especially pressing function at a time when ministerial responsibility to parliament was only haphazardly enforced. In order to play its constitutional role, impeachment demanded standards of probabilistic reasoning, evidence, and proof more suited to the legislator than the jurist. The Lords ought to assess "misconduct in Office" under the broadest possible rubric, by comparison with an ideal figure of virtue in office: "If [the accused] has done and if he has forborne in the manner in which a British Governor ought to do and to forbear, he has done his duty, and he is honorably acquitted."[23] The supremacy of the

[21]James Mill, *The History of British India* (New York: Chelsea House, 1968), 5:202.

[22]Burke to Henry Dundas, March 6, 1796, in *The Correspondence of Edmund Burke*, vol. 8, ed. R. B. McDowell (Chicago: University of Chicago Press, 1969), 401.

[23]Burke, "Opening of Impeachment, 16 February 1788," 345.

"law of Parliament," as Burke freely admitted to the judges, empowered them to set aside the letter of the common law and act in a quasi-arbitrary manner: "You are not bound by any rules whatever except those of natural, immutable and substantial justice."[24] In sum, Burke told the court, we have "the principles of honor, the spirit of cavaliers to govern here; not the low principles of jurisprudence only."[25]

Hastings and his attorneys, by contrast, approached the impeachment as a criminal proceeding. As early as his May 1786 appearance before the Commons, Hastings was already criticizing his accusers for departing from "the universal practice of every system of jurisprudence."[26] The defense's reasoning can best be reconstructed through the arguments of sympathetic members of Parliament. "If we talk of the law and usage of parliament, and are bound by it," asked Edward Thurlow, the lord chancellor, "what injustice shall we not commit?"[27] Departing from the common-law model, argued Thomas Erskine, would replace impartial standards with arbitrary judgments and electoral head-counting, "according to the strength of the party prosecuting or defending."[28] These parliamentarians had been trained as lawyers; in their view, impeachment was dangerous precisely because it offered a means of overriding the rule of law.

This clash between the deliberative and judicial conceptions of impeachment, and the dueling styles of argumentation that they entailed, had decisive consequences for the trial. These consequences were clearly evident to contemporaries. One satirical print, made by the caricaturist James Sayers in March 1788, on the heels of Burke's opening statement, depicts a ticket to the trial bearing a fictional coat of arms: the emblem includes Burke's head and a weeping judge, labeled "Common Law," crouching beneath a whip, labeled "Lex Parliamenti omnipotens."[29] King George himself (a supporter of Hastings) observed that "the managers do not seem to understand their business. There is a great difference between those who are Counsel [professional lawyers] and those who are not, in examining witnesses."[30] The fact that the difference was so clear speaks to the success of the defense in setting the terms of the trial; the Lords settled procedural and evidentiary

[24]Burke, "Opening of Impeachment, 15 February 1788," 276.

[25]Burke, "Minutes of Proceedings on the Trial of Warren Hastings," May 27, 1789, additional manuscripts, British Museum, 24230, f. 235, cited in Marshall, *Impeachment*, 65.

[26]Warren Hastings, *The Minutes of What Was Offered by Warren Hastings, Esq., at the Bar of the House of Commons* (London: J. Debrett, 1786), 5.

[27]*The Parliamentary History of England*, ed. W. Cobbett (London, 1806–20), 27:62.

[28]Erskine to W. D. Shipley, n.d., additional manuscripts, British Museum, 29196, ff. 6–7, cited in Marshall, *Impeachment*, 66.

[29]James Sayers, "For the Trial of Warren Ha[stings]," March 5, 1788, British Museum Satires 7276.

[30]James Bland Burges, *Letters and Correspondence*, ed. James Hutton (London: John Murray, 1885), 107.

disputes almost uniformly in Hastings's favor. Across three major sets of procedural issues, Burke and his fellow managers pressed and lost the case for a political trial. After summarizing these issues, I will argue that Burke cast these disputes as part of a more general argument about the superiority of deliberative over judicial reasoning.

First, the managers and the defense differed over the structure of the trial. Immediately following Burke's opening speech, Fox, his fellow manager, urged the tribunal to depart from the organization of an ordinary criminal trial, in which the entire prosecution case would be followed by the entire defense case. Such a structure, Fox argued, was unsuited to the "vastness" of the material at stake; in the interest of the judges' factual recall, the parties ought to present their arguments on each charge in turn. Yet the managers were just as concerned with emotive recall: as P. J. Marshall has argued, "the prosecution's slender changes of obtaining a conviction on any of the articles would be at their best while the atmosphere of the court was still charged with the Managers' oratory."[31] Burke's private admission that the impeachment had to be "mobbish" to have any hope of success speaks both to political calculation and to the considered belief that deliberators must be "alarmed into reflection."[32]

By contrast, the defense argued that "the mode proposed was contrary to the modes of procedure at common law." Hastings's attorneys further claimed that requiring them to respond immediately to each charge might compel them "to disclose to their adversary the defense which they meant to employ upon others"—not a pressing consideration in the fluid atmosphere of legislative debate, but a highly relevant one in a criminal context designed to protect the rights of the accused.[33] The Lords ruled in Hastings's favor. A dissenting opinion filed by a handful of Lords neatly captured the issue at stake: in binding itself to the common-law practices of the lower courts, the court had essentially ruled that "*the law of Parliament . . . has neither form, authority, nor even existence*."[34]

Second, the defense successfully demanded a strict reading of the articles of impeachment in order to dramatically limit the trial's scope. The articles, as drafted by Burke, aimed squarely at public opinion and more closely resembled a political pamphlet than a legal document. As a result, Burke was unprepared for the defense's efforts to hold him to the letter of the charges.

In February 1790, the managers attempted to substantiate claims of Hastings's corruption by providing evidence that one of his appointed tax farmers was "notoriously a person of infamous character, and . . . unqualified

[31]Marshall, *Impeachment*, 70.

[32]Burke, *Reflections on the Revolution in France*, in *The Works of the Right Honourable Edmund Burke* (London: John C. Nimmo, 1887), 3:338.

[33]Mill, *British India*, 80.

[34]Cited in Mill, *British India*, 85.

for the office."[35] In their view, unfitness was circumstantial proof of corruption, because Hastings could only have made such an appointment if he had been bribed. Hastings's attorneys objected that "unfitness was not a charge in the impeachment," and the Lords ruled in their favor. Questions to witnesses on the Indian public's perception of Hastings's appointments were also ruled out of order.[36] In effect, the Lords sharply limited the extent to which the court could take into account the condition of India and its inhabitants—an essential consideration if impeachment were a deliberative proceeding, but one without direct bearing on Hastings's personal guilt.

Shortly thereafter, the defense objected when the managers asked a witness whether Hastings's changes to the revenue collection resulted in "more evil, or less evil" for Indians under the company's rule. Again, the defense argued that their well-being was only tangential to the charges. When the managers pointed out that the articles did in fact contain the phrase "to the great oppression and injury of the said people," the defense responded that this must be read not as a substantive charge, but as a legal formula—the equivalent of the phrase "contrary to the peace of our Lord the King," routinely appended to criminal charges.[37] The Lords' ruling in the defense's favor triggered an outburst from Burke, who had perhaps come to realize that questions of the welfare of the empire's subject peoples had been progressively ruled out of the trial. Admonished by the judges to stop wasting the court's time, Burke shot back "that it was his object to save the HONOR and the CHARACTER of their Lordships, and not their TIME."[38]

Arguments about the likely future condition of the company's subjects also repeatedly failed to persuade the tribunal. The managers argued, to little effect, that "to adhere to the rules of evidence upheld by English lawyers, was to let loose rapine and spoil upon the subjects of government."[39] Here again, the patterns of argumentation at the heart of deliberative reasoning—in this case, orientation toward prospective outcomes rather than past wrongs—failed to take hold.

Third, in a wide range of cases, the tribunal ruled inadmissible evidence and testimony offered by the managers. In February 1788 and April 1789, the Lords followed common-law procedure in protecting company officials from hostile or potentially self-incriminating questions.[40] In May 1789, on similar grounds, the court shielded Hastings from questions related to the existence of a letter allegedly substantiating his acceptance of bribes.[41] In the same month, the court rejected written testimony offered, in Calcutta, against Hastings by one

[35]Paraphrased in Mill, *British India*, 131.
[36]Ibid., 135.
[37]Ibid., 136.
[38]*History of the Trial of Warren Hastings, Esq.*, part 3 (London: J. Debrett, 1796), 54–56.
[39]Paraphrased in Mill, *British India*, 109.
[40]Ibid., 87, 91.
[41]Ibid., 103.

of his Indian subordinates; the grounds for this ruling included the facts that the testimony was not given on oath or in the presence of the accused.[42] Also excluded were documents purporting to show the acceptance of bribes by Hastings's subordinates on his behalf.[43] One could imagine the court admitting all or most of this evidence if it accepted Burke's premise that the purpose of the impeachment was the reform by example of the imperial administration. But in rejecting that premise, the court was also bound to reject evidence that ran afoul of legal protections for the accused, no matter the cumulative picture of misgovernment that it painted.

Despite their consistent and consequential failure to carry their arguments for a political impeachment, the managers persisted in pressing the case. As late as 1794, Burke was still insisting that impeachment is "not of Right obliged to proceed . . . [by] the Law or Usage of any of the inferior Courts . . . but by the Law [or] Usage of Parliament."[44] His stubbornness on this point is telling. There are certainly cases—for instance, the drafting of the articles—in which Burke might have advanced his cause by moderating his stance. But on the whole, Burke acted as if the only hope of success as he defined it—decisively altering public opinion on the governance of the empire—depended on carrying through to the end an impeachment as frankly political as the circumstances would permit. To understand why, we need to understand Burke's conception of the relationship between deliberative and judicial reasoning.

For Burke, these two forms of reasoning or rhetoric were not morally interchangeable, each suited to its own domain. Rather, they were related hierarchically: while judicial reasoning was valuable in a limited sphere, deliberative reasoning was superior in important respects. This stance echoed Aristotle's claim that deliberative rhetoric is "nobler and more worthy of a statesman."[45] Nor were these two forms of reasoning necessarily bound to their contexts, one to legislatures and the other to courts. Just as certain courts, such as a court of impeachment, ought to proceed as deliberatively as possible, legislatures often labored under the temptation of lapsing into legalistic habits of thought. Deliberation was not, for Burke, what legislatures did by definition; it was a form of reasoning into which they could sometimes rise. And they could do so only by overcoming the mental and moral laziness that moved them to offload "the pain of judgment" onto preexisting rules, maxims, and procedures.[46] So while it is correct to

[42]Ibid., 104, 109, 112.

[43]Ibid., 113–14.

[44]Burke, "Report on the Lords Journals, 30 April 1794," in *Writings and Speeches*, ed. Paul Langford, vol. 7, ed. P. J. Marshall (Oxford: Clarendon, 1991), 118.

[45]Aristotle, *Rhetoric*, in *Aristotle*, vol. 22, trans. J. H. Freese (Cambridge, MA: Harvard University Press, 1926), 1.1.10.

[46]Rob Goodman, "The Deliberative Sublime: Edmund Burke on Disruptive Speech and Imaginative Judgment," *American Political Science Review* 112, no. 2 (2018): 268.

point out that the "contrast between the liberal mind and the narrow legalism of the profession is a familiar Burkean theme," the contrast Burke implies is further-reaching: with legal modes of thinking whenever they venture beyond a narrowly fixed province.[47]

This polarity—judicial reasoning as a tempting base state, and deliberation as a condition tenuously achieved—runs as a through-line across Burke's oratory and political writing. As early as his speeches on the American colonies, he urged his colleagues to avoid "the distinctions of rights . . . these metaphysical distinctions," and to enter into "the arguments of states and kingdoms."[48] He made a similar point even more explicitly in his speech on Fox's East India Bill, in which he insisted that questions on the legal status of the East India Company's charter should be subordinated to questions of its record of political rule. "It has been a little painful to me," Burke declared, "to observe the intrusion into this important debate of such company as *quo warranto*, and *mandamus*, and *certiorari*: as if we were on a trial about mayors and aldermen and capital burgesses, or engaged in a suit concerning the borough of Penryn, or Saltash, or St. Ives, or St. Mawes . . . matter of the lowest and meanest litigation." The encroachment of legalism would "degrade the majesty of this grave deliberation of policy and empire."[49]

Judicial reasoning fell short of the "grave" and "majestic" standard of deliberation in a number of ways. First, Burke considered it intellectually constricting. What it gained in precision, it lost in a quality that Burke variously referred to as "enlargement" or "expansion." This quality might be the ability to estimate the probabilities of future events (would the suppression of certain evidence increase the future likelihood of the bribery of company officials?) or to synthesize facts into broad judgments (did Hastings's tax policies leave his subjects better or worse off?)—modes of judgment that were ruled out of order in the impeachment. It might be the ability to imaginatively generalize from facts to underlying principles. Or it might be an apprehension of events in their proper moral proportions. "If . . . we do not stretch and expand our minds to the compass of their object," Burke warned in a 1785 speech denouncing the company, "be well assured that everything about us will dwindle by degrees, until at length our concerns are shrunk to the dimensions of our minds."[50] Hastings and the company could only succeed in the impeachment and in the court of public opinion, Burke insisted, by shrinking the concerns at stake. To understand Burke's outbursts before the judges, one must grasp something of his frustration in seeing "the great oppression and injury of the [Indian] people" reduced from a political reality to a verbal formula.

[47]F. P. Lock, *Edmund Burke*, vol. 2, *1784–1797* (Oxford: Oxford University Press, 2006), 234.

[48]Burke, "Speech on American Taxation," in *Works*, 2:73.

[49]Burke, "Speech on Mr. Fox's East India Bill," in *Works*, 2:434.

[50]Burke, "Speech on the Nabob of Arcot's Debts," in *Works*, 3:16.

Second, Burke contended that judicial reasoning divorced the passions from the work of judgment. As he told the court, "He that hath made us what we are, has made us at once resentful and reasonable."[51] The trouble is that legal proceedings may make insufficient room for just resentment, especially in cases of complex and systemic wrongs, when the wrongs themselves are obscured by "technical Subtilties." Similarly, the drier such proceedings are, the less space they leave for aesthetic reactions, such as disgust at injustice. Among the accusations that Burke leveled at Hastings, one was for the offense of attempting, through "palliating names" of vices, to lower the emotional temperature of the trial.[52] He mocked the defendant's legalese, reserving particular scorn for this "puzzled and studied" sentence from a 1785 letter to the company's directors: "Neither shall I attempt to add more than the clearer affirmation of the facts implied in the report of them, and such inferences as necessarily or with a strong probability follow them."[53] By contrast with Hastings, Burke argued that the "Plainness and Simplicity" of a deliberative impeachment made possible the exaction of "sympathetic revenge."[54]

Third and finally, Burke claimed that the judicial framework was specifically unsuited to grappling with imperial wrongdoing. Most immediately, the sheer distance of India, combined with common-law procedures that evolved for English use, acted as a shield for crimes that would be more easily uncovered if they were committed at home. As Burke put it in his 1794 committee report, "Such confined and inapplicable rules would be convenient indeed to Oppression, to Extortion, Bribery, and Corruption."[55] Concretely, the dilemmas of distance manifested themselves in Burke's difficulties in obtaining admissible written records of the company's activities, and in his belief—evidently derived from Nathaniel Halhed's *Code of Gentoo* [Hindu] *Law*—that observant Hindus were unable to leave Indian soil, preventing them from testifying in a British court.[56] More broadly, though, Burke suggested that applying the English common law to Indian oppression would quite literally domesticate imperial crimes. Returning to his speech on Fox's East India Bill, we can observe that direct engagement with Indian affairs is praised as a "grave deliberation of policy and empire," while the "lowest and meanest litigation" is linked with local goings-on in "Penryn, or Saltash, or St. Ives, or St. Mawes." These were all small boroughs in the far Southwest of England, the most provincial of the provincial, placed in

[51]Burke, "Speech in Reply, 28 May 1794," in *Writings and Speeches*, 7:245.
[52]Ibid., 244.
[53]Lock, *Edmund Burke*, 2:230.
[54]Burke, "Report on the Lords Journals," 121; Burke, "Speech in Reply, 28 May 1794," 245. See Paddy Bullard, *Edmund Burke and the Art of Rhetoric* (Cambridge: Cambridge University Press, 2011), 133.
[55]Burke, "Report on the Lords Journals," 153.
[56]Burke, "Opening of Impeachment, 15 February 1788," 305.

contrast with the empire's cosmopolitan scope. Litigating, then, is the ordinary, comfortable, parochial mode of proceeding, well suited to ordinary, comfortable, parochial affairs, such as take place in St. Mawes. To transpose India into this framework, Burke fears, is to render imperial crimes similarly ordinary to Englishmen. The implication, I think, is that procedures can be "contagious": routine procedures can routinize outrages.[57] If Burke is correct that these crimes are systemic in scope, then they are, for that very reason, potentially invisible. To assimilate them to the most familiar proceedings and phrasings of English law is to be complicit in their invisibility.[58]

Burke's repeated insistence that the impeachment's judges discard "the low principles of jurisprudence" derived, then, from a considered and multifaceted argument for the hierarchical relationship between deliberative and judicial reasoning. While the impeachment would necessarily retain some aspects of the judicial, Burke pressed consistently to minimize them. Even though the Lords were unpersuaded, we might still grant that—given Burke's aspirations for the trial—accepting a wholly judicial impeachment would have meant conceding his case from the outset.

3. The Indian Scene

In addition to their dispute over the nature of impeachment, Burke and Hastings also contended over the appropriate role of foreign law and custom in a domestic proceeding—a clash in which Burke, in particular, engaged closely with Indian law. The thoroughness of Burke's objection to judicial reasoning makes this close engagement all the more puzzling. If we grant the argument that concluded the last section—that absorption in legalistic reasoning would hamper the intellectual enlargement and emotional engagement necessary for the Lords to do justice in a case on the scale of Hastings's—then Burke would seem to be damaging his own chances of success whenever he invoked the details of Indian law. Burke's line of argument also raised the specters of inconsistency and opportunism. He was open to the rebuttal that, while denouncing Hastings's lawless and arbitrary rule in India, he himself was demanding an arbitrary judgment from Parliament.

Burke and the managers were drawn into an engagement with Indian law by Hastings's line of defense: that, while the impeachment itself ought to be governed by strict legal standards, Hastings's actions in India were outside the scope of law. In this section, I consider Hastings's substantive case in defense of his Indian record, followed by Burke's response. This dispute, as

[57]See Burke's argument on "the contagion of our passions": Burke, *Philosophical Enquiry*, in *Works*, 1:261.

[58]On systemic injustice and disruptive politics, see Clarissa Rile Hayward, "Responsibility and Ignorance: On Dismantling Structural Injustice," *Journal of Politics* 79, no. 2 (2017): 396–408.

I will argue, locked both parties into positions in tension with their respective claims about the procedure of impeachment. In the next section, I argue that Burke's turn to natural law mitigated the dangers that this tension posed to his case.

The claim that the states of Asia were characteristically despotic—subject to arbitrary rule, governed by force and fear rather than by law—was stamped with the authority of Montesquieu.[59] While a growing body of comparative legal scholarship had begun to undermine this account, it still retained wide currency.[60] What was more controversial was Hastings's variation on this theme: because India could only be governed despotically, the British in India had no choice but to govern despotically in their own right. As Hastings argued in his May 1786 defense before the House of Commons (in a passage written for him by Halhed), India's history of waves of foreign conquest had resulted in "unavoidable anarchy and confusion of different laws, religions, and prejudices." Because such unnatural diversity offered a standing inducement to the rebellion of subject peoples, the Indian states could only be governed by "the strong Hand of Power"; rebellion itself was "the parent and promoter of despotism." In fact, "the whole history of Asia is nothing but *precedents* to prove the invariable exercise of arbitrary power." Hastings explicitly assimilated his high-handed treatment of the company's tributary ally, Chait Singh, to the arbitrary relations between lords and vassals under the Mughals. Hastings's conduct toward his ally was "perhaps arbitrary; but for *that* I am not responsible: It is a defect woven in the texture of the Mogul system." Chait Singh's rebellion against the company (which Burke praised as an act of self-defense) was, for Hastings, simply evidence of that systemic defect. It also proved that he had been right to govern from fear of rebellion. Except for the briefly expressed hope that one day "the despotic institutes of Genghiz Khan, or Tamerlane, shall give place to the liberal spirit of a British legislature," there is little sign in Hastings's defense of the alleged "civilizing mission" of later imperialism.[61]

Hastings withdrew from this line of argument soon after his appearance before the Commons; it seems that his unapologetic picture of British despotism alienated a Parliament and a public that took pride, however dubious, in a "liberal spirit." But Hastings's revised defense was structurally quite similar

[59]Sharon Krause, "Despotism in the *Spirit of the Laws*," in *Montesquieu's Science of Politics*, ed. D. W. Carrithers et al. (Oxford: Rowman and Littlefield, 2001); Michael Sonenscher, *Before the Deluge: Public Debt, Inequality, and the Intellectual Origins of the French Revolution* (Princeton, NJ: Princeton University Press, 2009), 121–49; Alex Haskins, "Montesquieu's Paradoxical Spirit of Moderation: On the Making of Asian Despotism in *De l'esprit des lois*," *Political Theory* 46, no. 6 (2018): 915–37.

[60]Whelan, *Burke and India*, 259. See also Pitts, "Empire and Legal Universalisms in the Eighteenth Century," *American Historical Review* 117, no. 1 (2012): 92–121.

[61]Hastings, *Minutes*, 70, 67.

to his argument from despotism. In the revised line of defense, India was cast not as inherently lawless, but as contingently lawless; Hastings's exculpatory model was not a Mughal overlord, but an embattled official in wartime. His argument from necessity pointed to India's political and military turmoil amid the declining central authority of the Mughals; to the threat of French incursions into the eastern empire; and to the company's unstable financial position. In the face of these exigencies, Hastings argued, the imperial administration "must be armed for Defence, and it ought rather to advance against gathering Dangers on their own Ground than to await their Approach. . . . There are also Cases in which Power may be displayed to intimidate."[62] The charges of oppression for which he was on trial were, for Hastings, just such cases. His abrogation of treaties had taken place in a theater of war, in which apology "is an Acknowledgement of Weakness," and his acceptance of presents from Indian subjects had stabilized the company's accounts rather than padding his own. Above all, his results spoke for themselves: the provinces he oversaw had become "the most flourishing of all the states in India. It was I who made them so."[63]

This sketch of Hastings's defense can give us a sense of why Indian law played a more prominent role in Burke's prosecution than the English common law. First, Burke argued, the powers that Hastings claimed were themselves partly derived from Indian law. The East India Company had acquired territorial rule through the 1765 Treaty of Allahabad, which legally made the company a vassal of the Mughals. As a result, Burke argued in opening the impeachment, "an English Corporation became an integral part of the Mogul Empire. When Great Britain assented to that grant virtually, and afterwards took advantage of it, Great Britain made a virtual act of union with that country."[64] Hastings, too, acknowledged the company's vassal status, using it to legitimize his continuation of "the Mogul system" of despotism. But Burke, by contrast, used the same fact to subvert Britain's imperial claims. Rather than imposing order on Indian "anarchy," as Hastings claimed, Britain had entered into a relationship with the Mughal empire not essentially different from the Act of Union between England and Scotland. If this were the case, then Hastings, in his capacity as governor-general, was not a dispenser of laws to India, but a subject of Indian law. As a result of this fact, Britain had an interest in Hastings's adherence to Indian law—in the question whether he broke faith with Chait Singh or violated local laws of inheritance and property in the case of the Begams of Oudh. But most importantly, Burke was concerned with substantiating the sheer existence, diversity, and antiquity of "Asiatic" law, because such a

[62]Hastings to William Pitt, cited in C. C. Davies, "Warren Hastings and the Younger Pitt," *English Historical Review* 70 (1955): 619.

[63]*History of the Trial of Warren Hastings, Esq.*, part 4, 103.

[64]Burke, "Opening of Impeachment, 15 February 1788," 305.

claim, if persuasive, would undermine the core of Hastings's defense—that India was inherently despotic or permanently a theater of necessity.[65]

Burke set out to demonstrate, then, that law existed at every stratum of Indian history, from the earliest foreign invasions up to the present. Despots had certainly ruled in India, but in the sweep of history, they were aberrations. Burke's most striking illustration of this point was his claim that the ur-despots of the European imagination—Genghis Khan and Tamerlane, regretfully cited by Hastings as models—were in fact law-bound sovereigns. The surviving records of Genghis Khan, Burke admitted, were sparse, "but there is not a shadow of arbitrary power to be found in any one of them."[66] Tamerlane's legislation, on the other hand, appeared to be better attested. Gesturing to an English translation of the *Institutes of Tamerlane*, Burke told the court, "there is no book in the world, I believe, which contains nobler, more just, more manly, more pious, principles of Government than this book. . . . Nor is there one word of arbitrary power in it, much less of that arbitrary power which Mr. Hastings supposed himself justified by."[67] There follows a two-thousand-word quotation from the text, of which the following gives a flavor: "Twelfthly . . . it was known unto me by experience, that every empire which is not established in morality and religion, nor strengthened by regulations and laws, from that empire all order, grandeur and power, shall pass away. . . . Therefore I established the foundations of my empire on the morality and the religion of Islaum."[68]

More recently, the Ottoman Sultan had come to play a similar role in European discourse, and in Hastings's defense, as the prototypical Muslim despot. Here again, Burke dissented: "He an arbitrary power? . . . He cannot lay a tax upon his people. . . . He cannot dispose of the life, or the property, or of the liberty of any of his subjects, but by what is called the Fetfa or sentence of the law. He cannot declare peace or war without the same sentence of the law."[69] The cases of Tamerlane and the Sultan were relevant to the impeachment because they offered proof that "every Mahomedan

[65]"Permanently" should be stressed. Burke acknowledged that appeals to necessity were sometimes legitimate, but he insisted that necessity "could not be raised into a regular principle of government" (Armitage, "Edmund Burke and Reason of State," 625).

[66]Edmund Burke, "Opening of Impeachment, 16 February 1788," 355.

[67]Ibid., 356. The *Institutes*, translated into English in 1783, were a seventeenth-century Mughal forgery, but neither Burke nor his British contemporaries seem to have been aware of the fact. See Beatrice Forbes Manz, "Tamerlane's Career and Its Uses," *Journal of World History* 13, no. 1 (2002): 13.

[68]Burke, "Opening of Impeachment, 16 February 1788," 361.

[69]Ibid., 354. Marshall notes that Burke's sources for this claim appear to be Demetrius Cantemir, *The History of the Growth and Decay of the Othman Empire* (London, 1756), and the *Memoirs of Baron de Tott containing the State of the Turkish Empire* (London, 1786).

Government . . . is by its principles a Government of law."[70] The Mughal government was no exception, Burke insisted, "and I will prove it by the known provincial constitutions of Hindoostan." Burke outlined the structure of these constitutions, descending from the Koran—"against oppressors by name every letter of that law is fulminated"—to the body of case law. He also demonstrated that the Indian states had "subdelegated their power by parcels," explaining, as an instance of this subdelegation, the separate court jurisdictions for lawsuits related to taxation and to inheritance.[71] In Burke's telling, the framework of Muslim Indian law ought to be familiar to any common-law court in Britain, with laws "exactly in the same order, grounded upon the same authority."[72] Finally, Burke drew on Halhed's compendium to claim that India's Hindu law was no exception to the general trend: "These people are governed, not by the arbitrary power of any one, but by . . . a substantial body of equity and great principles of jurisprudence."[73]

As Mithi Mukherjee observes, the turn to Indian jurisprudence in a British impeachment posed a number of uncomfortable questions: for instance, "Could a subject of England be tried in the name of the laws of an alien land?"[74] At the risk of reading too much into too little, a single word can bring us to the heart of the trial's perplexities. In the British context, Burke speaks of the "*low* principles of jurisprudence"; in the Indian context, he speaks of the "*great* principles of jurisprudence." This is a telling shift in emphasis. The very same principles that Burke seeks to minimize in the context of a British impeachment trial—close judicial reasoning, strict adherence to complex rules, "technical Subtilties"—become praiseworthy in the context of that trial's Indian scene. Burke's dilemma, as well as Hastings's, can best be understood as an instance of rhetorical contradiction.

4. Rhetorical Contradictions and Burke's Natural Law

A rhetorical contradiction, as I want to develop the concept, is distinct from a contradiction proper; we could understand the distinction by analogy to Aristotle's distinction between rhetoric and dialectic. Rhetorical reasoning, for Aristotle, typically proceeds by enthymemes rather than syllogisms; an enthymeme might omit a premise, or take conventional wisdom as a premise, or operate at a level of simplicity appropriate to a deliberating public rather than a circle of logicians. One might call an enthymeme an informal syllogism. In the same way, a rhetorical contradiction is an informal contradiction. It is not the sort of statement, such as "p and $\neg p$," whose

[70]Burke, "Opening of Impeachment, 16 February 1788," 363.
[71]Ibid., 364.
[72]Ibid.
[73]Ibid., 365.
[74]Mithi Mukherjee, *India in the Shadows of Empire* (New Delhi: Oxford University Press, 2010), 20.

propositions must be incompatible regardless of the time or place at which they are stated. Rather, a rhetorical contradiction is the conjunction of two or more dissonant positions before a given audience. The sign of a rhetorical contradiction is not outright, verifiable incompatibility, but something closer to discomfort.

In this sense, Burke and Hastings faced reciprocal dilemmas. Their challenge was not to demonstrate conclusively that their contrasting stances in the trial's two scenes were consistent—they were engaged in a political conflict, not an academic disputation—but rather to mitigate their arguments' dissonance to the greatest extent possible. For Burke, this dissonance grew from his near-simultaneous statements in critique of and in praise of legal reasoning, and his appeal to legal authorities as diverse and seemingly contradictory as the "law of Parliament" and the Koran. Similarly, Hastings demanded a strictly law-bound trial within which to defend his admittedly lawless conduct in India. He claimed the full benefits of the law for himself, while openly defending his denial of those benefits to those under his imperial sway. What, if anything, safeguarded him from hypocrisy?

Hastings found a solution in the discourse of political realism and *raison d'état*.[75] Crucially, realism did not simply explain Hastings's choice "to advance against gathering Dangers" in India; it also explained why the law applied to him at home but not abroad. Lawless power was everywhere regrettable, but the British were free from such power, because they acknowledged a sovereign that underwrote a shared body of law. By contrast, there was no common sovereignty between the contending powers in India, or even within the Indian states, given their "unavoidable anarchy." Hastings claimed to be ruled by law wherever the rule of law was practicable. In this view, Burke's conception of the impeachment was a dangerous extension of lawlessness into a place from which it had been precariously excluded; it threatened to make Britain more like despotic India. Hastings's embrace of realism, of law at home and anarchy abroad, was not always popular—one spectator claimed to identify a "Mr. Machiavel" among his defense attorneys—but it was familiar.[76] Given the challenge of resolving a rhetorical contradiction—rendering two positions comfortable together, rather than jarring—familiarity was an important point in Hastings's favor.

Burke, it seems, faced a more difficult task: plausibly depicting the imperial metropole as *less* bound by positive law, and fortunately so, than its most distant region. He also faced the task of reconciling the various sources of legal authority on which he relied over the course of the trial, including the law of Parliament, a wide range of Indian jurisprudence, and the natural law. One of the most powerful accounts of the legal tensions in Burke's case is offered by Lida Maxwell. Maxwell points to "Burke's appeals to mutually

[75]Whelan, *Burke and India*, 188–99.

[76]Horace Walpole, *Selected Letters of Horace Walpole*, ed. W. S. Lewis (New Haven, CT: Yale University Press, 1973), 270, cited in Whelan, *Burke and India*, 193.

subverting sets of laws," positing that his deliberate invocation of conflicting laws amounts to "a dynamic practice of reflective judgment about the unprecedented," which "reveals that any attempt to adhere to one set of laws (national or natural) is insufficient to do justice."[77] But while Maxwell captures the trial's legal indeterminacy, the trouble with her account is, first, that it gives Burke too much credit. As we have seen, Hastings's defense team was just as motivated as Burke to offer potentially incompatible legal standards. This fact suggests that the presence of these diverse legal standards cannot solely be attributed to Burke's commitment to "reflective judgment," but rather to the structure of the trial itself.

Second, Maxwell understates Burke's goal of winning an argument, if not before the Lords then before the public. She characterizes Burke as deliberately prolonging tension between standards of judgment—yet doing so is surely a way of inviting an audience to suspend judgment, rather than exercise it. If the various sets of law invoked by Burke were truly mutually subversive, then how could either the Lords or the public come to a conclusion on Hastings's criminality or Britain's imperial policy? Burke's conduct in the trial makes clear that he demanded such a judgment. As a result, he was obliged to offer the judges a principle upon which to judge—a means of making his arguments in the trial's two scenes plausibly cohere. That principle was natural law. In the context of the trial, it is best understood not, as Maxwell would have it, as one more set of laws to stand in tension with the others, but as a synthesizing principle that brings together the British and the Indian, the deliberative and the judicial. A closer look at Burke's use of the natural law can shed light both on his attempts to bring coherence to his arguments across the trial and on the rhetorical uses of natural law discourse more generally.

As I noted at the beginning of the third section, Burke was pushed into an engagement with Indian law by the need to refute Hastings's claim that India was inherently lawless. But this engagement threatened his broader case in two ways. First, it raised the possibility of inconsistency: denouncing Hastings's exercise of lawless power in India, Burke was open to the charge that he himself was urging Britain's Parliament to set aside judicial procedures and rule lawlessly. Second, it risked dragging the trial into the sort of legal minutiae that, by Burke's own account, would seriously inhibit the audience's deliberative judgment. Burke attempted to surmount both of these challenges by turning to the language of natural law.

On the first point, Burke's words demonstrate his sensitivity to the inconsistency charge—that, while denying the possibility of arbitrary power in India, he was covertly demanding that the Lords exercise such power in Britain to supersede the common law and punish Hastings. In an important passage in the midst of his discussion of Indian law and Hastings's claim to arbitrary power, Burke acknowledges that the British government, as much as any

[77]Maxwell, *Public Trials*, 51.

government, can *appear* to act in an arbitrary manner: "This idea of arbitrary power has arisen from a gross confusion and perversion of ideas. . . . The Supreme power in every Country is not legally and in any ordinary way subject to a penal prosecution for any of its actions. It is unaccountable." For instance, even if they "abuse their judgments," the Lords cannot be held legally accountable for any decision they might reach in the impeachment. But, asked Burke, are supreme powers that commit or countenance injustice "less criminal, less rebellious against the Divine Majesty? . . . No. Till society fall into a state of dissolution, they cannot be accountable for their acts. But it is from confounding the unaccountable character inherent to the Supreme power with arbitrary power that all this confusion of ideas has arisen."[78]

Sovereign power, then, is always absolute by definition. But arbitrary power, or power entirely outside the scope of law, is impossible; whether in Britain or in India, no power is exempt from natural law. (Of course, those acting on the false belief that they possess arbitrary power might still do great damage.) Even when human laws are silent, power is always finally governed, morally if not effectively, by "the Divine Majesty," from which emanates the "great, immutable, pre-existent law."[79] If a given exercise of power appears arbitrary, it is simply because one is guilty of the "gross confusion" of failing to perceive the law that governs it. In the cases that Burke cites above, the source of the error is the fact that natural law is not perceptible in the same way that positive law is. Burke, then, claims that he is urging the Lords to act unaccountably but not lawlessly: "Your Lordships always had a boundless power. . . . You have now a boundless object," the pursuit of "Imperial justice."[80] If Hastings claimed either that he possessed arbitrary power in India, *or* that Burke was pushing the Lords toward an arbitrary judgment, then he would be guilty of what Burke once called the error of believing "that nothing exists but what is gross and material."[81]

Just as arbitrary power is ultimately impossible in both Britain and India for the same reason, both deliberative judgment in Parliament and the legal codes of India are, for Burke, manifestations of the underlying natural law—or at least potential manifestations, when they serve the cause of justice. In this way, invoking natural law helps Burke to reconcile his claims across the trial's two scenes. In different local circumstances, and even in different argumentative contexts, different means of putting the natural law into practice might come to the fore. In his *Reflections on the Revolution in France*, published in the third year of the Hastings trial, Burke compared the political manifestations of abstract natural rights to a beam of pure light entering a prism: "These metaphysic rights entering into common life, like rays of light

[78]Burke, "Opening of Impeachment, 16 February 1788," 351–52.
[79]Ibid., 350.
[80]Burke, "Opening of Impeachment, 15 February 1788," 277.
[81]Burke, "Speech on Conciliation with the Colonies," in *Works*, 2:181.

which pierce into a dense medium, are, by the laws of Nature, refracted from their straight line."[82] Burke's conduct in the impeachment shows him pursuing the practical implications of this argument with respect to natural law. In one context, vindicating the natural law might require emphasizing the limited and "low" qualities of positive law; in another, it might require emphasizing "technical Subtilties" and "great principles of jurisprudence" as a hedge against the claims of arbitrary power. If one does not grant Burke's underlying claim about the natural law, these distinct emphases might well appear to represent contradictory attitudes about the value of legal reasoning and procedures. But if one does grant Burke's underlying claim, his arguments across the trial's two scenes are likely to sound much less dissonant. This, I argue, is among the reasons why Burke stresses natural law so heavily, in a mode analogous to Hastings's stress on *raison d'état*. While some have argued that Burke's invocation of natural law is "of doubtful relevance" in the broader context of the impeachment, I would contend that it plays a crucial role in mediating between the trial's British and Indian scenes.[83]

But natural law also responds to a second problem. If legalism really is intellectually and emotionally dulling, as Burke claimed at length, then surely he was actively damaging his case whenever he descended from the register of "Imperial justice" into the details of Indian jurisprudence. In a parliamentary debate on the empire, Burke had once lamented the "intrusion . . . of such company as *quo warranto*, and *mandamus*, and *certiorari*"; yet now he was enabling the intrusion into the impeachment debate of such company as the Fetfa, *The Code of Gentoo Law*, and the inheritance laws of Hindoostan. Burke could mitigate this concern by casting these particular laws as instantiations of a broader and more indeterminate natural law. He could assure his audience that Indian law had its "technical Subtilties," and he could gesture at these subtleties in order to substantiate his rebuttal of Hastings. But once he had done so, the language of natural law allowed him to return to more deliberative ground, the ground on which he believed the public case against Britain's imperial practices had its best chance of success. The language of natural law enabled Burke to transmute Hastings's offenses against Indian law into offenses against "the Divine majesty"—and then to dwell on the latter charge.

Given Burke's premises about deliberative and judicial reasoning, this was an important advantage. Burke's language of natural law, as I proposed, is a language of lawfulness without legalism. It claims the binding force of law and the sanction of justice, but it is crucially underspecified. It is perceptible to reason, but incapable of being codified—and for that reason, it lacks the

[82]Burke, *Reflections on the Revolution in France*, 312. See Lauren Hall, "Rights and the Heart: Emotions and Rights Claims in the Political Theory of Edmund Burke," *Review of Politics* 73, no. 4 (2011): 625.

[83]Lock, *Edmund Burke*, 2:155.

details and distinctions that, for Burke, degrade judicial reasoning. In other words, natural law is the most deliberative of legal standards. It enables judges to practice deliberative thinking—the mode of judgment that Burke considered richest and most sophisticated—in a legal context. For Burke, it is particularly suited to an impeachment, which, beneath its outwardly judicial forms, ought to be a deliberative procedure.

As Burke presents it, natural law is less apt to foster legalism precisely because it is underspecified. At no point in the trial does Burke sketch the natural law's demands in anything but the broadest strokes. It governs "crimes that have their rise in avarice, rapacity, pride, cruelty, ferocity, malignity of temper, haughtiness, insolence."[84] Burke adds that "there is no action which would pass for an action of extortion, of peculation, of bribery and of oppression in England, that is not an act of extortion, of peculation, of bribery and of oppression in Europe, Asia, Africa, and all the world over."[85] At the level of generality implied by the natural law, it is enough to point out that oppression is oppression, and that, like pornography, we will know it when we see it. In the same way, those who exercise judgment are called to account by the natural law in only the broadest terms, "before the great Judge, when He comes to call upon us for the tenour of a well-spent life," with "tenour" suggesting a general tendency.[86] Nowhere in the impeachment does Burke offer a precise account of the natural law's demands—of, say, the way in which it can help us to draw the line between rapacity and "honest graft." Asking that of Burke's natural law would be a category error.

The natural law's lack of particularity is, for Burke, very much a point in its favor. But this very quality of underspecification has led some to conclude that Burke invokes the natural law only vaguely, or for "dramatic effect"—which I think is unwarranted, if we understand this as *mere* dramatic effect.[87] Jennifer Pitts offers a more persuasive reading of Burke's natural law, which "might best be regarded not primarily as a set of rules, but rather as a means of conveying the universal scope of moral duties."[88] But what even this account neglects, I argue, is the effect that Burke held the invocation of the natural law to exert on deliberators; the natural law is important not only for what it might *say*, but for what it might *do* to us in the course of considering it. The natural law, much like the sublime, is a force capable of alarming us into reflection.[89]

For Burke, the natural law offers an alternative to the emotionally dulling effects of other legal reasoning; it is a legal discourse that conserves rather than dissipates outrage. In fact, Burke seems to posit a reciprocal relationship between the natural law and the moral emotions. On the one hand, emotions

[84]Burke, "Opening of Impeachment, 15 February 1788," 275.
[85]Burke, "Opening of Impeachment, 16 February 1788," 346.
[86]Burke, "Speech in Reply, 16 June 1794," in *Writings and Speeches*, 7:693.
[87]Ahmed, "The Theater of the Civilized Self," 41.
[88]Pitts, *A Turn to Empire*, 82.
[89]Goodman, "The Deliberative Sublime," 272.

mediate the application of abstract natural law to concrete particulars. As Lauren Hall writes, "Burke looks for a rights language that is moderated by the claims of the heart": emotional attachments help to constitute the prism through which the natural law passes, enabling the accommodation to circumstances that is so important in Burke's political thought.[90] A deliberative judicial proceeding, like impeachment on Burke's model, is a way of publicly filtering natural law claims through emotive language. On the other hand, natural law lends itself to the very sort of charged language that can provoke indignation at injustice. It is one thing to say that Hastings overstepped the constitutional bounds on his authority; it is another to call him "rebellious against the Divine Majesty." Burke conceived of impeachment as a procedure that would enable him to do both, to satisfy reason as well as resentment.

That should not imply, however, that the natural law functions for Burke as an intellectually empty signifier, a sort of rhetorical exclamation point placed on judgments reached by other means. Rather, it is a provocation to the exercise of "expanded" and "enlarged" judgment—the sort of judgment in which the question whether imperialism led to "more evil, or less evil" for Indians is not ruled out of order, but is treated as absolutely central.

This account suggests that the language of natural law can do a broader range of political work than we might suspect. Of course, there is a long tradition of conceiving the natural law as a forum of appeal from unjust human laws. But Burke's quarrel with human laws was not that they excused Hastings's crimes; indeed, he insisted that they also condemned them. Burke's complaint was rather that the modes of judging fostered and honed by immersion in those laws was utterly inadequate in the face of imperial, systemic crime; if human laws condemned Hastings, human lawyers, if they thought like lawyers, would not. The very precision that rendered such thinking worthwhile on a small scale left it unequipped for the largest scale—a scalpel, where the case called for a cleaver. Following Burke's lead, we might see natural law not only as a language of appeal from injustice, but as a supplement to ordinary modes of legal reasoning.

Conclusion

And yet, even if we conclude that the language of natural law represented the most coherent available solution to Burke's rhetorical contradiction, we must still account for that strategy's evident failure. Not only did Burke fail to secure the conviction of Hastings; he also ended the trial deeply pessimistic about the impeachment's impact on public opinion.[91] A large majority of

[90]Hall, "Rights and the Heart," 624.

[91]Bourke, *Empire and Revolution*, 850. The impeachment's long-term effects on imperial policy are still disputed. For an argument that the Hastings trial "delegitimiz[ed] the

the Lords, for their part, agreed that Burke's appeals to natural law were essentially out of place: "It may be true that a violation of moral law is a crime against the natural order, but unless the act is also a violation of common or statute law, the state has no cognizance of it."[92] Because the Lords found no proof of the latter sort of violation, they treated the former sort as irrelevant.

More broadly, at least some responsibility for the impeachment's public failure (if failure it was) ought to be assigned to the potentially destabilizing nature of the enterprise as Burke conceived it. Burke demanded that the public conduct an unprecedented moral examination of the empire. To prompt this reckoning, he revived the dormant procedure of an impeachment trial. As the trial unfolded, he repeatedly challenged the dominant conception of impeachment as a judicial process. His sought-after outcome, in which the House of Lords accepted a role as arbiter of "Imperial justice," would have represented "a fundamental realignment of the highest political institutions in England."[93] Above all, the impeachment turned on a necessarily destabilizing question: "The rule of *which* laws?"

We need not agree that Burke actively sought out these disruptive consequences to find that he accepted them as costs of the pursuit of "Imperial justice." Given his well-known embrace of institutionalism, gradualism, and caution in public affairs, this must have represented a considerable sacrifice—one that speaks to the moral gravity of imperial wrongdoing as Burke saw it.

While Burke was severely disappointed by the trial's poor purchase on the public mind, we might at least speculate that he was unsurprised. After all, few have expressed the appeal of stolid stability—the very repose that the impeachment threatened—more eloquently than Burke himself. In 1790, in the trial's third year, he wrote his famous and barbed tribute to the British people: "thousands of great cattle reposed beneath the shadow of the British oak chew the cud and are silent."[94]

colonial state in India" well into the nineteenth century, see Mukherjeee, *India in the Shadows of Empire*, 43. For the contrary view, see Carl B. Cone, *Burke and the Nature of Politics: The Age of the French Revolution* (Lexington: University Press of Kentucky, 2014), 256.

[92]Cone, *Burke and the Nature of Politics*, 250.

[93]Mukherjeee, *India in the Shadows of Empire*, 39.

[94]Burke, *Reflections on the Revolution in France*, 344.