Dr. Johnson and the Law

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Preface

I try to show in this thesis that Johnson not only had an interest in the law but how the law affected the style of his general reasoning. The best evidence for this lies in the legal texture of his periodical essays, his consultations with Boswell on specific legal cases, and his collaboration with Chambers in the writing of the law lectures. Moreover, the Sermons, political pamphlets, Rasselas, the Life of Savage, and the petitions written on behalf of Dodd, add to an understanding of Johnson's legal 'habit of mind'. I have chosen to concentrate on these works because they reflect those juridical concerns that characterize Enlightenment thinking and define Johnson's approach to legal matters.

No attempt is made here to evaluate his journalism, the Parliamentary reports, the Lives of the Poets, the play Irene, his poems, and assorted other writings. They may be considered for their illustration of tendencies in Johnson's legal and political thinking but a detailed analysis of these works is outside the scope of this thesis. As I have said, my concern is with the periodical essays, the Boswell cases and the law lectures. I want to discuss the way Johnson functions in these relationships and how this contributes to an understanding of the pattern of his jurisprudence.

The pioneering works of McNair and McAdam are seminal to an understanding of this thesis. However, while they identify many specific legal elements in Johnson's writ-

ing, they do little to analyze these elements in terms of Johnson's jurisprudential thinking. Moreover, McNair falls short in explaining these patterns and does not place Johnson's writing in the context of contemporary thought. McAdam sets out Johnson's contributions to the Chambers lectures, but he neither places these contributions in the context of contemporary intellectual thought, nor does he fully appreciate the range of Johnson's legal reasoning. McAdam does little to prove his premise that Johnson affected the law.

Note Concerning Footnotes:

For the sake of simplification, none of Johnson's works are preceded by his name. Normally the Yale text when available is followed. All citations to Boswell's Life are taken from L.F. Powell edition which includes the Life of Johnson, Tour to the Hebrides and the Journey into North Wales.

All citations to Blackstone's Commentaries (Bl. Comm.) are taken from the Fourth Edition, 1770.

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Bibliography

Throughout his adult life Samuel Johnson displayed an intense interest in the law. This is evident not only in his collaborations with Boswell and Chambers, but also in the way that he implies that moral and social values are determined by the workings of the law. In this process moral and legal authority are perceived by him as operating in tandem.

The legal quality of Johnson's mind is apparent in his adoption of the advocate's mask, his intellectual inconsistency, his interest in property values, his advocacy of criminal law reform, and his understanding of the impact the law exerts upon social forces.

Although a coherent system of Johnson's jurisprudence does not emerge from his writings, nonetheless his legal thinking entitles him to consideration as an important contributor to the Enlightenment.

Chapter One

In his periodical essays Johnson reveals an embryonic legal philosophy. Commenting on moral principles and contemporary mores, Johnson in the Rambler, Idler, and Adventurer Essays reflects a concern for justice and an understanding of the complexity of legal administration. Despite the remark that he has an 'aversion to satire', Johnson, at times, makes sharp satiric observations on lawyers and on the law itself. In addition, Johnson draws his satiric portraits by exercising the techniques of argumentation used in the structure and presentation of a legal brief.[1] This manipulation of literary form permits Johnson to comment perceptively not only on practitioners of the law but also on current, substantive legal issues. In these essays Johnson effectively employs patterns of jurisprudential thinking within a literary texture to design the fabric and structure of his moral argument.[2] Indeed, the especial

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1. cf: Sidney R. Parker, jr., The Fundamentals of Legal Writing, (Charlottesville: The Michie Co., 1967), for a discussion of effective legal writing and the best way to organize the legal principles to be discussed in a brief.

   cf: George Rossman, ed. Advocacy and the Kings English, (Indianapolis: The Bobbs-Merril Co., Inc., 1960), for a discussion of the language required for effective advocacy.

2. Fussell, Samuel Johnson and the Life of Writing, pp. 45-46, "All this legal consciousness could not help stimulate skill in the management of images and ideas less for their own delightful sake than as elements in a process of advocacy. From this proximity of the law to literature stems the very eighteenth-century idea that the act of literature is necessarily an act of argument, that the writer, even when he assumes the role of poet, is most comparable to a barrister arguing a case."

attention and effort which Johnson gave to the legal comments in the Rambler essays requires them to be reviewed for the contribution these essays make to the assessment of his juridical thinking. Moreover, the legal comments that pervade these periodical essays reflect the moral and social truths which are most expressive of Johnson's own thoughts. In Rambler 208 Johnson wrote:

> The essays professedly serious, if I have been able to execute my own intentions, will be found exactly conformable to the precepts of Christianity, without any accommodation to the licentiousness and levity of the present age. I therefore look back on this part of my work with pleasure, which no blame or praise of man shall diminish or augment. I shall never envy the honours which wit and learning obtain in any other cause, if I can be numbered among the writers who have given ardour to virtue, and confidence to truth.
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With his mind focused on the universal verities in man and his relationship to his society, Johnson's juridical comments in these periodical essays suggest the tenor of his own thoughts more clearly than any of his other writings.[4]

The structure of these juridical essays indicates an understanding of the rules of evidence, of the complexity of procedure, of the concepts of mens rea, and, most prominently, shows an impressive grasp of legal writing and argument. Generally, these essays present a precept, elaborate its ram-

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3. Rambler 208, p. 320

4. Life I, p. 210 n. 1, "Dr. Johnson said to an acquaintance of mine, "My other works are wine and water; but my Rambler is pure wine."' Rogers's Table-Talk, 10.

ifications, introduce relevant or supporting examples, and produce a summation that unravels the potentialities of the theme. Organizing the legal essays in this way enables Johnson to make substantial legal comments within a literary perspective. An important aspect of this style of writing is its function of advancing Johnson's primary interests in legal philosophy and attendant moral precepts despite the genre limitations of the essay. The importance of Johnson's legal reasoning lies in the sagacity of his moral expression which reveals a conservative eighteenth-century humanist who, nevertheless, has an affinity with the most radical speculation of the Enlightenment.[5] Johnson's conservative proclivities, acting as a counterpoint to these flashes of enlightened thought, illustrate the inconsistency that characterizes Johnson's habit of thought.[6] However, the impetus behind this continual intellectual movement is the desire to discern the moral truths which invigorate the spirit of the law. It

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5. Leon Radzinowicz, A History of English Criminal Law and its Administration from 1750: The Movement for Reform 1750-1833, (New York: The MacMillan Co., 1948), pp. 336-339.

6. Life I, p. 471, 343; Life II, 21; Life IV, 338; Leopold Damrosch, jr., The Uses of Johnson's Criticism, (Charlottesville: University of Virginia, 1976), p. 17: "A more serious objection to systematizing Johnson's thought is that the more precise the system becomes, the more it distorts or leaves out matters of great importance to him." What Damrosch writes about the limitations of Johnson's critical theory applies also to the habit of mind he exhibits in his jurisprudential thinking.
Rasselas, p. 20, "'Inconsistencies, answered Imlac, cannot both be right, but, imputed to man, they may both be true.'"

is this quality of the moral philosopher that impels Johnson to search out his sense of justice as he comprehends the more strictly constructed letter of the law.

Not only do these juridical essays manipulate legal diction for literary concerns, but they reflect an intricate knowledge of classical juristic opinion and rhetorical style. Throughout these essays Johnson utilizes legal judgments to develop the moral precepts he desires to inculcate or employs legal diction and imagery in their structure to flavour examples and initiate discussion. The legal quality this practice weaves into the texture of these essays reflects not only Johnson's preoccupation with the law but his awareness of the law as a regulator of society. This is clearly illustrated by Johnson's use of 'form-words',[7] such as prepositions, conjunctions, and articles to shape, accent and emphasize. In addition, he uses sentences that are elliptical in that the specific legal context is understood though

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7. Margaret M. Bryant, English in the Law Courts: The Part that Articles, Prepositions and Conjunctions Play in Legal Discussions, (New York: Columbia Univ. Press, 1930), p. 1: "Briefly, 'form-words' are not definite content words which present a specific idea to the mind, but are words which show relationship." In her treatise Bryant discusses how 'form-words' affect legal submissions and determine judicial response.

cf. Rambler 86, p. 89, for a discussion of the precise use of critical and technical terms, and how the arrangement of words affect harmony in the language.

Wimsatt, Philosophic Words, pp. 65-66: "It is characteristic of all the types of philosophical image in the Rambler that they occur not only in explicit and firmly drawn similes and analogies but more dispersedly and pervasively, in attenuated and shorter metaphors or in phrases which have only a coloring of philosophy."

omitted. There is no systematic use of legal idioms and maxims in Johnson's periodical essays; however, distinct and frequent usage of these terms and the concerns they reflect do occur. Any discrete review of these essays indicates the importance of the law to Johnson not only in a synoptic sense but in the realization that the intimations in his language reflect the relationship between the law and the society which it governs.

Several Rambler[8] essays contribute prominently to an understanding of Johnson's jurisprudential thinking or reflect a legal flavour in their structure and language. These essays complemented by numbers from the Idler[9] and Adventurer[10] help to formulate Johnson's general legal thinking and establish his view of the legal relations existing between rights and duties. The content of these essays ranges from the citation of legal maxims, to comments on debt and the excessive reliance on the death penalty. Johnson examines legal education and the type of persons drawn to the law. He characterizes the lawyer's position in society and the perceptions of him held by the average person as well as his peers in the profession. Although Johnson often tries to hide behind the mask of a satirist, he shows himself to be a man who loves

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8. Rambler essays: 23, 60, 81, 114, 142, 148, 149, 19, 95, 197, 8, 9, 13, 18, 57, 20, 60, 14, 113, and 125.

9. Idler essays: 5, 10, 11, 22, 38, 65, 71, 85, 89, and 90.

10. Adventurer essays: 50, 62, and 102.

the law and is disconcerted by the realization that not all share his view of propriety and professional ethics. In these essays the foundations of Johnson's legal views are laid and the points discussed illuminate the problems inherent in a society that is governed by the appearance of justice and the rule of law.

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Throughout these essays, Johnson employs the techniques of the rhetorician to set up a framework within which his moral and legal discussions are advanced. Johnson uses language to create examples that present incisive legal arguments. With discernment and insight Johnson advised how to design a successful argument:

> It is observed by the Younger Pliny, that an orator ought not so much to select the strongest arguments which his cause admits, as to employ all which his imagination can afford; for, in pleading, those are of most value, which will most affect the judges; and the judges, says he, will be always most touched with that which they had before conceived.
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This technical advice may appear obvious; however, to Johnson the importance of an effective oral presentation
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could not be over-estimated. The value of pleading and

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11. Rambler 23, p. 128.
12. Alessandro Giuliani, 'The Influence of Rhetoric on the Law of Evidence and Pleading', 7 N.S. Juridical Review (1962), pp. 216-251.
John A. Inglis, 'Eighteenth Century Pleading', 19 Juridical Review (1907-1908), pp. 42-57.

its rhetorical presentation gave life and shape to the legal questions involved. And this rather general advice cannot be dismissed as valueless since Johnson understood that the verbal argument added colour and understanding to notions of proof and evidence.[13]

Although the focus of Rambler 23 is not specifically a legal one, the observations made on judicial proceedings indicate that some reference is being made to an unfortunate occurrence in the courtroom. Conveyed through an essay on literary criticism, Johnson's advice to an orator suggests a serious failing in the judicial process. Advocates who exploit their talents can obscure facts and suggest to a judge interpretations at the expense of justice. Superficially, legal principle and procedure provide the connection with the rule of law; however, the prejudices and thought processes of a judge assuredly parallel those of the literary critic in reaching a judgment. Thus, a judge's understanding of the elements in a case is similar to that of a critic evaluating a literary text. Both are subject to preconceived opinions, bound by tradition in the roles they assume, and influenced by reputation; yet in spite of that they present a facade of independence

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13. Life V, pp. 26-27; On the practice of law Johnson comments: "lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. ...If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or other; and it is better that advantage should be had by talents, than by chance."

and vigorously deny they have any prejudice. An awareness of what is convincing to both types of judge, in essence, provides a guide to an effective legal presentation.

This analogy is not extraordinary since the attention with which jurist and critic observe life is the same. Both function in much the same way as they scrutinize principles and their application.[14] In their review of either a case or a text, they try to detect disparities between form and content as well as expose illusion. Each in their way complement the other and each is a metaphor for the other. And in Johnson himself there is a perceptible, though subtle, integration of the two. With this relationship in mind, it becomes clear that much of Johnson's counsel to an orator or literary critic has its corresponding function also in the law and its administration. The various and extensive dimensions of their relationship becomes apparent in these essays when their specific legal texture is examined. This is not to suggest that everything here must be regarded as of a legal nature but to realize the peculiar habit of Johnson's mind where the possibility is always present.

Evidence of this relationship between critic and judge is present in Rambler 95. In this essay Johnson articulates the dangers in sophistry and the susceptibility to intellectual hubris that afflict lawyers and

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14. The word 'critic' comes from the Greek κρίνω which has the gloss of 'to judge'.

judges. He discusses the skills needed for an advocate and points out the way these skills can be abused in an adversary relationship. Describing how he survived living in a disputatious household, Pertinax[15] actually relates the manner in which a judge is perceived to act:

> It was necessarily my care to preserve the kindness of both the controvertists, and therefore I had very early formed the habit of suspending my judgment, of hearing arguments with indifference, inclining as occasion required to either side, and of holding myself undetermined between them till I knew of what opinion I might conveniently declare.
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This recitation suggests the joys present in a sense of power, and despite protestations to the contrary, the frequent exercise of an arbitrary judgment. Pertinax's remarks capture the common view of the judge in society especially with the appearance of impartiality disguising the preconceived opinion. By describing Pertinax's method of decision-making, Johnson implies, that the lack of essential fairness required for the proper administration of justice is common to judges.

Pertinax relates how his early training led him to the study of the law:

> Thus, Sir, I acquired very early the skill of disputation, and, as we natur-

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15. cf. Edward A. Bloom, 'Symbolic Names in Johnson's Periodical Essays', Modern Language Quarterly, vol. 13 (1952), pp. 333-352; for the classic paper on the value and importance of Johnson's use of names in these essays.

16. Rambler 95, p. 144.

> ally love the arts in which we believe ourselves to excel, I did not let my abilities lie useless, nor suffer my dexterity to be lost for want of practice. I engaged in perpetual wrangles with my schoolfellows, and was never to be convinced or repressed by any other arguments than blows, by which my antagonists commonly determined the controversy, as I was, like the Roman orator, much more eminent for eloquence than courage. .....
> My father, who had no other wish than to see his son richer than himself, easily concluded that I should distinguish myself among the professors of the law; and therefor, when I had taken my first degree, dispatched me to the Temple with a paternal admonition, that I should never suffer myself to feel shame, for nothing but modesty could retard my fortune.
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Quickness of tongue and desire for riches seem to be the motivating forces behind Pertinax's quest for a legal career. These character traits are set out in this essay as common to those attracted to the legal profession. Naturally, to Johnson this situation would wreak havoc not only so far as Pertinax was concerned, but also in its effect on the quality and status of the profession. The Horatian urbanity with which the portrait of Pertinax is drawn is an attempt to hide the dismay Johnson feels when he has to undertake such castigation of character and motive.

It is instructive to consider the way in which Johnson has Pertinax tell of his stay at the Temple:

> I was now in the place where every one catches the contagion of vanity, and soon began to distinguish myself by sophisms

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17. Rambler 95, pp. 144-145.

> and paradoxes. I declared war against all received opinions and established rules, and levelled my batteries particularly against those universal principles which had stood unshaken in all the vicissitudes of literature, and are considered as the inviolable temples of truth, or the impregnable bulwarks of science.
> .....
> I knew the defects of every scheme of government, and the inconveniencies of every law.[18]

This indictment of the legal profession and legal education[19] reflects Johnson's disapproval of the type and quality of person drawn to the law. And this educational process seen through the use of a figure such as Pertinax has significant consequences:

> The habit of considering every proposition as alike uncertain, left me no test by which any tenet could be tried; every opinion presented both sides with equal evidence, and my fallacies began to operate upon my own mind in more important enquiries. It was at last the sport of my vanity to weaken the obligations of moral duty, and efface the distinctions of good and evil, till I had deadened the sense of conviction, and abandoned my heart to the fluctuations of uncertainty, without anchor and without compass, without satisfaction of curiosity or peace of conscience; without principles of reason, or motives of action. Such is the hazard of repressing the first perceptions of truth, of spreading for diversion the snares of sophistry, and engaging reason against its own determinations.[20]

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18. Rambler 95, pp. 145-146.

19. cf. Holdsworth, A History of English Law, vol. 6, pp. 489-499; 620-624, for a discussion of legal education and the comments of Roger North in the late 17th Century; vol. 12, pp. 77-91, for his remarks on the melancholy topic of legal education in the eighteenth century.

20. Rambler 95, p. 147.

This suggestion of moral relativism now recognized by Pertinax is an affliction that often affects members of the legal community. Pertinax's comprehension of this weakness presented in the way one approaches the issues in a law case suggests moral problems present in any adversary system.[21] Questions of moral and intellectual honesty affect the professional advocate not only with the temptation for mental gymnastics but in the appeal to vanity. Johnson intimates that a solid foundation in moral values and an understanding of intellectual principles are more necessary to the advocate than the facility for specious argumentation.

Although Pertinax is portrayed as a conscientious though certainly confused law student, the logic and discipline mandatory for a legal mind is absent. Pertinax does not have the temperament that Johnson feels is required for one to be a credit to the law and its administration. The suggestion in Rambler 95 is that the problems in the administration of the law and the delivery of justice are "intimate" with the quality of the practitioner. And before there can be any solution to these problems, reform must begin with legal education and the quality of those persons drawn to its study.

This theme of legal education and the personality traits of those attracted to the law was of constant con-

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21. cf. Life II, pp. 47, 430-431; Life V, pp. 26-27, for a discussion of legal ethics in the adversary system.

cern to Johnson[22] and appears often in these essays. Johnson raises questions of both the quality and sincerity of students and practitioners to determine the effective and just administration of the law. To this end Johnson creates his satiric portraits of unscrupulous lawyers and incompetent students as a way to query method and the delivery of justice in the legal system. The way in which Johnson varies the design of these portraits highlights the particular problem he wishes to be examined. The legal system depends on those who operate it, and Johnson recognizes that stability in society and the advance of civilization is measured by how the law is per-

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22. cf. Bl. Comm I, 5-14, for Blackstone's complaints about the quality, status, and nature of legal education. Johnson's interest in legal education is most clearly demonstrated in the aid he gave in composing Chambers' law lectures. In these lectures one of Johnson's most interesting, legal education, is where he advises on the use of books and the art of learning: "Precedents thus necessarily established are necessary to be learned, but they must be learned only from books, for there could be no use of rewriting in a lecture a long form which by its exactness is inevitably too long for the memory and too minute for the attention of the hearer, and which the lecturer having no power to alter or contract, can only transcribe from a book in which any of his auditors can read it for himself. The course and order of this legal process or the reciprocal transactions of a suit might be generally deduced and described, but of such accounts the use would probably not equal the expectation of the hearer because it is useless to be told of that which may every day be seen, and a judicial process like everything else is learned with less danger of error or forgetfulness, by practice and observation than by precept and description. To know forms it is necessary to read precedents, and to learn practice it is requisite to frequent the courts, not neglecting to excite observation and to confirm experience by the use of such books as the great masters of legal proceedings have given us for our direction. (Kings 96, pp. 89-90).

ceived to function by the common people.[23] It has often been observed by Johnson that the law provides the connection between the citizen and his society,[24] and that lawyers as officers of the court represent the law in fact and deed to these people. While he does not overlook the minor judiciary,[25] Johnson's focus in these essays is on those who represent themselves as having been influenced by systematic legal study.

Johnson's most striking portrait of a vicious lawyer is developed in Rambler 197. Captator's father is a country attorney whose mission in life seems to be the accumulation of wealth by either legitimate or fraudulent means. Dexterity of conscience and sharp practice provided the justifications and devices of this attorney. Captator describes how this attitude manifests itself in his father's attention to selected relatives.

> These hoarders of money were visited and courted by all who had any pretence to

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23. Sermon 24, pp. 250-251: "...that no publick prosperity, or private quiet, can be hoped for, but from the justice and wisdom of those, to whom the administration of affairs, and the execution of the laws, is committed."

24. Life II, p. 249: "it is the society for which the magistrate is agent."

25. Adventurer 102, p. 439: Writing of a country Justice of the Peace, Johnson portrays him as saying: "I have no skill in controversial learning, nor can conceive why so many volumes should have been written upon questions, which I have lived so long and so happily without understanding. I once resolved to go through the volumes relating to the office of justice of the peace, but found them so crabbed and intricate, that in less than a month I desisted in despair, and resolved to supply my deficiencies by paying a competent salary to a skillful clerk."

> approach them, and received presents and compliments from cousins who could scarcely tell the degrees of their relation. But we had peculiar advantages, which encouraged us to hope, that we should by degrees supplant our competitors. My father, by his profession, made himself necessary in their affairs; for the sailor and chambermaid, he enquired out mortgages and securities, and wrote bonds and contracts, and had endeared himself to the old woman, who once rashly lent an hundred pounds without consulting him, by informing her, that her debtor, was on the point of bankruptcy, and posting so expeditiously with an execution, that all the other creditors were defrauded.
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> [26]

Johnson suggests that such misconduct and exploitation is too common in the practice of the law. This type of solicitation[27] and abuse of process, which violates the standard of legal ethics set out in even the most general canons of the law, is one of the oldest and most legitimate objects of satire.[28]

In choosing satire as the vehicle to denounce this conduct, Johnson appreciates the levels on which his criticism operates. And in following Pope's dictum: 'no writing is good that does not tend to better mankind some way or other', Johnson is aware that his readers will recog-

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26. Rambler, 197, pp. 263-264.

27. Life II, pp. 430-431, Johnson discusses a different type of legal solicitation.

28. Dictionary: "Proper Satire is distinguished, by the generality of the reflections from a lampoon which is aimed at a particular person." Johnson is acting as a sort of guardian of legal ideals, and the use of satire reflects his recognition of what actually is and what should be.
cf. Idler 45 where Johnson attacks a particular type of satire (lampooner of mankind) but here he hopes his satire will effect change.

nize the existence of this type of attorney and become vigilant in dealing with him. The requisite that good satire requires easy identification indicates that Captator's father is not an unusual character. The inclusion of this portrait of misconduct and exploitation in the essays discloses how seriously Johnson takes the myth of the unprincipled attorney.

Captator relates how this betrayal of trust by his father was accomplished:

> To the squire he was a kind of steward, and had distinguished himself in his office by his address in raising the rents, his inflexibility in distressing the tardy tenants, and his acuteness in setting the parish free from burthensome inhabitants, by shifting them off to some other settlement.
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> Business made frequent attendance necessary; trust soon produced intimacy; and success gave a claim to kindness; so that we had opportunity to practise all the arts of flattery and endearment.
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By making Captator's father attractive to his clients and effective on their behalf, Johnson points out just how seductive evil can be. People who have problems or want things done for them allow their own scruples to be compromised. When moral or business standards are abrogated in an effort to seek quick advantage, control over actions in this pursuit can be illusory. Johnson suggests the dangers of yielding to temptation for power or riches, and why one must be especially vigilant in fiduciary re-

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29. Rambler 197, p. 264.

lationships.

Derived from this situation is the question of what determines proper standards of behavior and what elements constitute the norms required to be accepted in any functioning legal system. "Every guide to behaviour is also a standard for evaluation- individual acts can be evaluated according to whether or not they are prescribed behaviour."[30] Johnson's suggestion is that because of the presence of quirks in man and society one may easily reap a crop that one does not sow. Reasoning that individuals affect the way in which the law functions, Johnson avers that the misuse of the system affects those who subvert intention and angle for unfair advantage. In setting out this situation, Johnson spreads the responsibility for the maintenance of the legal system between all those who are touched by it. It is not stipulated that this obligation applies only to the lawyer, his clients, or victims, but that it assuredly involves the reader of the essays. The liability rests with everyone to ensure the equitable administration of justice, and it is this idea which gives the portrait its avenging spirit.

The remarks contained in these satiric portraits are not mere jibes but reveal Johnson's considered opinion on the morals of lawyers and students. In Rambler 19 the vignette presents a facile and multifariously talented

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30. Joseph Raz, The Concept of a Legal System: An Introduction to the Theory System, (Oxford: Clarendon Press, 1970), p. 124.

student named Polyphilus who surveys various careers to find the one for which he is most fitted. When Polyphilus investigates the demands and requirements of the legal profession, he perceives many curious discrepancies between appearance and reality. This is how Johnson describes Polyphilus' experience:

> He immediately took chambers in the Temple, bought a commonplace-book, and confined himself for some months to the perusal of the statutes, year-books, pleadings, and reports; he was a constant hearer of the courts, and began to put cases with reasonable accuracy. But he soon discovered, by considering the fortune of lawyers, that preferment was not to be got by acuteness, learning,and eloquence. He was perplexed by the absurdities of attorneys, and misrepresentations made by his clients of their own causes; by the useless anxiety of one, and the incessant importunity of another; he began to repent of having devoted himself to a study, which was so narrow in its comprehension that it could never carry his name to any other country, and thought it unworthy of a man of parts to sell his life only for money.
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To his dismay Polyphilus discovers that neither diligence nor virtue finds sure reward in the law. A narrow and constricted learning combined with an ease of conscience seem to be the prescription for a successful legal career. Unfortunately, this observation does not reflect an anomalous situation, but instead makes a succinct statement on the popular perceptions of lawyers and law students.

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31. Rambler 19, p. 106; cf. footnote 22, for Johnson's remarks on law books and legal education (Chambers' lecture K. 95, pp. 89-90).

Polyphilus' acute disappointment and unfulfilled expectations are described in this account to dramatize the evident absence of ethical conduct by both lawyers and their clients. Encouraged by their clients, lawyers manipulate fact and subvert principle in the mutual desire for success. This alliance contributes to a breakdown of confidence in the legal system and contempt for all those involved in the legal process. Johnson avers that a higher standard of behaviour is demanded from those who act as guardians of the regulating processes of society. Thus, Johnson draws from Polyphilus' experience to underscore the relevance of this thesis as well as sharpen his satiric thrust. The tension created between Polyphilus' revelation and the viewpoint of the reader sets the stage on which Johnson plays out his tale of disenchantment. This appeal for the reader to be the judge of where and how such conduct is harmful to society is entirely managed by Johnson. By utilizing this particular image of Polyphilus, Johnson denies the reader the luxury of a complacent attitude.

In Rambler 19 Johnson develops the sentiment that advancement in the law is proportionate to one's talents for obfuscation, and that the speed with which this advancement is achieved is determined by the degree of avarice. This vignette is replete with suggestions of a conspiracy[32] to

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32. Douglas Hay, "Property, Authority and the Criminal Law", in Albion's Fatal Tree: Crime and Society in Eighteenth-Century England, (New York: Random House, 1975), p. 52: "The private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy, in the most exact meaning of the word. The King, judges, magistrates and gentry used private, extra-legal dealings among themselves to bend the statute and common law to their own purposes."

subvert virtue and distort justice. Johnson avers that their clients' complicity abets lawyers in a deceitful approach to legal practice and ethical conduct. The structure of Polyphilus' tale allows wide scope for the promulgation of Johnson's didacticism. Certainly, Johnson's intention is to expose weaknesses in the legal system and imperfections in the moral character of those involved. He does not admonish merely to reaffirm contemporary opinion of lawyers and the management of their practice,[33] but to offer the remedy of vigilance. In essence, this portrait argues for a better system of legal education, and one which does not neglect the teaching of ethical and moral standards.

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33. cf. Rambler 13, p. 69, for Johnson's remarks on secrecy and how lawyers are known to use private information for their own purposes.

Robert Robson, The Attorney in Eighteenth-Century England, (Cambridge: Univ. Press, 1959), p. 136: "The lawyer, on the other hand, was made necessary only by the depravity of men- or of other men- and by the increased complexity and artificiality of society. A defeated client would abuse his own attorney for his ineptitude, and his opponent's for his chicanery. His successful antagonist would resent having to pay for what he believed to be his rights, and would harbour a grudge against his adversary's attorney for having subjected him to unnecessary expense and delay. Further, lawyers were agents and nothing more. They were, in the opinion of many besides Swift, 'A Society of men bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid.' (cf. Junius' Letter of 22 June 1769) It was assumed that they were not over-fastidious in accepting cases and clients, or very seriously concerned that justice should prevail."

Henry Fielding, The Author's Farce, ed. Henley: "The lawyer, with a face demure,/ Hangs him who steals your pelf;/ Because the good man can endure/ No robber but himself. vol.viii, p. 245.

To Johnson religion provided the ethical framework for a moral life,[34] and in large measure this attitude helped to shape his legal and social thinking. For Johnson advanced a strong relationship between church and state where there was toleration[35] but not equality[36] as to religion. This position forms a central tenet in his understanding of the moral content in legal education.

In Rambler 9 the vignette illustrates a law student's resistance to this viewpoint. Here, Johnson does not underestimate the hostility the self-assured law student betrays:

> The truth is, very few of them have thought about religion, but they have all seen a parson, seen him in a habit different from their own, and therefore declared war against him. A young student from the inns of court, who has often attacked the curate of his father's parish with such arguments as his acquaintances could furnish, and returned ~~to town~~ without success is now gone down with a resolution to destroy him; for he has learned at last how to manage a prig, and if he pretends to hold him again to syllogism, he has a catch in reserve, which neither logic nor metaphysics can resist.[37]

This law student has an enmity to religion that is a mere

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34. Quinlan, Samuel Johnson: A Layman's Religion, p. 155.

35. Life II, pp. 249-253, Johnson places limits on toleration.

36. Chapin, The Religious Thought of Samuel Johnson, pp. 118-140. cf. Sermon 24, where Johnson suggests that moral and legal authority are predicated on Christian principles.

37. Rambler 9, p. 48.

reflex and uninformed. In addition, this law student's actions contribute to Johnson's assertions as to the faulty moral structure inherent in legal education. In Johnson's view the ethical framework derived from religious teaching sustains fidelity to the working out of legal principles. Johnson's premise is that laws are in large measure developed by moral teachings, and that the quality of those persons involved in the law must be shaped by them. It is the responsibility of law lecturers to point out these connections to their students and have them avoid ill-considered argument. Unfortunately, Johnson sees a penchant for superficial and facile reasoning in the type of training law students undergo.[38] Johnson informs the reader that the product of this training reflects the wisdom of the maxim: leges sine moribus vanae. While this student may have learned the techniques of argument, he fails to realize how essential moral standards are to the law and legal argument. Johnson uses this portrait to underscore his idea that morals are indispensable for any successful legal system.

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38. Bl Comm. I, p. 31: Blackstone clearly evidences sympathy for the student trapped by contemporary pedagogical practice: "A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his enquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business."

Adrift and lonely, it is only a short journey for a student to degenerate into a consuming cynicism and expedience. Moreover, from ill-digested learning and the uninstructed attention to lofty principle comes delusion. Certainly, it is the law student to whom:

> It is natural to mean well, when only abstracted ideas of virtue are proposed to the mind, and no particular passion turns us aside from rectitude; and so willing is every man to flatter himself, that the difference between approving laws, and obeying them, is frequently forgotten; he that acknowledges the obligations of morality, and pleases his vanity with enforcing them to others, concludes himself zealous in the cause of virtue, though he has no longer any regard to her precepts, than they conform to his own desires; and counts himself among her warmest lovers, because he praises her beauty, though every rival steals away his heart.
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> 39

On the one hand, Johnson shows his understanding of the dispiriting nature of legal education, and on the other, he recognizes the eventual damage this does to the law itself. These portraits articulate Johnson's indictment of the way legal study corrupts and the impact this corruption has on society. Those involved in all aspects of the law share with the reader the responsibility for permitting this to happen.

These uncomplimentary portraits of law students and lawyers indicate the precariousness that human agency injects into the exercise of moral and legal principles. In these observations on the legal community, Johnson ex-

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39. Rambler 76, p. 34.

presses the ethical imperatives that he passionately wants the law to reflect. However, it is not in the power of Johnson's portraits to correct all these defects, but in pointing them out Johnson hopes to inspire reformation. Johnson's grasp of legal education and his own moral principles provide the impetus behind the corrections he feels are needed. These unseemly portraits are drawn to focus attention on the state of legal administration. All this helps to lay the foundation for Johnson's collaboration with Chambers and his intense involvement with the reform of legal education.

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This theme of the lawyer in pursuit of expediency has its corollary in the malevolent intention of clients.[40] Johnson sees this as leading to an exploitation of power and privilege that can corrupt a man and harm his subordinates.[41] It is not surprising that there is a series of essays dealing with money and abuse in the law.[42] For

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40. cf. My remarks on Rambler 197, pp. 14-17.

41. Sermon 23, p. 239: "Every man may, without a crime, study his own happiness, if he be careful not to impede, by design, the happiness of others. In the race of life, some must gain the prize, and others must lose it; but the prize is honestly gained by him who outruns his competitor, without endeavouring to overthrow him."; p. 246: "The great benefit of society is that the weak are protected against the strong."

    Voitle, Samuel Johnson the Moralist, pp. 57-58.

42. Adventurer 34, 41, 53, and 62; Idler 22 and 38.

this relation between law and money holds great potential for a moralist who himself has suffered from poverty.[43] While these essays elicit a compassionate and humane response,[44] Johnson's own sense of property conflicts with the effect strict laws on property have. On the one hand, in his jurisprudential thinking Johnson stresses the sanctity of property, and on the other, he is willing to adapt elements of his theory to particular cases. This duality illuminates Johnson's understanding of the importance human agency has in the administration of the law.

Johnson's reaction to the types of injustice that occur when money intervenes is characteristic of his understanding of the place moral values have in seemingly mundane legal issues. In Rambler 142 Johnson attacks the privileged classes' manipulation of the legal system to the disadvantage of the poor and untutored.

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43. Clifford, Young Sam Johnson, pp. 210-212; Bate, The Achievement of Samuel Johnson, pp. 74-78; In The Vanity of Human Wishes, Johnson writing from both the depth of his own experience with poverty and his moral outlook sets out in a legal context the corruption of wealth: "But scarce observ'd, the knowing and the bold/ Fall in the gen'ral massacre of gold;/ Wide-wasting pest! that rages unconfin'd,/ And clouds with crimes the records of mankind;/ For Gold his sword the hireling ruffian draws,/ For Gold the hireling judge distorts the laws;/ Wealth heap'd on wealth, nor truth nor safety buys,/ The dangers gather as the treasures rise. (lines 21-28).

44. Greene, The Politics of Samuel Johnson, p. 196: "... there must be laws protecting private property. But at the back of all his political thinking there is the feeling that it is wrong for any one individual to be allowed unlimited opportunity to increase his own happiness at the expense of that of others, and that it is a prime function of the state to set limits to such opportunity." cf. My chapter on Johnson's varied views of property discussed in the Chambers' lectures.

Johnson examines an avenue for abuse in a gentry-peasant relationship:

> His (Squire Bluster's) next acts of offence were committed in a contentious and spiteful vindication of the privileges of his manors, and a rigorous and relentless prosecution of every man that presumed to violate his game. As he happens to have no estate adjoining equal to his own; his oppressions are often borne without resistance, for fear of a long suit, of which he delights to count the expenses without the least solicitude about the event; for he knows, that where nothing but an honorary right is contested, the poorer antagonist must always suffer, whatever shall be the last decision of the law.
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Limitation of actions in law and discriminatory vestiges of a feudal system combine to subvert civilized values. It is odious that the poor may be manipulated at the discretion of a caviling squire, and the instrument that permits this to happen is provided by lawyers. And it is the recurring pattern of such activity that imbues this portrait with its moral intensity.[46] The insensitivity of a Squire Bluster supplies an example for Johnson's criticism and illustrates the burdens which the law must

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45. Rambler 142, p. 392.

46. cf. Johnson's translation of Horace. Epode the 2d. where a different kind of country squire is described: "Blest as th' immortal Gods is he/ Who lives from toilsome bus'ness free,/ Like the first race in Saturns reign/ When floods of Nectar stain'd the main,/ Manuring with laborious hand/ His own hereditary Land,/ Whome no contracted debts molest/ No griping Creditors infesst./ No trumpets sound, no Soldiers cries,/ Drive the soft Slumbers from his eyes / He sees no boist'rous Tempests sweep / The Surface of the boiling Deep, / Him no contentious suits in law / from his beloved retirement draw. / (lines 1-14).

bear.

Although Squire Bluster's actions are insolent and mischievous, what is more reprehensible is the violation of security which the law is supposed to nurture. To Johnson this is especially distressing since he always feared the violent disintegration of society.[47] Although Rambler 142 is not a precise exposition of how the poor are treated by local squires, it does point out how the legal system is exploited. Johnson sees this type of legal perversion as providing the background from which fundamental changes in the law must come. When the letter of the law is applied exclusively, the spirit of the law can be neglected, and Johnson apprehends the damage this does to the fabric of society. The cynical and unethical employment of legal theory to advance an untenable moral position militates against the relevance and majesty of the law. Johnson's belief in the rule of law has a strong ideological basis, but this includes an adherence to moral precepts that are not confused in the web of legal theory.[48] Certainly, Johnson's object in this portrait of Squire Bluster is to show how the cunning use of social power

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47. cf. The False Alarm (1770), Johnson's political pamphlet written on the expulsion of Wilkes from Parliament, contains many illustrations of Johnson's abhorrence of mob rule and the dangers this holds for society.

48. cf. Diaries, Prayers, and Annals, p. 96; Johnson's prayer "Before the Study of Law"; Sermon 18, p. 193: "To subdue passion, and regulate desire, is the great task of man, as a moral agent; a task, for which natural reason, however assisted and enforced by human laws, has been found insufficient, and which cannot be performed but by the help of religion."

distorts belief in justice and shadows the appearance of law.

Such behaviour makes Johnson anxious. As a practical moralist Johnson believes that the pursuit of general happiness is not limited to intention but includes the effect of activity.[49] Both his moral and legal reasoning tells him that the fundamental utility[50] which enables the law to operate is impeded by the actions of a Squire Bluster. Johnson's concept of the law includes the morality that makes it possible and acceptable. The internal morality of the law conflicts with Bluster's subversion of its external function, and it is this problem that Johnson wants to demonstrate. While it is desirable to have laws governing the landlord-tenant relation, their application requires balance and discrimination. Bluster's abuse of process not only subtends moral principle but the social fabric of society on which the law depends. Integrity in the law is the substantive aim of Johnson's moral outlook and the recognition of this attitude illumi-

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49. Voitle, p. 150: "He (Johnson) does not regard morality as mainly consisting in being goodhearted or in being anything, because above all morality to him means doing. The chief goals of the activity so fundamental to his moral thinking are the happiness of the agent, which involves self-realization, and the happiness of others.

50. cf. Kings 80, pp. 20-21; Writing on 'politick law', Johnson sets out more clearly his ideas on utility and happiness in determining laws for society. In my discussion I point out Johnson's compatibility with Bentham's idea of utility in the law; moreover, in this attitude Johnson reflects his interests in the classical thinking of Aristotle and Horace, as well as how he absorbs nuances from Blackstone and Grotius.

nates his character studies. Certainly, Johnson's interest in the subjective aspects of legal administration affects his reaction to the law as a powerful institution, and his probe of the activity of Bluster indicates his commitment to a sense of the dignity which the law must have.

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Moreover, it is precisely his commitment to the meaningful and just expression of human and moral values in the law that requires Johnson to investigate the treatment of debtors. To Johnson the power of the law is nowhere more misguided than in its application to those persons imprisoned for debt.[51] In two groups of essays; Adventurer 34, 41, 53; Idler 22 and 38, Johnson deals with the unfortunate condition of debtors and the laws that oppress them. In Idler 22 Johnson decries the laws from which the harsh sanctions imposed on debtors derive their authority:

> The wisdom and justice of the English laws, are by Englishmen at least, loudly celebrated; but scarcely the most zealous admirers of our institutions can think that law wise, which when men are capable of work, obliges them to beg; or just, which exposes the liberty of one to the passions of another.[52]

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51. Bate, Samuel Johnson, p. 321; Johnson was arrested for debt (£5 18s.) and relief was provided by Richardson. Johnson therefore personally experienced the fear and authority of the debt laws.

52. Idler 22, p. 69.

Economic hardship is not a crime although the law at this time in effect considered it so.[53] In large measure the severe penalty for debt led to more crime and further degradation,[54] and Johnson's understanding of this is behind his advocacy of better prison conditions and more sensible administration of the law. In these essays Johnson's compassion and enlightened approach place him at the forefront of the movement for reform,[55] and dispose of any notion of him as a regressive conservative. His horror at the quality of life forced on those condemned

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53. Flinn, An Economic and Social History of Britain: 1066-1939, p. 97.

    cf. Holdsworth, A History of English Law, v. 1, pp. 257-258, for a quick review of the relevant statutes.

    Sermon 5, p. 58: "Poverty indeed is not always the effect of wickedness, it may often be the consequence of virtue;"

54. Sermon 4, p. 47: "Let any man reflect upon the snares to which poverty exposes virtue, and remember, how certainly one crime makes way for another, till at last all distinction of good and evil is obliterated; and he will easily discover the necessity of charity, to preserve a great part of mankind from the most atrocious wickedness."

    cf. Babington, The English Bastile, pp. 81-91; George, London Life in the Eighteenth Century, pp. 309-311, for descriptions of prison conditions.

55. Voitle, p. 84; Radzinowicz, pp. 336-339; cf. Fielding, Enquiry into the Cause of the Increase of Robbers, for a different analysis of the problems of crime and debtors.

to a debtor's prison[56] impels Johnson to write these pleas for intervention.

In a curious way, the tale of the ingenuous Misargyrus related in Adventurer essays 34, 41, 53, and 62 argues against the retributive nature of debt laws. Misargyrus recites a catalogue of middle-class temptations and crimes; folly, fraud, pretense, delusion, gratification, bribery (flattery), usury, and loan-sharking, where the criminal often becomes himself the victim. In suggesting this view, Misargyrus maintains that these victims suffer disproportionately to the gravity of their crimes. This is not to dismiss the effect these offences have on individuals or to minimize the damage done to the moral fabric

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56. Heath, Eighteenth Century Penal Theory, pp. 201-204, for a discussion of Howard's contributions to penal reform.

Idler 38, p. 120: "The misery of gaols is not half their evil; they are filled with every corruption which poverty and wickedness can generate between them; with all the shameless and profligate enormities that can be produced by the impudence of ignominy, the rage of want, and the malignity of despair. In a prison, the awe of the public eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious. Every one fortifies himself as he can against his own sensibility, endeavours to practise on others the arts which are practised on himself; and gains the kindness of his associates by similitude of manners. Thus some sink amidst their misery, and others survive only to propagate villainy."

Stephen, History of the Criminal Law, v. 1, p. 418: "A whole series of prosecutions of the officers of the Fleet prison for the murder of prisoners by barbarous ill-usage throws light upon another dark side of the administration of justice in the eighteenth century." cf. Trials of Higgins, Bainbridge, and Aston, 17 State Trials 298-626.

of society, but to question whether there is any place for rehabilitation in the present legal system. While Misargyrus disarmingly accepts the wisdom in punishing those beyond redemption:

> I know not, Sir, whether among this fraternity of sorrow you will think any much to be pitied; nor indeed do many of them appear to solicit compassion, for they generally applaud their own conduct, and despise those whom want of taste or spirit suffers to grow rich. It were happy if the prisons of the kingdom were filled only with characters like these, men whom prosperity could not make useful, and whom ruin cannot make wise; but there are among us many who raise different sensations, many that owe their present misery to the seductions of treachery, the strokes of casualty, or the tenderness of pity; many whose sufferings disgrace society, and whose virtues would adorn it;
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> 57

But he maintains that the system fails in demanding the incarceration of those

> whose virtue has made them unhappy, or whose misfortunes are at least without a crime,
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In pointing out the unfairness in uniform sanctions, Misargyrus advances the modern sociological premise that the kind and degree of punishment should be determined by the circumstance and that the law should have a degree of

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57. Adventurer 53, p. 370.

58. Adventurer 62, p. 378.

flexibility to meet this situation.[59]

When he writes that:

> the laws of a just government ought either to prevent or repair: nothing is more inequitable than that one man should suffer for the crimes of another, for crimes which he neither prompted nor permitted, which he could neither foresee nor prevent.

[60]

Misargyrus is not only arguing for the adjustment of punishment to guilt[61] but appealing to the compassion of a just society. And he suggests that there is no prevention where events cannot be controlled. Moreover, there is the suggestion that this could happen to anybody. In this way Misargyrus appeals to self-interest which is often the most persuasive argument. By writing the Misargyrus letters, Johnson builds a careful structure to portray men who are ensnared in the tangles of the debt

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59. Kames, Historical Law Tracts, p. 52: "that to preserve a strict proportion betwixt a crime and its punishment, is not the only or chief view of a wise legislature."; p. 53: "Hence, in regulating the punishment of crimes, two circumstances ought to weigh, viz., the immorality of the action, and its sad treachery."

60. Adventurer 62, p. 381.

61. cf. Beccaria, Dei Delitti e Delle pene, trans Farrer, p. 251, for "... a general theorem may be deduced, of great utility, though little conformable to custom, that common lawgiver of nations. The theorem is this: 'In order that every punishment may not be an act of violence, committed by one man or by many against a single individual, it ought to be above all things public, speedy, necessary, the least possible in the given circumstances, proportioned to its crime, dictated by the laws."

laws,[62] and at the same time, uses their stories to illustrate the pernicious nature of retributive justice.

Idler 22 and its companion Idler 38 both criticize the harsh treatment that debtors must endure. Johnson frames his analysis with common sense economics[63] in his suggestion that such imprisonment actually exacerbates the problem it pretends to alleviate:

> The prosperity of a people is proportionate to the number of hands and minds usefully employed. To the community sedition is a fever, corruption is a gangrene, and idleness an atrophy. Whatever body, and whatever society, wastes more than it acquires, must gradually decay; and every being that continues to be fed, and ceases to labour, takes away something from the public stock.
> The confinement, therefore, of any man in the sloth and darkness of a prison, is a loss to the nation, and no gain to the creditor. For of the multitudes who are pining in those cells of misery, a very small part is suspected of any fraudulent act by which they retain what belongs to others. The rest are imprisoned by the wantonness of pride, the malignity of revenge, or the acrimony

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62. Adventurer 62, p. 381; Johnson points out how the legal concept of consideration in a contract can trap one in legal entanglements and highlight moral failures: "It is, I think, worthy of consideration, whether, since no wager is binding without a possibility of loss on each side, it is not equally reasonable that no contract should be valid without reciprocal stipulations: but in this case, and others of the same kind, what is stipulated on his side to whom the bond is given? he takes advantage of the security, neglects his affairs, omits his duty, suffers timorous wickedness to grow daring by degrees, permits appetite to call new gratifications, and, perhaps, secretly longs for the time, in which he shall have power to seize forfeiture:..."

63. Johnson's style of economic thinking is similar to Smith's general assessment in Wealth of Nations, chap. VIII, p. 78-79, where he writes that the high earnings of labour are an advantage to the society.

of disappointed expectation.
64

Johnson argues that it makes little economic sense to retain a debtor who under supervision could contribute to the well-being of society. This is a fundamental weakness in the law since there is no pretense of prevention or reformation, only revenge. Despite the imperfections, vanity, or folly that can drive one into debt, Johnson considers the honest debtor to have the ability to contribute to society, and therefore worth saving.

The arbitrary imposition and inequitable distribution
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of sanctions represented by the power of personal writs is particularly distasteful to Johnson. Johnson finds these writs which allow an individual to distrain property or send a person to prison only on the basis of a motion or summary judgement unfair:

> Since poverty is punished among us as a crime, it ought at least to be treated with the same lenity as other crimes; the offender ought not to languish, at the will of him whom he has offended, but to be allowed some appeal to the justice of his country.
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> 66

Johnson avers that the debtor is not afforded due process of law but subjected to a rule administered at the suffer-

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64. Idler 22, p. 69; cf. Adventurer 41, p. 356, for a similar argument.

65. cf. Maitland, Forms of Action at Common Law, p. 5: These personal writs or "the fictions contrived to get modern results out of medieval premises."; Bl Comm. III, C 9, p. 159.

66. Idler 22, p. 70.

ance of an individual. This distresses Johnson's understanding of the moral and ethical components the law must have for it to be just:

> The end of all civil regulations is to secure private happiness from public malignity; to keep individuals from the power of one another; but this end is apparently neglected, when a man, irritated with loss, is allowed to be the judge of his own cause, and to assign the punishment of his own pain; when the distinction between guilt and unhappiness, between casualty and design, is intrusted to eyes blind with interest, to understandings depraved by resentment.
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The maxim: nemo debet esse judex in propria causa (12 Coke, 114a) succinctly states Johnson's objection to law administered by those who have a vested interest in its outcome. Johnson's remarks constitute a vigorous indictment of the legal system and its professed sense of bal-
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ance. Moreover, it is just this lack of balance that Johnson sees as the critical failure in debt laws. To Johnson not only do these laws but also their administration violate the rule of reason and natural justice.

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67. Idler 22, p. 70.

68. Boorstin, The Mysterious Science of the Law, pp. 97-98; "This metaphysical use of the idea of balance was not easily distinguished from the idea of moderation, and the Commentaries used the two interchangeably. By setting up suitable alternatives, Blackstone was able to define any rule as a moderate one: "The laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend." Bl. Comm. II, 473.

Johnson realizes the economic imperatives[69] that encourage the growth and development of a credit economy. But he demands that the responsibility for personal and commercial failure must be shared by the creditor:

> The motive to credit, is the hope of advantage. Commerce can never be at a stop, while one man wants what another can supply; credit will never be denied, while it is likely to be repaid with profit. He that trusts one whom he designs to sue, is criminal by the act of trust, the cessation of such insidious traffick is to be desired, and no reason can be given why a change of the law should impair any other.
> We see nation trade with nation, where no payment can be compelled. Mutual convenience produces mutual confidence, and the merchants continue to satisfy the demands of each other, though they have nothing to dread but the loss of trade.
>
> [70]

In this way Johnson apportions the legal and moral guilt in the collapse of monetary prudence. By creating in Idler 38 a vivid picture of the finality of debtor's prison, Johnson attempts to use this guilt and prick conscience:

> Surely, he whose debtor has perished in prison, though he may acquit himself of deliberate murder, must at least have his mind clouded with discontent, when he considers how much another has suffered from him; when he thinks on the wife bewailing her

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69. cf. Middendorf, 'Johnson on Wealth and Commerce', Johnson, Boswell and their Circle, pp. 4-64; Carswell, The South Sea Bubble, for a discussion of the most significant collapse of credit to date and the effect this had on the psyche of Britain.

70. Idler 22, p. 71.

> husband, or the children begging the bread which their father would have earned. If there are any made so obdurate by avarice or cruelty, as to revolve these consequences without dread or pity, I must leave them to be awakened by some other power, for I write only for human beings.
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> 71

Johnson wants to make the creditor see the results of his actions. This appeal carefully defines responsibility and demonstrates the implications of prosecution for debt. Johnson maintains that the harsh sanctions governing debtors argue for penal reform. Certainly, his catalogue of the sufferings debtors endure and the conditions society imposed on them confronts current standards and anticipates how the law must change if it is to be responsive to the society it regulates.[72]

To promote his thesis that society must demand change in the circumstances of debtors, Johnson uses a mathematical argument to show how the lives of many are complicated by such wholesale imprisonment:

> we live in an age of commerce and computation; let us therefore coolly enquire

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71. Idler 38, pp. 120-121.

72. Life II, p. 416, "Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes," Johnson argues that the changing conditions and understanding of society mandate that laws adapt to the new perceptions or concerns that arise. This is especially important because in Idler 11, p. 37, Johnson points out: "Forms of government are seldom the result of much deliberation, they are framed by chance in popular assemblies, or in conquered countries by despotick authority. Laws are often occasional, often capricious, made always by a few, and sometimes by a single voice."

> what is the sum of evil which the imprisonment of debtors brings upon our country .....
> The misfortunes of an individual do not extend their influence to many; yet, if we consider the effects of consanguinity and friendship, and the general reciprocation of wants and benefits, which make one man dear or necessary to another, it may reasonably be supposed, that every man languishing in prison gives trouble of some kind to two others who love or need him. By this multiplication of misery we see distress extended to the hundredth part of the whole society.
> If we estimate at a shilling a day what is lost by the inaction and consumed in the support of each man thus chained down to involuntary idleness, the public loss will rise in one year to three hundred thousand pounds; in ten years to more than a sixth part of our circulating coin.
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> [73]

This argument touches the interest and common sense of the multitude and not directly their conscience.[74] For it points out how everyone suffers because the economic impact is direct and damaging.

Johnson sums up his argument for change with the exhortation:

> It may be hoped that our lawgivers will at length take away from us this power of starving and depraving one another; but, if there be any reason why this inveterate evil should not be removed from our age, which true policy has enlightened beyond any

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73. Idler 38, p. 118: Johnson is again advanced in his thinking when he considers the psychological damage misery causes and how this affects productivity.

74. Rambler 148, p. 26; "the great law of social beings, by which every individual is commanded to consult the happiness of others."

> former time, let those, whose writings form opinions and the practices of their contemporaries, endeavour to transfer the reproach of such imprisonment from the debtor to the creditor, till universal infamy shall pursue the wretch, whose wantonness of power, or revenge of disappointment, condemns another to torture and to ruin; till he shall be hunted through the world as an enemy to man, and find in riches no shelter from contempt.
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> 75

This demagogic appeal to the public at large indicates the intensity of feeling aroused in him by the debt laws. For he is advocating not only change in the law but a campaign to bring this change about.[76] Johnson's evangelical summation reflects a belief in the wisdom of the people and their acceptance of the responsibility they have in insuring that laws work for the betterment of society.[77]

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Johnson's finest jurisprudential thinking is contained in Rambler 114. This essay is a cogent, well reasoned

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75. Idler 38, p. 120.

76. Greene, The Politics of Samuel Johnson, pp. 51-54.

77. cf. Bl Comm, I, 244-245, for the right to petition against 'such oppressions as tend to dissolve the constitution and subvert the fundamental of government' and when the 'positive laws are silent'; Locke, Two Treatises of Government, @243, p. 447, the summation which maintains that when authority is abused, it is forfeited and the people have a right to act. This is the logical conclusion of the campaign Johnson is advocating, and shows that he absorbed Lockes' ideas in encouraging the people to guard the terms of the social contract, and the debt laws lead Johnson to embrace this thinking.

appeal for radical change in the present system of punishment. Johnson calls into question the entrenched attitudes that impede innovations in the nature and kind of sanction that he feels society demands. Criticizing orthodox positions that favour sternness and retribution, Johnson remarks that the law must function not by terror but by respect:

> Even those that have most reverence for the laws of right, are pleased with shewing that not fear, but choice, regulates their behaviour; and would be thought to comply, rather than obey [78]

Essentially, Johnson sets up a utilitarian argument [79] to show that stringent laws and revengeful punishments were ineffective and counterproductive. [80] In this essay which reflects the most progressive of his social notions, [81] Johnson maintains that the failure of apportioning crimes to punishment [82] actually hinders the distribution of jus-

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78. Rambler 114, pp. 241-242.

79. Voitle, pp. 86-88; Radzinowicz, p. 336.

80. cf. Montesquieu, De l'esprit des lois, Book VI, chap. 13; Beccaria, Dei Delitti e delle Pene, chap. 20, for their arguments that agree with Johnson's position.

81. Voitle, p. 86.

82. Grotius, De Jure Belli et Pacis, Bk. II, Chap. XX @28, p. 291; Montesquieu, De l'esprit des lois, Bk VI, chap. xvi, p. 77: "C'est un grand mal, parmi nous de faire subir la même peine à celui qui vole sur un grand chemin, et à celui qui vole et assassine. Il est visible que, pour la sûreté publique, il faudrait mettre quelque différence dans la peine."

tice. It is his focus on the overuse of capital punishment that makes Johnson realize his most humanitarian impulse.[83]

Certain observations are made deploring the public wisdom in allowing this legislation of legal 'massacre'. Johnson writes:

> A slight perusal of the laws by which the measures of vindictive and coercive justice are established, will discover so many disproportions between crimes and punishments, such capricious distinctions of guilt, and such confusion of remissness and severity, as can scarcely be believed to have produced by public wisdom, sincerely and calmly of publick happiness.[84]

The themes of retribution, proportion, determination, and barbarity develop the patterns of Johnson's argument against capital punishment.[85] Moreover, Johnson suggests that 'political arrogance' and legislative incompetence encouraged by the abdication of public responsibility permits such cruel punishment. Paradoxically, these laws do

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83. cf. Sir Thomas More, Utopia, tr. Paul Turner, (Harmondsworth: Penguin Books, 1965), Bk I, pp. 44-45; Johnson's Christian humanism is influenced by More to whom he credits for this number (Rambler 114, p. 247). In the Utopia More responds to an English lawyer's advocacy of stern measures against thieves, and this lawyer's consternation that despite hanging England is still plagued with robbers: "This method of dealing with thieves is both unjust and socially undesirable. As a punishment it's too severe, and as a deterrent it's quite ineffective. Petty larceny isn't bad enough to deserve the death penalty."

84. Rambler 114, p. 242.

85. Life I, 147, n.i.; Life IV, 328 n 1; 329 n.2; 359 n.2.

not protect society but endanger it, and in writing this essay Johnson tries to mould public opinion to realize their self-interest in changing the nature and frequency of capital punishment.

Johnson attacks capital punishment because it is not a remedy but a vengeful reflex:

> It has been always the practice, when any particular species of robbery becomes prevalent and common, to endeavour its suppression by capital denunciations.
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> 86

This approach offers no solution to ending criminal activity, and actually argues that more and ingenious criminal acts take place. Of this escalation, Johnson writes:

> Thus, one generation of malefactors is commonly cut off, and their successors are frightened into new expedients; the act of thievery is augmented with greater variety of fraud, and subtilized to higher degrees of dexterity, and more occult methods of conveyance.
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> 87

A cycle develops whereby the death penalty, out of frustration, is applied indiscriminately and disproportionately. Johnson continues:

> The law then renews the pursuit in the heat of anger, and overtakes the offender again with death. By this practice, capital inflictions are multiplied, and crimes very different in their degrees of enormity are equally subjected to the severest punishment that man has the power

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86. Rambler 114, p. 243.

87. Ibid.

of exercising upon man.[88]

If there is any legitimate basis for capital punishment, it is its ability to act as a deterrent.[89] However, as Johnson points out the result here is the proliferation of new classes of crime mandating the death penalty.[90] It is obvious to Johnson that the only way to break this cycle is either to abolish capital punishment or to lessen its use.

Johnson presents a conservative political position that vests wide authority and discretion in those who determine the law:

> The lawgiver is undoubtedly allowed to estimate the malignity of an offence, not merely by the loss or pain which single acts may produce, but by the general alarm and anxiety arising from the fear of mischief, and insecurity of possession: he therefore exercises the right which societies are supposed to have over the lives of those that compose them, not simply to punish a transgression, but to maintain order, and preserve quiet; he enforces those laws

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88. Ibid.

89. Rambler 114, p. 245.

90. Bl. Comm. IV, 18-19: "no less than a hundred and sixty have been declared by an act of Parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the numbers of offenders." Hay, "Property, Authority and the Criminal Law", in Albion's Fatal Tree, p. 56: "The post-revolution Parliaments passed more and more capital statutes in order to make every kind of theft, malicious damage or rebellion an act punishable by death. Although most executions took place under Tudor statutes rather than these fresh-minted ones, the new legislation gave the power to make terrible examples when necessary."

> with severity that are most in danger of violation, as the commander of a garrison doubles the guard on that side which is threatened by the enemy.
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> 91

But the presence of a siege mentality undermines the legislator in providing for the public welfare. For this mentality obscures a rational approach to combating rising crime, and offers ideas that are uninspired and moribund. Johnson maintains:

> This method has been long tried, but tried with so little success, that rapine and violence are hourly encreasing; yet few seem willing to despair of its efficacy, and of those who employ their speculations upon the present corruption of the people, some propose the introduction of more horrid, lingering and terrifick punishments; some are inclined to accelerate the executions; some to discourage pardons; and all seem to think that lenity has given confidence to wickedness, and that we can only be rescued from the talons of robbery by inflexible rigour, and sanguinary justice.
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All this provides no reasonable answers, and Johnson realizes the failure to resolve this pressing problem will eventually undermine the government.

This is not to say that capital punishment should be abolished, or the government has no right to select it; but that its imposition must be chosen with care and

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91. Rambler 114, p. 243.

92. Rambler 114, pp. 243-244.

deliberation.[93] Johnson has a stringent criterion for its acceptance:

> Death is, as one of the ancients observes, τὸ τῶν φοβερῶν φοβερώτατον 'of dreadful things the most dreadful'; an evil, beyond which nothing can be threatened by sublunary power, or feared from human enmity or vengeance. This terror should, therefore, be reserved as the last resort of authority, as the strongest and most operative of prohibitory sanctions, and placed before the treasure of life, to guard from invasion which cannot be restored.
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> 94

This standard for the use of capital punishment is abused continually and leads to confusion in the classification of crimes. Johnson reasons as follows:

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93. Bl Comm. IV, 9-10: "The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, Sir Matthew Hale: 'when offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers.' It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no light penalty will be effectual."

94. Rambler 114, p. 244.

> To equate robbery with murder is to reduce murder to robbery, to confound in common minds the gradations of iniquity, and incite the commission of a greater crime to prevent the detection of a less. If only murder were punished with death, very few robbers would stain their hands in blood; but when, by the last acts of cruelty no new danger is incurred, and greater security may be obtained, upon what principle shall we bid them forbear?
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Not only does the excessive use of the death penalty confuse the nature and severity of criminal acts, but it inculcates an attitude of abandon. As Johnson observes from his experiences, this attitude is not only counter-productive but contributes to the commission of more violent acts as well as the disintegration of the legal process.

Despite the structure of the law, its administration will be frustrated by the common sense and humanity of those who perceive the difference in degree.[96] The administration of justice is retarded by this overemployment of capital punishment:

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95. Ibid.; cf. Sermon 18, p. 196, for robbery and theft so destructive of social fabric.; More, Utopia, pp. 50-51: "From a practical point of view, surely it's obvious that to punish thieves and murders in precisely the same way is not only absurd but also highly dangerous to the public. If a thief knows that a conviction for murder will get him no more trouble than a conviction for theft, he's naturally impelled to kill the person that he'd otherwise merely have robbed. It's no worse for him if he's caught, and it gives him a better chance of not being caught, and of concealing the crime altogether by eliminating the only witness. So in our efforts to terrorize thieves we're actually encouraging them to murder innocent people."

96. cf. Hall, Theft, Law and Society, pp.91-97, for a discussion on larceny and how both judges and jurors modified the use of capital punishment mandated by statute.

> The frequency of capital punishments, therefore, rarely hinders the commission of a crime, but naturally and commonly prevents its detection, and is, if we proceed only upon prudential principles, chiefly for that reason to be avoided.
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> Whatever may be urged by casuists or politicians, the greater part of mankind, as they can never think that to pick the pocket and to pierce the heart is equally criminal, will scarcely believe that two malefactors so different in guilt can be justly doomed to the same punishment: nor is the necessity of submitting the conscience to human laws so plainly evinced, so clearly stated, or so generally allowed, but that the pious, the tender, and the just will always scruple to concur with the community in an act which their private judgement cannot approve.
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> He who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten for fear of hurrying the offender to that state in which there is no repentance, has conversed very little with mankind. And whatever epithets of reproach or contempt this compassion may incur from those who confound cruelty with firmness, I know not whether any wise man would wish it less powerful, or less extensive.

This enlightened and articulate plea[98] is characteristic[97]

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97. Rambler 114, p. 245.

98. cf. Bl. Comm. IV, 16-17: "Lastly, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, (Beccaria, c 7), that crimes are more effectively prevented by the certainty, than by the severity, of punishment. For the excessive severity of laws (says Montesquieu, Sp.L.b6.c.13) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it."

Much of Johnson's argument and his phrasing come almost directly from Montesquieu, who absorbed More; cf. Fletcher, Montesquieu and English Politics: 1750-1800, pp. 21-33, for early British opinion on Esprit des Lois.

of Johnson's mixture of morals and utility. On the one hand, Johnson points out how police detection so necessary to frustrate future crime is limited, and on the other, he approves the intervention of moral action. Thus, Johnson unites self-interest with conscience in this argument in an effort to broaden its appeal. Certainly, Johnson wants laws that are effective, but they must also be just. This ultimate sanction that does not respect the variety and complexity of issues, that is imposed uniformly, that is vindictive and repressive, and that hinders an equitable distribution of justice, is itself destructive and noxious.

Johnson's summation is a severe indictment and one that offers insights into the pattern of his jurisprudential thinking:

> All laws against wickedness are ineffectual, unless some will inform, and some will prosecute; but till we mitigate the penalties for mere violations of property, information will always be hated, and prosecution dreaded. The heart of a good man cannot but recoil at the thought of punishing a slight injury with death; especially when he remembers, that the thief might have procured safety by another crime, from which he was restrained only by his remaining virtue.
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> The obligations to assist the exercise of publick justice are indeed strong; but they will certainly be overpowered by tenderness for life. What is punished with severity contrary to our ideas of adequate retribution, will be seldom discovered; and multitudes will be suffered to advance from crime to crime, till they deserve death, because they had been sooner prosecuted, they would have suffered death before they deserved it.
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99. Rambler 114, p. 246: This in part conflicts with Johnson's view of the sanctity of property.

Written with the assurance that forecloses opposition, this statement defines the nature and aim of criminal laws. Public order and security as the objects of criminal laws are compromised by a criminal's perception that his punishment will be disproportionate to his crime. The criminal law should control revenge and develop sanctions that are civilized and appropriate to the gravity of the offence. These sanctions should indeed be punitive but not avenging. For the criminal law to be effective, good men must consider it to be just. Only when the criminal law meets these criteria will it have public confidence and enjoy just administration. To Johnson these elements are absent in a system that relies on the strict adherence of the death penalty.

However, it is Johnson's desire to reform the law and to lessen the use of the death penalty. In this essay Johnson realizes that his ideas are advanced:[100]

> This scheme of invigorating the laws by relaxation, and extirpating wickedness by lenity, is so remote from common practice, that I might reasonably fear to expose it to the publick.[101]

By his advocacy in this essay, Johnson reveals himself to be a thinker in tune with the most enlightened thought of his time, and one who is willing to oppose current 'prej-

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100. Voitle, p. 84; Radzinowicz, pp. 336-337.

101. Rambler 114, p. 247.

udice'.[102] Moreover, Johnson shows himself not to be trapped by the iron chains of legal precedent. He has the ability to transcend conventional wisdom and fashion from prevailing trends those truths which only need to be uncovered. It is the quality of Johnson's mind that enables him to take these discoveries and organize them into a reasoned, humane argument that gets at the substance of the social values the law is supposed to articulate.

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In his opposition to the death penalty as a universal

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102. cf. Burke, Reflections on the Revolution in France, for how this Enlightenment writer's use of 'prejudice' is consciously defiant; Boulton, The Language of Politics in the Age of Wilkes and Burke (London: Routledge and Kegan Paul, 1963), pp. 97-133; Among the entries in the Dictionary about prejudice the main point is that prejudices are unexamined opinions:

Prejudice:
1. Prepossession; judgment formed beforehand without examination.
2. Mischief; detriment; hurt; injury.

To prejudice:
1. To prepossess with unexamined opinions; to fill with prejudices.
2. To obstruct or injure by prejudices previously raised.
3. To injure; to hurt; to diminish; to impair.

Prejudicial:
1. Obstructive by means of opposite prepossessions.
2. Contrary; opposite.
3. Mischievous; hurtful; injurious; detrimental.

remedy, Johnson is remarkably consistent.[103] His advocacy on behalf of Dr. William Dodd,[104] who was convicted of forgery, shows Johnson sustaining the principal arguments he made in Rambler 114.[105] His adherence to the substance of Rambler 114 is especially significant since Johnson did not care for Dodd,[106] abhorred the nature of his fraud,[107] and was frightened by the vociferousness

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103. Life IV, pp. 188-189; Despite Johnson's seeming approval of public executions, he continued to oppose capital punishment if mandated for crimes which did not involve murder.

104. Dictionary of National Biography, Vol. V, pp. 1060-1062: Fitzgerald, A Famous Forgery, being the Story of 'The Unfortunate' Doctor Dodd.

105. Radzinowicz, pp. 458-459, n. 29.

106. Hawkins, The Life of Samuel Johnson, ed. Bertram H. Davis, pp. 235; 191.

107. Sermon 18, pp. 198-199: "The crime of fraud has this aggravation, that it is generally an abuse of confidence. Robberies of violence are committed commonly upon those, to whom the robber is unknown. The lurking thief takes indiscriminately what comes by chance within his reach. But deceit cannot be practised, unless by some previous entreaty, and gradual advance, by which distrust is dissipated, and an opinion of candour and integrity excited. Fraud, therefore, necessarily disguises life with solicitude and suspicion. He that has been deceived, knows not afterwards whom he can trust, but grows timorous, reserved, afraid alike of enemies and friends; and loses, at least, part of that benevolence which is necessary to an amiable and virtuous character. Fraud is the more to be suppressed by universal detestation, as its effects can scarcely be limited. A thief seldom takes away what can much impoverish the loser; but by fraud, the opulent may at once be reduced to indigence, and the prosperous distressed; the effects of a long course of industry may be suddenly annihilated, the provision made for age may be withdrawn, and inheritance of posterity intercepted."

of the public agitation demanding commutation.[108] All this is summed up by Radzinowicz:

> In view of Johnson's poor opinion of Dodd, the readiness with which he consented to help him may seem somewhat surprising. It may be explained partly by his great kindness and sympathy with human beings in distress, and partly by the fact that Dodd's case confirmed Johnson in his conviction that the criminal law was excessively and unnecessarily severe as well as irrationally uniform. He was fully aware that as the law then stood, Dodd had to be hanged; and he objected to a system providing no alternative to the death penalty which was - he firmly believed - too severe a punishment for Dodd's offence.
> [109]

While Radzinowicz's remarks provide a fine summation, it is instructive[110] to review Johnson's specific writings on behalf of Dodd to see the jurisprudential patterns that develop.

Johnson's petition on Dodd's behalf to the King for clemency is one of the finest pieces of this type of supplicatory writing. It accepts the truth and wisdom of the conviction, the legitimacy of the authority that imposes the sentence, offers extreme repentance, but ques-

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108. Life II, p. 90: 'This petitioning is a new mode of distressing government, and a mighty easy one.' cf. The False Alarm where Johnson attacks the ease with which petitions are circulated. However, Johnson aroused by his sympathy for Dodd abandoned his usual opposition to petitions: "Surely the voice of the publick, when it calls so loudly, and calls only for mercy, ought to be heard." Life II, p. 120.

109. Radzinowicz, p. 458.

110. Life III, pp. 120-122; Papers Written by Dr. Johnson and Dr. Dodd, ed. R.W.Chapman; Sermon 28,pp. 301-313.

tions the severity of the sentence and suggests mitigating circumstances of life and past actions. Johnson writes:

> That debased as he is by ignominy, and distressed as he is by poverty, scorned by the world and detested by himself, deprived of all external comforts, and afflicted by consciousness of guilt, he can derive no hope from longer life, but that of repairing the injury done to Mankind, by exhibiting an example of shame and submission, and of expiating his sins by prayer and penitence.
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> [111]

Johnson expresses his Christian humanism in writing this compelling plea based on mercy and potential service. In his effort Johnson balances the interests of an individual against the demands of society.[112] He explores the proposition that mercy forms an integral part of this relationship, and emphasizes the humanity from which it must spring. To do this, Johnson exploits the 'emotional and ethical dimensions of language',[113] but does not give a

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111. Chapman, #4 p. 2-3.

112. cf. Rambler 60, p. 323, for Johnson's usual approach to this balance in a legal context. Here Johnson quotes Sir Matthew Hale: 'Let me remember when I find myself inclined to pity a criminal, that there is likewise a pity due to the country.' This quotation introduces a theme that is more characteristic of Johnson's legal philosophy. Johnson realizes that in any legal determination it is necessary to balance the trust invested in judicial decision against society's interest. This understanding is an intricate factor investigating how justice is ultimately dispensed, and reflects the legal and moral tensions present in the issuance of a decree. However, in the Dodd case Johnson shows his habitual inconsistency and an ability to moderate some of his basic propositions.

113. Marie Hochmuth Nichols, Rhetoric and Criticism, (Baton Rouge: Louisiana State University Press,1963), p. 13.

juris consultus.[114] He exercises his considerable talent for advocacy rather than his legal acumen.

Johnson does raise two legal points: the question of 'intent' and the issue of proportionate punishment, to enhance his argument in favour of a royal pardon.[115] Johnson reasons unsuccessfully that Dodd's restitution implies that he did not intend 'finally to defraud'[116] and thus,

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114. cf. My chapter on the Boswell cases for Johnson's talents as an advocate; Rambler 27, p. 150, for a different view of an advocate's artful defences: "My next patron was Eutyches the statesman, who was wholly engaged in publick affairs, and seemed to have no ambition but to be powerful and rich. I found his favour more permanent than that of the others, for there was a certain price at which it might be bought; he allowed nothing to humour, or to affectation, but was always ready to pay liberally for the service that he required. His demands were, indeed, very often such as virtue could not easily consent to gratify; but virtue is not to be consulted when men are to raise their fortunes by the favour of the great. His measures were censured; I wrote in his defence, and was recompensed with a place, of which the profits were never received by me without the pangs of remembering that they were the rewards of wickedness, a reward which nothing but that necessity, which the consumption of my little estate in these wild pursuits had brought upon me, hindered me from throwing back in the face of my corruptor." Ironically, much of this misfortune affected Dodd in the same way.

115. cf. Radzinowicz, pp. 126-131. for a discussion on the differing views of Beccaria and Blackstone on the royal prerogative of mercy. In his efforts on behalf of Dodd, Johnson follows a middle course that veers toward Blackstone's opinion which is more practical and takes into greater consideration present circumstances more than fidelity to theory. Johnson realizes that while such harsh penalties should not be universally mandated, this does not question the validity or need for the royal pardon. Instead, he asserts its usefulness both as a correction to legislative impetuosity and as a way to support the institution of monarchy.

116. Select State Trials at Justice-Hall, vol I, p. 28; Rex v. Dodd I Leach 155.

did not fall within the terms of the statute.[117] Moreover, Johnson avers that the circumstances of Dodd's case do not merit the imposition of the death penalty. To this effect, Johnson tries to make an argument based on the gap between social needs and substantive law. He considers Dodd's case to be one which points up the inherent unfairness in the administration of a law that leaves little room for judicial discretion.[118] In addition Johnson appreciates the ramifications Dodd's case has for society and especially, the effect it may have on the future authority of the state.

This issue of criminal intent (mens rea)[119] is critical to Johnson's legal argument, and he tries to make a great deal out of the ambiguity between mens rea and in-

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117. 2 George 2 c. 25 (1729) @ 1; Archbold, Pleading and Evidence, 3rd ed., (London: Pheney; Sweet and Dublin: Millian, 1928), p. 234: this statute "made it felony, death, to forge any deed, will, bond, bill of exchange, or promissory note, or acquittance or receipt for money or goods, 'to utter or publish as true' any forged deed, ...".; Radzinowicz, p. 100, n. 68, for his treatment of this statute as a capital crime for forgery; Hall, Theft, Law and Society, 110-152; for an historical discussion of the statutes governing forgery and the problems in administration.

118. Select Trials, p. 29: Mr. Sergeant Glynn writes: "Your application for mercy must be made elsewhere; it would be cruel in the court to flatter you; there is a power of dispensing mercy where you may apply." By the terms of this statute, this felony denies the benefit of clergy and carries a death penalty which on determination of guilt must be imposed by the court.

119. actus non facit reum nisi mens sit rea.

tention.[120] However, Johnson realizes that not only did Dodd act and have the intention to act, but that he understood his action to be criminal. Dodd was well aware that his forgery was proscribed by law and morals, and since he carried out the design of his plan, the criminal intent was proven. Moreover, the decisive legal interpretation and the one supported by most legal authorities[121] does not concur with the thrust of Johnson's submission. Indeed, the tenor of Johnson's remarks reveals that even

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120. cf. Hall, General Principles of Criminal Law, pp. 70-145, for an illuminating discussion of mens rea and intention. Hall's comments are historical and analytical although this is primarily a modern treatment. Rambler 28, pp. 153-157; Rambler 76, pp. 33-37, for Johnson's comments on intention and the way one misconstrues one's own motives. Much of Johnson's remarks seem to anticipate the case of Dr. Dodd.

121. cf. Bl. Comm, IV, pp. 20-33; Hobbes, Leviathian, Chapter 27; Russell on Crimes Vol II, Chap. 32, S.3 p. 353. Idler 65, p. 203, Johnson's familiarity with Hale's Pleas of the Crown; Hale, Pleas of the Crown I, p. 14 (1736), .. where there is no will to commit an offense, there can be no .. just reason to incur the penalty..". Stephen, vol III, ch. 29, p. 187: "The meaning of the phrase would be more exactly though less neatly expressed if it was 'with intent to deceive in such a manner as to expose any person to loss or the risk of loss'. The object of a forger is nearly always his own advantage, and he thinks that in many cases he will be able to gain his own object without ultimate loss to any person, and it is not at once obvious that such an intention is fraudulent."

he knew how thin his submission was.[122] But in bringing up this issue of mens rea, Johnson questions its formulation as an element of the crime as defined by the statute. This question of mens rea in the penal law is what actually determines a criminal state of mind, and in his submission Johnson tries to confuse Dodd's action with mental states, i.e. those intellectual, emotional or psychic patterns that characterize the mind and which in a legal sense help to define 'intent' as an element of a crime, in order to lessen the degree of guilt. By raising this issue, Johnson hopes to mitigate the criminal effects of Dodd's forgery and strengthen the plea for mercy.

By advocating transportation instead of death, Johnson makes an enlightened argument on the need for propor-

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122. Rambler 31, p. 171-172: cf. for Johnson not wearing the advocate's mask and where he points out moral implications in the intent to do wrong: "But such pride, once indulged, too frequently operates upon more important objects, and inclines men not only to vindicate their errors, but their vices; to persist in practices which their own hearts condemn, only lest they should seem to feel reproaches, or be made wiser by the advice of others; or to search for sophisms tending to the confusion of all principles, and the evacuation of all duties, that they may not appear to act what they are not able to defend. Let every man, who finds vanity so far predominant, as to betray him to the danger of this last degree of corruption, pause a moment to consider what will be the consequences of the plea which he is about to offer for a practice to which he knows himself not led at first by reason, but impelled by the violence of desire, surprized by the suddenness of passion, or seduced by the soft approaches of temptation, and by imperceptible graduations of guilt. Let him consider what he is going to commit by forcing his understanding to patronise those appetites, which it is its chief business to hinder and reform.

tionate punishment. A case such as Dodd's calls for reason not vindictiveness. Moreover, Johnson's use of external considerations in making this argument is like the modern pre-sentence investigation that takes personal and social circumstances into account. This becomes clear in the letter he writes for Dodd to the Lord Chancellor Bathhurst:

> My Life has not been wholly useless, I have laboured in my calling diligently and successfully but success inflamed my vanity, and my heart betrayed me. --- violent passions exposed me to violent temptations, but I am not the first whom temptation has overthrown. I have in all my deviations, kept right always in view, and have invariably resolved to return to it. Whether in a prosperous state I should have kept my resolution publick justice had not suffered me to know.
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> My Crime has been indeed atrocious, but my punishment has not been light. From a height of reputation which perhaps raised envy in others, and certainly produced pride in myself, I have fallen to the lowest and grossest infamy;
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In this appeal to the Lord Chancellor, Johnson points out what he hopes are mitigating personal circumstances. It is interesting to note that Johnson does not argue for commutation on the basis of legal issues. Instead he suggests social utility and societal values as reasons for mercy. While the legal aspects of Johnson's plea are not strong, the impact of hanging so prominent a man as Dodd is. And it is this idea that runs through the letter to Bathhurst.

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123. Chapman, Papers Written by Dr. Johnson and Dr. Dodd 1777, #8, p. 6.

In the letter Johnson writes for Dodd to Lord Mansfield there are no salient legal points developed. What is written is a continuation of the plea to Bathhurst:

> I have offended; I am penitent; I entreat but for Life, for a Life which must pass certainly in Dishonour, and probably in Want. Do not refuse, my Lord, to compassionate a Man who blasted in Fame, and ruined in Fortune, yet shrinks with Terrour from the Precipice of Eternity. Let me live, however miserable, and let my Miseries warn all those to whom they shall be known, against Self Indulgence, Vanity, and Profusion.
> Once more my Lord, let me beg for Life, and when you see me going from the Gloom of a Prison, to the Penury of Banishment, do not consider publick justice as wholly unsatisfied.....
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> 124

The importance of these pleas lies in their questioning of what is the proper function of punishment. Certainly, 125 Johnson understands the nature of eternal punishment 126 but the nature of civil punishment is a different thing. Johnson sees correction and example as keys to the function

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124. Chapman, pp. 8-9. #9.

125. Life III, p. 200; Life IV, p. 299, Johnson has a strong, firm belief in the Christian theory of eternal punishment and salvation.

126. Rambler 31, p. 173: "As justice requires that all injuries should be repaired, it is the duty of him who has seduced others by bad practices, or false notions, to endeavour that such as have adopted his errors should know his retraction, and that those who have learned vice by his example, should by his example be taught amendment." Johnson maintains the need for punishment in secular matters to complement his theological views.

of civil punishment, not vengeance or retribution.[127] Johnson's idea of correction is the more modern one of reformation. In the Dodd case Johnson argues for the example of a reformed life and not the example of death. Certainly, Dodd's death is the final deterrent for him, but Johnson offers the broader view that Dodd's life provides an example for others tempted by forgery to witness a living example of degradation.

In his advocacy for life and transportation, Johnson concurs with Beccaria[128] in thinking that crimes of a pecuniary nature do not merit the death penalty. Despite his deep concern for property, Johnson also agrees with

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127. Rambler 114, p. 245: "From this conviction of the inequality of the punishment to the offence proceeds the frequent solicitation of pardons. They who would rejoice at the correction of a thief, are yet shocked at the thought of destroying him. His crime shrinks to nothing, compared with his misery; and severity defeats itself by exciting pity. The gibbet, indeed, certainly disables those who die upon it from infesting the community; but their death seems not to contribute more to the reformation of their associates than any other method of separation."

128. Beccaria, XXX, p. 74: "Thefts not involving violence should be punished by a fine. Whoever seeks to enrich himself at the expense of others should be deprived of his own. But, since this is ordinarily the crime only of poverty and desperation, ... the most suitable punishment will be that kind of servitude which alone can be called just- the temporary subjection of the labors and person of the criminal to the community, as repayment, through total personal dependence, for the unjust despotism usurped against the social contract."

Blackstone[129] in the view that these types of crimes are not against nature but civil authority. Because of this attitude, Johnson appreciates that the death penalty must be imposed with discretion and deliberation. The Dodd case provides Johnson with reasons to refine his arguments against the death penalty and the way it is applied uniformly and excessively. The philosophical basis for Johnson's advocacy on behalf of Dodd lies with his opposition to the death penalty and his support of proportionate punishment. While Johnson had reservations about Dodd himself, he saw in the Dodd case not only a way to advance the status of the state but to reform the criminal law. Johnson does not question the right of the state to impose the death penalty but argues that in this instance it is an abuse of authority. The Dodd case allows Johnson to

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129. Bl.Comm. IV, p. 9: Writing of crimes that are mala prohibita not mala in se Blackstone says: "With regard to offences mala in se, capital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative, 'whoso sheddeth man's blood, by man shall his blood be shed.' In other instances they are inflicted by the example of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature; as for forgery, for robbery, and sometimes for offences of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offences against natural, but only against social, rights; not even robbery itself, unless it be a robbery from one's person; all others being an infringement of that right of property, which, as we have formerly seen, owes it's origin not to the law of nature, but merely to civil society.

use the issue of criminal reform in such a way as to strengthen the power of the state. His reasoning follows contemporary thinking on proportionate punishment and, at the same time, enables Johnson to reinforce a generally conservative political outlook. This is not inconsistent, because Johnson is seeking to justify a perception of the state as a wise, humane and necessary institution. However, while his efforts for Dodd failed, Johnson was not disconcerted,[130] but thenceforth lent his support to the movement for criminal law reform.[131]

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In Rambler 81 Johnson explores the religious maxim: 'whatsoever ye would that men should do unto you, even so do unto them' (Matthew vii 12) within its legal context. Johnson deals with principles of mercy and compassion and their relation to community and individual. He distinguishes a concept of justice and analyzes community responsibility. In this effort Johnson examines the critical juncture of benevolence and justice in terms of civil rights and moral duties. He probes the moral implications in a judge's sentence and considers the social utility in granting mercy. Writing on the difference between 'debts of charity' and 'debts of justice', Johnson pursues his

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130. Radzinowicz, pp. 336-339.

131. cf. Observations on the Propriety of Pardoning Dr. Dodd, ed., Chapman, pp. 24-26; for a statement of the Dodd case which Johnson had sent to the newspapers.

enquiry into the nature of punishment and its effect on society.

The issue of judicial sentencing illustrates Johnson's ability to sustain apparent inconsistency. In the Dodd case Johnson takes a benevolent view of judicial mercy where, as opposed to a "crime against nature", e.g. murder, the death penalty may be imposed for a civil crime. However, in this essay, Johnson frames a more general argument on the need and effect of sentencing:

> One of the most celebrated cases which have been produced as requiring some skill in the direction to conscience to adapt them to this great rule, is that of a criminal asking mercy of his judge, who cannot but know that if he was in the state of the supplicant, he should desire that pardon which he now denies. The difficulty of this sophism will vanish, if we remember that the parties are, in reality, on one side the criminal, and on the other the community of which the magistrate is only the minister, and by which he is intrusted with the publick safety.
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Johnson sees the paramount concern as that of public safety and, in essence, the security of the state:

> The magistrate therefore, in pardoning a man unworthy of pardon, betrays the trust with which he is invested, gives away what is not his own, and, apparently, does to others what he would not that others should do to him. Even the community, whose right is still greater to arbitrary grants of mercy, is bound by those laws which regard the great republick of mankind, and cannot justify such forbearance as may produce wickedness, and lessen the general confidence and security in which all have an equal interest, and which all are therefore

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132. Rambler 81, p. 62.

> bound to maintain. For this reason the state has not a right to erect a general sanctuary for fugitives, or give protection to such as have forfeited their lives by crimes against the laws of common morality equally acknowledged by all nations, because no people can, without infraction of the universal league of social beings, incite, by prospects of impunity and safety, those practices in another dominion, which they would themselves punish in their own.
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This stern and seemingly uncompromising approach is fundamental to Johnson's view of crimes against nature. There is a distinction in the pattern of Johnson's thinking on punishment when the crime is capital by natural law and not just by civil legislation.[134]

This distinction is made clear in the way Johnson explores the application of positivist law to the exercise of individual morals. Johnson accepts the need for those personal deliberations that are made in quest of a proper judgment. To him such a pursuit defines the major constituents in his theory of virtue. This is not based on a situation ethic but a rigorous moral core that implies direction and guides action. It is here that Johnson takes exception to a rule of distributive justice:

> The discharge of the 'debts of charity', or duties which we owe to others not merely as required by justice, but as

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133. Rambler 81, p. 62-63.

134. cf. chapter 3, pp.210,218,231-32; however, this implies a different, non-utilitarian view of natural law from the position he takes in the Chambers' lectures. Nevertheless, this shift shows how Johnson's thinking matures, and his ability to advance seemingly, conflicting positions on even fundamental points.

> dictated by benevolence, admits in its own nature greater complication of circumstances and greater latitude of choice. Justice is indispensably and universally necessary, and what is necessary must always be limited, uniform, and distinct.
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> 135

Johnson argues for a moral rule that 'is not equally determinate and absolute with respect to offices of kindness, and acts of liberality', but the question remains as to how this affects the state.

Johnson's perception of personal 'debts of charity' allows him to say that:

> we can only know what others suffer or want, by considering how we should be affected in the same state; nor can we proportion our assistance by any other rule than that of doing what we should expect from others,
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However, the demands of the state do not permit this rule to be followed when allocating punishment. This is because the scope of criminal punishment includes annulling a breach of duty or setting out the parameters of rights. In this essay Johnson suggests that appropriate punishments provide a suitable answer for some aspects of a crime; but

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135. Ibid. p. 63.

136. Rambler 81, p. 64.

maintains that the interest of society is paramount.[137] The legal and philosophical basis in a judicial decision involves a combination of legal, moral and community responsibility which governs Johnson's thinking on the nature of punishment.[138]

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An Account of the Life of Mr. Richard Savage[139] shows how Johnson shapes facts and manipulates perceptions in order to make an effective legal presentation. Savage, a minor poet[140] who shared many late night adventures with

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137. cf. Adventurer 50, p. 366, where Johnson feels severe corporal punishment is legitimate for personal correction and state security: "There is, I think, an antient law in Scotland, by which Lessing-making was capitally punished. I am, indeed, far from desiring to increase in this kingdom the number of executions: yet I cannot but think, that they who destroy the confidence of society, weaken the credit of intelligence, and interrupt the security of life; harass the delicate with shame, and perplex the timorous with alarms; might very properly be awakened to a sense of their crimes, by denunciations of a whipping post or pillory: since many are so insensible of right and wrong, that they have no standard of action but the law; nor feel guilt, but as they dread punishment."

138. Idler 89, p. 276: "But in a world like ours, where our senses assault us, and our hearts betray us, we should pass on from crime to crime, heedless and remorseless, if misery did not stand in our way, and our own pains admonish us of our folly."

139. All citations from this work are taken from Samuel Johnson: The Life of Savage, ed. Clarence Tracy, (Oxford, Clarendon Press, 1971). Tracy's notes and comparisons with the anonymous Life which Johnson utilized in writing his, are indispensable. However, my concern is with Johnson's handling of the facts as he understood them, not the actual record.

140. Richard Savage, The Poetical Works of Richard Savage, ed. Clarence Tracy, (Cambridge: At the University Press, 1962). Although Johnson thought Savage possessed much 'genius', the general opinion and the one I share is that he is an interesting figure but an insignificant poet.

Johnson,[141] claimed to be the illegitmate son of the Earl Rivers, was arrested for debt more than once, and was tried for murder during a coffee-house brawl.[142] In his biography Johnson creates a sympathetic though inaccurate view[143] of the circumstances surrounding Savage's birth and parentage. Moreover, Johnson argues that throughout his life Savage had to endure the burdens of illegitimacy and shameful treatment accorded him by his mother the Countess of Macclesfield.[144] Such treatment affected Savage's psychological development and influenced his subsequent behaviour.[145] Although this situation allows Johnson to discuss the legal implications of illegitimacy,

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141. Life I, pp. 161-164.

142. Account, pp. 30-33; Clarence Tracy, The Artifical Bastard: A Biography of Richard Savage, (Cambridge: Harvard University Press, 1953), pp. 82-83.

143. Tracy, pp. 3-37; Tracy surveys the historical record and takes a middle view of the scandal by suggesting that whatever the truth, Savage believed his own story; Life I, pp. 161-174.

144. Account, p. 20: Johnson attacks the state of the law that permits a "moral" infanticide to exist: "The Punishment which our laws inflict upon those Parents who murder their infants, is well known, nor has its Justice ever been contested; but if they deserve Death, who destroy a Child in it's Birth, what Pains can be severe enough for her who forbears to destroy him only to inflict sharper Miseries upon him; who prolongs his Life only to make it miserable; and who exposes him without care and without Pity, to the Malice of Oppression, the Caprices of Chance, and the Temptations of Poverty; who rejoices to see him overwhelmed with Calamities; and when his own Industry, or Charity of others, has enabled him to rise for a short time above the Miseries, plunges him again into his former Distress?" Moreover, Johnson suggests but avoids the issue of abortion when he seems to consider the quality of life and not mere existence.

145. cf. The Bastard, which also argues the plea for self-defense.

he concentrates instead on the abuse of legal procedure and the subversion of evidence that characterize the murder trial.[146]

At a late evening altercation in Robinson's Coffee-house, Savage who was accompanied by Merchant and Gregory, became involved in a dispute over the control of heat from a fireplace. Johnson points out that not only was the subsequent murder of Sinclair unpremeditated and thus, really a degree of manslaughter;

> ... Swords were drawn on both Sides, and one Mr. James Sinclair was killed. Savage having wounded likewise a Maid that held him, forced his way with Merchant out of the house; but being intimidated and confused, without Resolution either to fly or stay, they were taken in a back Court by one of the Company and some Soldiers, whom he had called to his Assistance;[147]

but that Savage had no serious intention to flee eventual prosecution:

> With regard to the Violence with which he endeavoured his Escape, he declared, that it was not his Design to fly from Justice, or decline a Trial, but to avoid the Expences and Severities of a Prison, and that he intended to have appeared at the Bar without Compulsion.[148]

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146. Thursday 7 December 1727; Select Trials for Murder at the Old Bailey, pp. 249-250; Account, pp. 32-cf. Tracy, pp. 83-93, for his discussion of the trial and the events surrounding the appeal.

147. Account, p. 31.

148. Ibid. p. 33.

Johnson's recital of these facts is calculated to minimize Savage's willing participation in the incident and undercut any suggestion of wilful intent.[149] This becomes much clearer in his report of the actual trial.

Here Johnson tells of slight discrepancies in the depositions of the prosecuting witnesses. At first, he uses this point not to impeach their testimony but to show the general confusion that affects the reliability of their description of events:

> This Difference however was very far from amounting to Inconsistency, but it was sufficient to shew, that the Hurry of the Quarrel was such, that it was not easy to discover the Truth with relation to particular Circumstances, and that therefore some Deductions were to be made from the Credibility of the Testimonies.[150]

It is only later in his account that Johnson tries to impeach the witnesses' credibility by showing their bad reputations and thus, questioning implicitly their veracity:

> The Witnesses which appeared against him were proved to be Persons of Characters which did not entitle them to much Credit; a common Strumpet, a Woman by whom Strumpets were entertained, and a Man by whom they were supported.[151]

Johnson intends to show that the conduct of these persons

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149. cf. this chapter pp.56-58, for my discussion of mens rea.
150. Op cit.
151. Ibid. p. 34.

is inconsistent with their testimony. It is relevant for him to do this so that he can highlight the contrast with Savage:

> ... the Character of Savage was by several Persons of Distinction asserted, to be that of a modest inoffensive Man, not inclined to Broils, or to Insolence, and who had, to that Time, been only known for his Misfortunes and his wit.

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Moreover, Johnson desires to lay the foundation for an
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appeal to the Monarch and so, he must present Savage as favorably as possible. The need for this is easily seen when the Judge's conduct and the invidious comparisons he makes are reviewed.

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Johnson takes exception to Sir Francis Page's sum-

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152. Ibid.

153. Ibid. pp. 36-38, for the efforts made by his mother to frustrate the appeal for pardon which was eventually ordered by the King 6 January 1728. However, Johnson has this final bitter comment on the trial: "Thus had Savage perished by the Evidence of a Bawd, a Strumpet, and his Mother, had not Justice and Compassion procured him an Advocate of Rank too great to be rejected unheard, and of Virtue too eminent to be heard without being believed. His merit and his Calamities happened to reach the Ear of the Countess of Hertford, who engaged in his Support with all the Tenderness that is excited by Pity, and all the Zeal which is kindled by Generosity, and demanding an Audience of the Queen, laid before her the whole series of his Mother's Cruelty, exposed the Improbability of an Accusation by which he was charged with an Intent to commit a Murder, that could produce no Advantage, and soon convinced her how little his former Conduct could serve to be mentioned as a Reason for extraordinary Severity." p. 38; also see my remarks on pardons I, p. 55 and on ranks III, pp. 275-278.

154. cf. Tracy, Artificial Bastard, p. 86, for the notoriety Page enjoyed.

mation:

> ... that good Characters were of no Weight against positive evidence, though they might turn the Scale, where it was doubtful; and that though when two Men attack each other the Death of either is only Manslaughter; but where one is the Aggressor, as in the Case before them, and in Pursuance of his first Attack, kills the other, the Law supposes the Action, however sudden to be malicious;
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and especially the language he uses to indicate his loathing of Savage:

> Gentlemen of the Jury, you are to consider, that Mr. Savage is a very great Man, a much greater Man than you or I, Gentlemen of the Jury; that he wears very fine Clothes, much finer Clothes than you or I, Gentlemen of the Jury; that he has abundance of Money in his Pocket, much more Money than you or I, Gentlemen of the Jury; but, Gentlemen of the Jury, is it not a very hard Case, Gentlemen of the Jury, that Mr. Savage should therefore kill you or me, Gentlemen of the Jury?
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> 156

Naturally, Johnson abhors the binding instructions to convict, but he accepts the duty of the court to inform the jury on the law. However, Page gives a charge that could only sustain a conviction and one which assassinates Savage's character as well.

Johnson's portrayal of this trial foreshadows his

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155. Ibid. p. 34.

156. Ibid., p. 34; This harangue is related by Savage; see also Tracy's note 30 for his remarks on the reliability of this quotation; Johnson also quotes Savage's unsuccessful plea for mercy, pp. 35-36.

interest in the Dodd affair[157] and the movement for criminal law reform. The flagrant abuse of legal procedure and judicial ethics characterizes the type of failure that attracts Johnson's interest. Certainly, he has a vested interest in vindicating Savage, but this in no way lessens his desire to seek reform. Although Johnson shapes his description of events to place Savage in the best possible light, his efforts must be seen in the context of his understanding of the legal system. Johnson's trial scene eloquently points up how arbitrarily judges subvert intent and thus, deny justice.

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Johnson's major legal concerns in these periodical essays and his remarks on Dodd and Savage show the early stages of his legal philosophy. This philosophy is characterized by the strong moral presumption that permeates the texture of these writings and the intense personal involvement these issues stirred in him. This is evident by Johnson's frustration at the state of legal education and the quality of those persons drawn to the law. Because Johnson appreciates the close connection between the law and those who administer it, much of his jurisprudential thinking refers to the development of this relationship. This moral component helps to define the 'habit of mind' Johnson brings to each question of

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157. cf. this chapter pp. 51-63.

legal rights and duties. The presence of a strong humanitarian impulse in all his comments indicates Johnson's recognition that the law relies too much on disproportionate punishment. Not only does his recognition of this fact help to place him among Enlightenment thinkers, but also reveals the relationship between legal theory and moral practice.

Chapter Two

Johnson was a generalist[1] whose concern with the function of the law in society is evident in his comments on the specific legal cases mentioned in Boswell's Life of Johnson[2]. In these cases Johnson as a moral philosopher[3] is interested in the scope of the law and its function in the interaction between man and society. Johnson realized the delicate balance between vested interests and society's values in terms of rights and duties[4]. The idea is that: "Legal rules confine a person's duties towards others within previously defined limits"[5]. In this way Johnson conceived of the law as a facet of a universal justice that is endemic in the mind of intelligent man. As the product of a classical education[6] Johnson would certainly have absorbed Cicero's maxim: "a lege ducendum est juris exordium; ea est enim naturae vis, ea mens ratioque prudentis, ea juris atque iniuriae regula[7]. The conflict between individual and community

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1. W.K. Wimsatt, jr., The Prose Style of Samuel Johnson, (New Haven; Yale University Press, 1941), pp. 93-96

2. James Boswell, The Life of Samuel Johnson, LL.D., edited by George Birkbeck Hill, D.C.L., revised and enlarged by L.F. Powell, six volumes, (Oxford; At the Clarendon Press, 1934).

3. J.L. Clifford, Johnsonian Studies, 1887-1950, (Minneapolis; University of Minnesota Press, 1951), pp. 121-124.

   J.L. Clifford, D.J. Greene, :A Bibliography of Johnsonian Studies, 1950-1960", in Johnsonian Studies, edited by Magdi Wahba, (Cairo: 1962; distributed outside the U.A.R. by the Oxford University Press, 1962), pp. 337-338.

4. London 53, Vanity 108

5. Stein, Shand, 1974, p.3.

6. Life IV, p.102: "The classical quotation is the parole of literary men all over the world".

7. Cicero, De Legibus, I vi 19; cf: Donald J. Greene, Samuel Johnson's Library An Annotated Guide, English Literary Studies, University of Victoria, 1975; J.D. Fleetman, editor of The Sale Catalogue of Samuel Johnson's Library (Christie 1785) A Facsimile Edition, English Literary Studies, University of Victoria, 1975,

rests on an internal moral discipline guided by both wisdom and piety. Johnson's moral didacticism finds its expression and illustration in the technicalities of law and the supporting jurisprudential concerns that approach the "mutability of mankind" (Preface to the plan of an English Dictionary). The social function of the law in the fabric of eighteenth-century society is acutely perceived by Johnson in his understanding of the law as an instrument for the regulation of society and of the nuances it creates in varied class relationships[8].

In Boswell's biography a view of Johnson emerges which expands the idea of the "alternation which time is always making in the modes of Life"[9]. This is clear in the way in which Johnson's involvement with the law and jurisprudence acts as a counterpoint in his reactions to the more familiar occurrences and speculations in the Life. It is important to recall that Johnson wrote in Rambler 24: "The great praise of Socrates is, that he drew the wits of Greece, by his instruction and example, from the vain pursuit of natural philosophy to moral inquiries, and turned their thoughts from stars and tides, and matter and motion, upon the various modes of virtue, and relations of life."[10] For Johnson the law offers a framework in which practical human expression is entwined with the interests of society and its

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8. cf. Chapter III, pp. 275-278, Johnson appreciates the effect land laws have in maintaining property and sustaining rank and social order.
9. Adventurer, 95.
10. Rambler 24, pp. 131-132; Alkon, p.7: Tradition of Socratic Humanism.

attendant moral impulse. Hugo Grotius, a favorite legal and moral philosopher of Johnson's, encapsulates this Johnsonian viewpoint: "Law is the doctrine of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof."[11] It is for an understanding of this perspective that Boswell's record is essential as it permits a glimpse of Johnson's jurisprudential thinking and its application in realistic terms. An analysis of Johnson's comments in this context provides an understanding of legal institutions and their function in society as perceived by a mind characterized by its "splash of strong bold thought"[12]. An examination of Johnson's legal comments allows his humanitarian spirit to be discerned in the regulation of society. In this context there is the realization that "the role of law in society depends on the spirit of that society, if by spirit we understand an amalgam of moral attitudes, political organization, social traditions, and level of economic development."[13] To appreciate Johnson's personal inclinations, it is necessary to analyze the texture of comment in each instance of his writing, to penetrate the lawyer's role as

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11. Stair, Sir James Dalrymple, 1st Viscount, The Institutions of the Law of Scotland, Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighboring Nations, (Edinburgh, 1681) edited by Brodie, 1826.

12. G.B. Hill, Johnson Miscellanies Vol. I. p. 74, quotes Richard Cumberland's Memoirs (1806). Vol. I. p. 353: "splash of strong bold thought about him.:

13. Stein, Shand, p. 16.

he sees it if possible, and ascertain the philosophical undercurrents[14] evidenced in the diction and content of his work.

All of the major cases mentioned in Boswell's Life deal with factual situations and reveal general principles that have a personal meaning for Johnson. The schoolmaster case, Hastie v. Campbell, enables Johnson to utilize his own pedagogical experience. The interesting defamation cases; Paterson v. Stirling, Menis v. Jop, Scotland v. Thompson, Society of Solicitors v. Robertson with their political overtones naturally would be of interest to any literary man or journalist. Johnson as periodical essayist, satirist, and journalist for Cave's Gentleman's Magazine would also be concerned with the copyright cases, Donaldson v. Beckett, and in re Trapp. Since property and its security reflect a dominant concern of current political and social action[15], Johnson's interest in this area forms a major part of his legal thinking. In Knight v. Wedderbourne, Wilson v. Smith et al., in re Auchinleck, Douglas v. Hamilton, and Maclean v. Argyle, Johnson discusses the nature and function of property. It does not surprise one that Johnson's moral and political views would find expression in the law's treatment of these concepts.

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14. cf. Life I, p. 342; Life III p. 356; Gay, The Enlightenment An Interpretation vol. I: The Rise of Modern Paganism, p. 21: "...Johnson, who detested the philosophes as unprincipled infidels, accepted much of their program: he had The Enlightenment Style".

15. Boorstin, pp. 167-186.

Indeed, Johnson's observations on these specific legal cases indicate his traditional habits of thought[16], even when he assumes an advocate's mask.

While there is an element of speculation in elucidating any coherent legal philosophy from these cases, what does emerge is the confirmation of his advice to Boswell: "lawyers are a class of the community, who by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled"[17]. These cases evidence the applicability of this definition to Johnson himself. It is characteristic of the quality of Johnson's mind that his interests lie in all the ramifications of the law and emphasize its general quality. The comprehensive nature of the law in its reflection of the interactions among all elements within society attracts Johnson with his penchant for wide-ranging analysis and comment. Indeed, Johnson's wide-angle vision has its focus on the law because he felt "it is always a writer's duty to make the world better" (Preface to Shakespeare). Since the law is inextricably connected with the moral condition of its society, Johnson maintained that "he that thinks reasonably must think morally" (Ibid), and thus understood his responsibility in dealing with the interrelationship between the law and its society.

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16. Wimsatt, The Prose Style of Samuel Johnson, p. 96-98.

17. Life V. p. 26-27

The legal questions raised in these cases reflect issues that are fundamental to Enlightenment concerns[18]. How the law relates to educational practice, the limits of authority, the nature of discipline, the balance between rights and duties, and the extent of and qualification for government intervention figure prominently in contemporary intellectual debates. Conflicting opinions on the nature, control, and disposition of property; control over the dissemination of ideas; the ability to protect or husband one's own ideas; social prestige and how it affects the fabric of society; communal responsibility and the issues of moral duty, are questions that occupied Enlightenment thinkers. All issues and concerns of this kind are present in the cases, and it is clear from the texture of Johnson's remarks that he assimilated arguments advanced by continental philosophes[19].

Not only do Johnson's comments on these cases reflect current thinking but they show him to be the heir of 17th-century Christian humanism. In England especially after the Revolution of 1688, there was a release of intellectual activity encouraged by an entire century of philosophical enquiry that rejuvenated civilization[20]. The writings of Bacon[21],

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18. Gay, II, p. 8; "The Enlightenment was the age of what David Hume called the moral sciences; sociology, psychology, political economy, and modern education."

19. cf Gay, Vol. I, p. 21; Life I, p.342; Rasselas and Candide; Voltaire II, 125

20. Willey, The Eighteenth-Century Background, p. 1.

21. Life III, p. 11, 194, II, p. 158.

Newton[22], Locke[23], and Hale[24] exerted considerable influence on Johnson. All of these thinkers cultivated scientific enquiry and in conjunction with the concepts of the natural law articulated by Grotius and Puffendorf set the stage for the intellectual revolution of which Johnson was a part. From these antecedents Johnson drew up his methodology of reviewing facts, emphasized close personal observation, and applied rigorous common sense to formulate his legal opinion. Despite the tendency for an idiosyncratic response, there is logic to Johnson's legal reasoning that these cases help to define.

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In a letter dated 3 March, 1772 from Edinburgh, Boswell wrote to Johnson seeking his advice in the matter of a discharged schoolmaster from Campbelltown. In an abbreviated history of the case, Boswell related that Hastie was dismissed from his position "for being somewhat severe in the chastisement of his scholars"[25]. In this letter Boswell continued:

"The Court of Session, considering it to be dangerous to the interests of learning and education, to lessen the dignity of teachers, and make them afraid of too indulgent parents, instigated by the complaints of their children, restored him"[26]. Then he invited Johnson to help draft the defense

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22, cf Life II, 125; Life IV, 23, p. 3.

23. cf Wimsatt, Philosophic Words, pp. 96-98; Alkon, Samuel Johnson and Moral Discipline, Chapter 5, pp. 94-98

24. Life II, p. 158.

25. Life II, p. 144.

26. Ibid, p. 145.

for the appeal to the House of Lords:

> I hope there will be a little fear of a reversal; but I must beg to have your air in my plan of supporting the decree. It is a general question, and not a point of particular law.
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Johnson's guidance in terms of general legal principles yields constituents of the theoretical foundation for his overview of jurisprudential concerns. Although Boswell was a practicing advocate[28], he realized Johnson's considerable ability in general analysis and understood the necessity for reason and experience that shaped a response essential for legal speculation. Johnson's response of "collateral help" illustrates his ability to generalize and presume the moral problems the case raises. An examination of Johnson's construction of the issues in the case reveals a masterful legal presentation. Johnson's approach enabled

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27. Ibid.

28. W.H. Bond, Daniel E. Whitten, "Boswell's Court of Session Papers: A Preliminary check-list," in 18th-century Studies in Honor of Donald F. Hyde, ed. W.H. Bond, (NY: The Gaslier Club, 1970) pp. 231-265; Walker Lowry, " James Boswell, Scots Advocate and English Barrister, 1740-1795," Stanford Law Review (vol. 2, 1949-1950), pp. 471-495; John Murray, "Some Civil Cases of James Boswell: 1772-74," 52 Juridical Law Review (1940), pp. 222-51; T.B. Simpson, "Boswell as an Advocate," 34 Juridical Review (1922), pp. 201 - 225; William K. Wimsatt, jr. and Frederick A. Pottle, eds. Boswell for the Defense 1769-1774, (New York: McGraw-Hill, 1959).

him to develop a line of reasoning that seems to foreclose potential opposition. The power of Johnson's legal acumen leads him to concentrate the argument on the need for a disciplined educational process instead of the particular activity of the respondent.

John Hastie, Boswell's client schoolmaster, had been summarily removed from his position on the charges that: "he was irregular in his attendance upon the school; that he was in the practice of correcting his scholars in a cruel and barbarous manner, to the danger of their health", (Hastie v. Campbell, 28 June; Faculty Decisions, p. 351). Corollary issues in this action involve a question of libel and the rules governing legal evidence. However, Johnson did not focus his remarks on these issues but dealt with the broad principle of "authority"[29]. "The discipline of a school is military. There must be either unbounded license or absolute authority"[30]. "Authority" is a tool for the management of society that is effective through the fictions of justice and the impartiality of law. Johnson understood the dominant currents needed to sustain a social order[31],

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29. Among the definitions Johnson offers in the Dictionary (1755) for; AUTHORITY (auctoritas) include: legal power; influence, credit; power, rule; support, justification, court use; testimony; weight of testimony, creditability.

30. Op. Cit. p. 184.

31. Life of Roscommon (1748), "In absolute governments, there is sometimes a general reverence paid to all that has the sanction of power and the countenance of greatness. How little this is the state of our country needs not to be told".

and in this case he exhibits an ambivalence toward the maintenance of that order. On one hand his argument showed him humane to the individual, but on the other there is a harshness present in his assumptions about the control of the individual in that society.

Johnson's initial reply; "Why, Sir, till you can fix the degree of obstinacy and negligence of the scholars, you cannot fix the degree of severity of the master. Severity must be continued until obstinacy be subdued, and negligence be cured[32], frames the issue of force involved. Johnson does not specify a lex talionis but that degree of retaliative sanction required to maintain the dignity of the schoolmasters:

> The degrees of obstinacy in young minds are very different; as different must be the degrees of persevering. A stubborn scholar must be corrected till he is subdued.
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The object of this personal form of administration of law is ostensibly to create the most favorable environment for learning. In his argument Johnson grants wide discretion in the need and choice of discipline as a precondition for the schoolmaster to teach:

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32. Life II, p. 146.

33. Ibid, p. 184.

> No severity is cruel which obstinacy makes necessary; for the greatest cruelty would be to desist, and leave the scholar too careless for instruction and too much hardened for reproof.
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> 34

Here Johnson is also careful to anticipate and refute the element of cruelty that the appellants would introduce. By suggesting that the ability to enforce discipline is a proper pedagogical method, Johnson is able to maintain that Hastie's action is no more than an effort made in good faith to fulfill his teaching responsibility.

At a dinner in the Mitre tavern, Johnson succinctly sets out his first argument on Hastie v. Campbell:

> Sir, (said he), the government of a schoolmaster is somewhat of the nature of military government; that is to say, it must be arbitrary, it must be exercised by the will of one man, according to particular circumstances. You must shew some learning upon the occasion. You must shew that a schoolmaster has a prescriptive right to beat; and that an action of assault and battery cannot be admitted against him, unless there is some great excess, some barbarity. This man has maimed none of his boys. They are left with the full exercise of their corporeal faculties. In our schools in England, many boys have been maimed; yet I never heard of an action against a schoolmaster on that account. Puffendorf, I think, maintains the right of a schoolmaster to beat his scholars.
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Johnson stipulates a special analogy where limited privilege due to position or status is granted, and the exercise of auctoritas vests its discretion in a schoolmaster as a

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34. Ibid, p. 184.

35. Ibid, p. 157.

sovereign. An abnegation of any semblance of due process of law exists as Johnson has framed the particular society within narrow constructs. This military analogy enables Johnson to advance an administrative rule that severely curtails the operations of individual students. Johnson's argument rests on the theory that the best schoolroom situation depends upon an acceptance of unquestioned rules as in the army. The principle is that a schoolmaster acting in the name of an efficient educational process may do what he considers necessary for successful administration. This rule of law which allows the schoolmaster to exercise such broad discretionary powers may undermine the student's sense of well-being by leaving his rights uncertain and subject to chance. However, this problem is not specifically dealt with by Johnson in this discussion but is alluded to in his belief that the end product benefits the society at large. "He (Johnson) was rather one who believed that the chief end of action was the good of society, and that to this end the principal concern was getting things done"[36]. Indeed, Hastie's method of discipline is seen by Johnson as an effort to satisfy the schoolmaster's role in society.

The philosophical ramifications of Johnson's viewpoint set out a control vested in the use of power that defines the nature of the duty needed for benevolent despotism. There is a restriction present in the privilege for any

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36. Herman W. Liebert, "Reflections on Samuel Johnson", in Samuel Johnson A Collection of Critical Essays, edited by Donald J. Greene, (Englewood Cliffs: Prentice-Hall, Inc., 1965), p. 19.

remedy [37], i.e. means by which a right is enforced or the violation of a right is prevented, redressed, or compensated. The effect of Johnson's argument is an emphasis on the minimal corresponding rights granted to the individual students. Johnson's justification for this legal comment approached his answer to the American Colonists in Taxation No Tyranny:

> Government is necessary to man, and where obedience is not compelled, there is no government ....Society cannot subsist but by force, first by making laws, and then of enforcing them.
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> 38

In this instance Johnson affirms all these government powers to be in the complete domain of the schoolmaster. The precedent found in Justinian's 'force of law'[39] serves as an external source for comparison and authority. Terror or a form of it provided a foundation for the social fabric in eighteenth-century Britain[40]. Johnson was aware that

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37. Among the definitions offered in the Dictionary for REMEDY include: cure of any easiness; that which counteracts any evil (civil government is the proper remedy for the inconvenience of the state of nature, Locke); reparation, means of repairing hurt.

38. Taxation No Tyranny (1775);(Yale Edition)Volume 10, edited by Donald J. Greene, p. 448.

39. Henry John Roby, An Introduction to the Study of Justinian's Digest, (Cambridge; At the University Press, 1886), p. XXV; the Digest was made the exclusive legal authority and its emphasis on the reason of law attempts to give a unity to the whole.

40. Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow, Albion's Fatal Tree:Crime and Society in Eighteenth-Century England, (New York: Pantheon Books, 1975), p. 17-65.

control by force is not incidental but substantive to a present legal and legislative remedy. He realized that some use or element of force was a universal instrument for state sanction or control.

Public rebellion was odious to Johnson[41], and its prejudicial effect on the rule of law was viewed through the microcosm of his own experience. This encouraged Johnson to view the possibility that lawlessness which could reign in a classroom demands a method of regulation for the betterment of all. Johnson avers that "The degrees of scholastic, as of military punishment, no stated rule can ascertain, it must be enforced till it overpowers temptation; till stubbornness becomes flexible, and perverseness regular"[42]. Johnson's argument does not reveal any understanding of independence in the relationship between freedom and the need and right of authority. His only guidance lies in the nebulous concept of custom and a somewhat naive faith in the wise use of power. Johnson suggests unwritten but established pedagogical practice where the force, use, and temper of discipline is determined by experience.

While learning demands external discipline, it is questionable whether Johnson was fully apprised of Hastie's overzealous enforcement:

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41. The False Alarm , Vol. 10, pp. 313-345.

42. Life II, p. 184.

> that scarce a day passed without some of the scholars coming home to their parents with their heads cut, and their bodies discoloured. (2 Paton 277)

Here is an example of a caveat in Boswell's reporting for the official report of the case stresses the severity of the punishment and the resulting damage done to the students. The unreliability of Boswell's reporting must be kept in mind as well as his motive in the presentation of Johnson's argument[43]. It must be realized that the presentation of a factual situation in any legal case is a prime determinant for analysis. Boswell's function as a reporter in this case enabled him to arrange and edit events and thereby modify the material Johnson used to develop his response. In this instance it appears Boswell reflects his involvement as an advocate[44], and thus the facts are refracted.

Johnson's predisposition for and conviction that any government is better than none at all reflects Hobbes'

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43. James L. Clifford, ed., Twentieth Century Interpretations of Boswell's Life of Johnson A Collection of Critical Essays, (Englewood Cliffs; Prentice-Hall, Inc., 1970).

    David L. Passler, Time, Form, and Style in Boswell's Life of Johnson, (New Haven and London: Yale University Press, 1971).

    Irma S. Lustig, "Boswell's Portrait of Himself in The Life of Samuel Johnson," (unpublished, Ph.D. Diss., University of Pennsylvania, 1963).

44. William K. Wimsatt, jr, and Frederick A. Pottle, editors, Boswell for the Defense 1769-1774, The Yale Editions of the Private Papers of James Boswell, (New York: McGraw-Hill Book Company, Inc., 1959).

influence[45]. In his dictated remarks on the case Johnson respects some limitation by external standards: "Correction must be proportioned to occasions. The inflexible must be subdued by harsher standards"[46]. Yet his discussion reaffirms a principle of sovereignty[47] vested in a master over a classroom that fills out the parallel with military law. In this framework of martial law, one may apply Johnson's basic premise that"All government supposes subjects, all authority implies obedience"[48]. That is to say the concept of sovereignty that a schoolmaster enjoys has to be unrestricted by virtue of the quality of this sovereign authority inherent in his position. Johnson understands a form of covenant instituted among parents, students, and teachers, and thus underscores the powers in sovereignty Hobbes' appreciated:

> ....to the Sovereign is committed the Power of Rewarding with Riches, or honour; and of Punishing corporall, or pecuniary punishment, or with ignominy every Subject according to the Law he hath formerly made; or if there be no Law made, according as he shall judge most to conduce to the encouraging of men to serve the Common-wealth, or deterring of them from

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45. Greene, Politics of Samuel Johnson, p. 245, 253; Life I, 408.

46. Life II p. 184.

47. Among the definitions in Johnson's Dictionary for SOVEREIGNTY include: supremacy; highest place; supreme power; highest degree of excellence. (The sole authority of making war and peace, are the true marks of sovereignty Davies)

48. The Works of Samuel Johnson, Volume 10, p. 12.

doing dis-service to the same.....

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This theory of government allows Johnson to expound in a straight-forward way the arbitrary principles that operate here.

Proceeding in his legal discussion Johnson advances to a discussion of Hastie's method of punishment. Johnson dismisses the unusual use of the measuring instrument known as the "word square" as a weapon on the grounds that its physical effect was temporary:

> No instrument of correction is more proper than another but as it is better adapted to produce present pain without lasting mischief. Whatever were his instruments, no lasting mischief has ensued; and therefore, however unusual, in hands so cautious they were proper.

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Carefully, Johnson discusses this device, and refutes any suggestion of brutality that may result from Hastie's use of it.

Finally, the discussion concludes with a sympathetic portrait of a schoolmaster living in a hostile community both frightened and envious of him:

> If it be supposed that the enmity of their fathers proves the justice of the charge, it must be considered how often experience shews us, that men who are angry on one ground

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49. Thomas Hobbes, Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil, selected by, Richard S. Peters, edited by Michael Oakeshott, (Collier Macmillan, London, 1975 printing), Chapter 18, p. 139.

50. Life II, p. 185.

> will accuse one another; with how little kindness in a town of low trade, a man who lives by learning is regarded; and how implicitly, where the inhabitants are not very rich, a rich man is hearkened to and followed.
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> 51

Johnson's exposition of this petty jealousy demonstrated by the people in Campbelltown is an attempt to pre-empt any revocation of their covenant. He impugns their motives in bringing the action and warns one to carefully distinguish the specious elements in their arguments. Johnson does this by discussing mob psychology and persecution based on abuse of legal process:

> In a place like Campbelltown, it is easy for one of the principal inhabitants to make a party. It is easy for that party to heat themselves with imaginary grievances. It is easy for them to oppress a man poorer than themselves; and natural to assert the dignity of riches, by persisting in oppression. The argument which attempts to prove the impropriety of restoring him to his school, by alledging that he has lost the confidence of the people, is not the subject of juridical consideration; for he is to suffer, if he must suffer, not for their judgment, but for his own actions. It may be convenient for them to have another master; but it is a convenience of their own making. It would be likewise convenient for him to find another school; but this convenience he cannot obtain.-- The question is not what is now convenient, but what is generally right.
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In this way Johnson not only deals with the legal questions raised in the issue but subtly throws doubt on the good faith of the prosecution.

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51. Ibid.

52. Ibid.

Although Johnson was not blindly reactionary, aspects of his argument are profoundly disturbing. Almost any educational theorist[53] would have been horrified at his assertion that "children, not being reasonable, can be governed only by fear". Evidently, Johnson's great powers of observation failed him in this matter. A foundation is laid for a position able to do severe psychological damage to a child. Moreover, the extension of Johnson's argument suggests an equation of learning with fear. The tension induced in a student undermines the acquisition of learning and this causes eventual damage to the proper reception of knowledge. This approach may discourage any instinctive desire for learning and is itself destructive. It is inconsistent for Johnson who took such care in learning not to realize the damaging prospects of his argument.

Johnson's attack is paradoxical since he labeled his own schoolmaster Mr. Hunter, "very severe and wrongheadedly severe"[54]. This illiberal approach to student discipline is at odds with other views of discipline Johnson was known to espouse[55]. Certainly, the focus of Johnson's position is on the schoolmaster's status and the respect for his judgment required in the classroom. Specifically, Johnson's argument develops his parallel with martial law and the

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53. cf Roger Ascham, The Schoolmaster (1571), The Whole Works of Roger Ascham, Now First Collected and Revised by Rev. Dr. Giles, Volume III, (London; John Russell Smith, 1864), p. 120.

"Ascham" in the Lives of Sundry Eminent Persons, The Works of Samuel Johnson, A New Edition in 12 Vols with an Essay on his Life and Genius, by Arthur Murphy, Esq., (London; J. Nichols and Son, 1810), vol. 12, p. 308-328.

54. Life I, p. 46.

55. Life II, p. 476.

complex legal duty present in the master-servant relationship. The legal relationships contained in the concept in loco parentis hold the same legal relation for a citizen under military domination. In this case Johnson sees that the power exercised by Hastie is expressed in Hobbes's terms as the "present means to obtain some future apparent good"[56]. Thus contrary to the opinions characteristic of the Enlightenment[57], Johnson views this society existing in a school from a positivist point of view and avers that the reasonableness of authority lies in the power to exercise that authority. Future civilization requires that "the master, who punishes, not only consults the future happiness of him who is the immediate subject of correction; but he propagates obedience through the whole school; and establishes regularity of exemplary justice"[58]. The broad question for this case is not the vital interests of the students but the position the master plays in moulding the future.

Johnson appeals to the principle of the 'reasonable man', where limits are determined by ad monendum et docendum, and his assertion that "custom and reason have, indeed, set some bounds to scholastic penalties"[59]. Yet, his limitation

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56. Hobbes, Leviathan, Chapter 10, p. 72.

57. Gay, The Enlightenment An Interpretation Vol. I; The Rise of Modern Paganism, pp. 3-27;

    ___ , The Enlightenment An Interpretation Vol. II; The Science of Freedom, pp. 397-447.

58. Life II, p. 184.

59. Ibid.

is a civil law principle that "a master who strikes at a scholar's eye shall be considered a criminal"[60]. Johnson extends this principle in a way that is almost ludicrous; "the schoolmaster inflicts no capital punishment, nor enforces his edicts by either death or mutilation"[61]. For this capital response would subject the schoolmaster to civil authority that would naturally prohibit such extreme chastisement. The issue concerns the limitations of punishment within the classroom and the parameters of the schoolmaster's discretion in that punishment. Johnson develops his argument to this extent in order to obscure the real issue and by exaggeration bury it.

Johnson's memorandum on this case hints at the basis of the corollary issues where Hastie is accused of irregularity in attention to his duties. Also, jealousy in business competition may yield the motive behind the charge that Hastie "traded in cattle grazing and farming - dealt in black cattle-shipping business - herring fishing" (2 Paton 277). An appreciation of the structure of a legal argument is evident as Johnson minimizes Hastie's putative business interests and puts the prosecution on the defensive. Johnson introduces this aspect by the suggestion that "those who are dispersed cannot be found; those who remain are the sons of his persecutors, and are not likely to support a man to whom their fathers are enemies"[62]. This challenge to the veracity of the accusers shifts the focus from the

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60. Ibid.

61. Ibid.

62. Ibid, p. 185.

accused in a clear, transparent advocate's device.
Possibly Johnson's view would place Scotland and the reaction to her schoolmaster as evidence of a primitive culture[63]. Also, Johnson's well known prejudice against the Scotch and his English chauvinism appear as undercurrents here[64]. Problems of evidence and the way this evidence may be tainted are suggested as well as the correctness of the facts themselves. A question is raised as to what or who constitutes Hasties peers. Is a schoolmaster's position unusual and does it require a different set of social norms especially in a society whose prejudice is transparent? A presumption of guilt is certainly present for Hastie in the climate of Campbelltown. Toward this end Johnson questions the fundamental elements of jury qualification and conflict of interest in the citizens.

This final concern with the hostility and the distrust to which a schoolmaster may be subject reflects the indignity Johnson endured as an assistant instructor in a school at Market-Bosworth, Leicestershire. Johnson portrays Hastie sympathetically as a disparaged victim of a malicious community that is leery and suspicious of knowledge. The techniques used in presenting the accused Hastie as victim are designed to create sympathy in the jury. Identification with the accused and the staged prosecution is intended to elicit the most favorable response whether

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63. Samuel Johnson, A Journey to the Western Islands of Scotland, Yale Edition Volume IX, edited by Mary Lascelles, 1971.

64. Life II, pp. 126, 171, 363, 520, 300 n. 5.

justified by fact or not. Observation and an acute awareness of psychological ploys serves Johnson's legal presentation. His performance is consistent with Hagstrum's understanding:

> Virtually every thing that Samuel Johnson said about the mind indicates firm adherence to the principle that most human knowledge arises from the closest possible contact with objective, inescapable, coercive experience.
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> 65

An intuitive understanding of the persuasive arts is revealed in this very effective summation of Johnson's thinking. For Johnson's grasp of human nature is most readily realized in his legal comments. Aware of the subtle response needed for a jury to support his contention, Johnson in his legal presentation plays on the nuances of his client's position to elicit the most favorable reception.

Characteristically, Johnson is able to respond to Lord Mansfield's dictum: "My Lords, severity, is not the way to govern either boys or men", by creating a distinction which displays his legal acumen: "Nay, (said Johnson) it is the way to mend them"[66]. Later Johnson wrote to Boswell on this decision: "I am glad if you got your verdict by your cause, and am yet of opinion, that our cause was good, and that the determination ought to have been in your favor.

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65. Jean H. Hagstrum, Samuel Johnson's Literary Criticism, (1952; rpt. Chicago; University of Chicago Press, 1967), p. 19.

66. Life II, p. 186.

Poor Hastie, I think, had but his deserts"[67]. Does Johnson object to the justice of the summary removal of Hastie or does he maintain the rights and privileges of schoolmaster?

The narrow legal issue rests on an application of Act 1693 c. 22 where schoolmasters are declared liable to the trial, judgement, and censure of the presbyteries of the borough, for their sufficiency, qualifications and deportment in their office (2 Paton 277). Under this act, discretion rests with the community and Johnson's general argument on discipline may only be viewed in the meaning of deportment. However, since the discretion is vested in the local presbytery, the weight of Johnson's argument would be defeated on the narrow legal issue. Nevertheless, despite Hastie's seemingly excessive brutality, Johnson's disquisition on the interrelationships between students, master, and community is successful in carrying through most of its general assumptions.

While Johnson successfully encloses his brief on points, the distinct propositions of law or questions of law arising or propounded in a case, his habit of mind demands further elaboration and question. It must always be remembered that legal argument necessitates a calculated effort to present a strong case for any client. And thus, this need to make a strong case for the client renders suspect any general principles developed in the course of a plea. While Johnson stresses the dangerous implications in the subversion

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67. Ibid, p. 202.

of pedagogical authority, he was aware of its limitations. As his experience at Oxford indicated, he, nevertheless, realized that the learning process must accommodate a degree of individuality. Despite his countless personal inconsistencies and contradictions, Johnson's motive is clear. Wearing the mask of an advocate, his forte in grasping essential situations and moulding them into coherent, reasoned argument. To generalize from this case, Johnson's legal acumen is revealed by a firm, sympathetic identification with a schoolmaster's problems that is persuasive and compelling. These qualities in his comments make his brief stronger and even convincing. Johnson is able to do this despite his own feelings about the merits of the issue. Certainly, he abstracts from this case an argument for discipline in society at large, but this in no way lessens his understanding of Hastie's predicament. Indeed, Johnson's integrity is enhanced despite his cautious, traditional response to Boswell's plea.

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Discourse on the law and especially on the events that require its intervention was commonly considered to be within the province of an eighteenth-century man of letters[68].

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68. Paul Fussell, Samuel Johnson and the Life of Writing, (New York: Harcourt Brace Jovanovich, Inc., 1971), p. 45. "It would be a mistake to imagine that in his leanings toward the law Johnson is behaving very idiosyncratically. He is only one among countless eighteenth-century writers who were bred to the law only to deviate into literature".

Indeed, Johnson is in no way deterred by his amateur status from commenting on aspects of the law and its integration within society. As a former political commentator for Cave in writing parliamentary reports[69], Johnson is keen to answer Boswell's summons for consultation in the Stirling election case. This case provides an opportunity for Johnson to comment on the political process such as it existed at this time and the possible corruption that may occur. In his remarks Johnson asserts that a legal and moral duty exists for citizens to guard their own freedom. As Demetrius in Irene proclaims:

> A thousand horrid Prodigies foretold it.
> A feeble Government, eluded Laws,
> A factious Populace, luxurious Nobles,
> And all the Maladies of sinking States.
> When publick Villainy, too strong for Justice,
> Shows his bold Front, the Harbinger of Ruin,
> Can brave Leontius call for airy Wonders,
> Which Cheats interpret, and which Fools regard?
> When some neglected Fabrick nods beneath
> The Weight of Years, and totters to the Tempest,
> Must Heaven dispatch the Messengers of Light,
> Or wake the Dead to warn us of its Fall?
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> [70]

Here, Johnson is concerned with the specific considerations

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69. Life I, p. 150 n. 2; Greene, Political Writings, pp. 5, 77, 127 n., 282 n.; Samuel Johnson, Debates in the Senate of Lilliput; John Wain, Samuel Johnson, (London: Macmillan Company, 1974), pp. 89-92.

70. Samuel Johnson, The Poems of Samuel Johnson, edr; David Nichol Smith and Edward L. McAdam, (1941, rpt. Oxford: Clarendon Press, 1968), Act I, Scene I, lines 36-47, p. 250.

that operate in his understanding of an electoral process. Primarily, his innate conservatism requires the citizenry to endure the consequences of any breach in their vigilance. The Stirling case reflects a moral position where the breach demands the acceptance of punishment or of suffering. Hence, it will be evident that Johnson expects a form of lex talionis or a moral retaliation dictated by his natural reason to exist.

John Paterson et al v. Alexander et al (Magistrates of the Town Council of Stirling), 1 March, 1775, Faculty Decisions, is a case that involves a pactum illicitum. An association of three leading politicians conspired to protect their interests by trying to avoid an election contest. These politicians used undue influence in their efforts to undermine the public, and their mutual bond subverted the quasi-fiduciary relationship they enjoyed in respect to the council. On account of their secret, unjustifiable compact, the court set aside the subsequent election. Johnson's remarks[71] discuss the effective disenfranchisement of the innocent because of these councillors' surreptitious activity. Legally, Johnson's remarks focus on the equitable principles operative in the court's ruling, but in no way minimize the moral responsibility inherent in the electoral process.

Public policy regarding the relationships involved in an election demands the recognition of both civil and moral

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71. Life II, pp. 373-374.

law. The contractual nature of the election process in society permits an application of conventional principles of contract. While Johnson's argument suggests an element of confirmation by the parties in the Stirling election, the right of recission must still exist because of the presence of undue influence. Little distinction needs to be made in this contact since the councillors clearly violated their fiduciary capacity. In the opinion of the court the election is invalidated by the councillors' subversion of their guardianship. In contemplating a wrong to society, the ultimate aim of the litigants in Alexander et al is the destruction of liberty for the Stirling electorate.

Unfortunately, Johnson's argument forecloses a plea of ignorance on behalf of the populace as it attempts to suggest that the responsibility for a free election is vested solely in the constituents:

> All societies, great and small, subsist upon this condition; that as the individuals derive advantages from union, they may likewise suffer inconveniences; that as those who do nothing, and sometime those who do ill, will have the honours and emoluments of general virtue and general prosperity, so those likewise who do nothing, or perhaps do well, must be involved in the consequences of predominate corruption.
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> 72

It is regrettable in this instance that Johnson does not realize that a function of the law is to protect the weak and

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72. Ibid, p. 374.

uncertain. The potential for an abuse of power is evidenced in most societies, and the existence of corruption may be due to misplaced trust by the people. Such contractual unfairness has been discussed by modern commentators:

> In such cases as these (Fiduciary relationships) there is a presumption that the subordinate party has confidence in and yields to the authority of the dominant party, so that transactions between them are not on the ordinary footing of transaction between strangers.
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This analysis is appropriate here since the basic theory of contractual relations explored in this case conforms to the modern view. The thrust of Johnson's argument is on one of collective guilt in the citizens themselves for the existence of this corruption:

> That borough, which is so constituted as to act corruptly, is in the eye of reason corrupt, whether it be by the uncontrollable power of a few, or by an accidental pravity of the multitude.
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> 74

Indeed, Johnson's argument intimates that the entire community should suffer for allowing this type of influential corruption to fester.

In his observation that power survives non numero sed pondere, Johnson applies general principles for his analysis. There is a duty in the community to regulate an abuse of influence and the attendant power it wields. Power relationships in a society must, however, be subjected

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73. Keith, The Law of Contract, (Oxford: Clarendon Press, 1931), p. 42.

74. Life II, p. 373.

to the rule of law and the spirit of justice. Johnson's view disregards the peculiarities of political organization where there is some abdication of responsibility to the system; yet, he reflects a skepticism of the political process. Johnson neglects to consider the degree to which the community is informed as to the intricacies of the dominant power structure. His broad castigation of and demand for group responsibility rests on a principle of limitations imposed on the activities of officials by the society. Johnson asserted that the councillors' compact only reflects the custom or normal operation of the community.

However, this is not to say that Johnson is either a political reactionary or blase' about political realities[75]. Naturally, in the context of the Stirling case, Johnson must function as an advocate and shape his comments to support Boswell's clients and advance their case. However, a hortatory moral impulse in the texture of his discussion does emerge and suggests the makings of a positive contribution on behalf of the electorate. Johnson's comments imply the responsibility for a constructive watch rests with the members in a society on the activity of its elected officials:

> The objection, in which is urged the injustice of making the innocent suffer with the guilty, is an objection not only against society but against the possibility of society.
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> [76]

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75. Greene, The Politics of Samuel Johnson, for a major discussion of Johnson's awareness of politics and the political activities in which he was engaged.

76. Life, II, p. 373

He refutes this objection by his argument that the error of the councillors now exposed would make the citizens skeptical of the political process in the future. Greene appraises this attitude in Johnson:

> Johnson carried his skepticism further, and comparing proposed systems of government with the realities of human nature saw their fallacies and potentials for danger easily enough. Yet his skepticism was not of a kind to cause him to lapse into cynical inaction: he had the empiricist's faith that by careful observation and analysis, improvement can be brought about - slowly, perhaps, but certainly; and he had the rationalist's conviction that absurdity and ignorance and obscurantism are absolute evils, to be combated at all times.
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> 77

Johnson's argument in Paterson et al v. Alexander et al is didactic in its common sense and in its stress on community responsibility. It is from his observation on human nature that Johnson realized error may bring eventual benefit[78].

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In general observation and the communication of reasoned legal commentary, Johnson is particularly successful in defamation cases. As an expert on language[79]

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77. Op cit. p. 235.

78. cf. The Rambler Essays for Johnson's finest writing on morals and human experience.

79. James H. Sledd, Gwin J. Kolb, Dr. Johnson's Dictionary; Essays in the Biography of a Book, (Chicago; University of Chicago Press, 1955), pp. 25-37.

Johnson possesses unusual skill in applying a blend of authority and common sense to the specific circumstances of each example that comes to his attention. He is able to discern differences in interpretation and in the effect words have, and offer incisive comment on the intention behind the language used[80]. Defamation cases require the refined wisdom of a "right thinking individual" to weigh the general import of the words chosen and the extent of injury they may do to the reputation. Insight into the effect of language on an individual and the community is essential for any test for defamation. Therefore, these cases are of specific interest to Johnson for they permit him to study the most detailed elaboration of words both in their meaning and context. Johnson is deftly able to weld his knowledge of the impact of language with an understanding of legal reasoning that reveals his broad acquaintance with human experience.

Johnson's attitude to one's reputation is not that of a perfunctory concern common to the literary man but suggests the strengths of a moral satirist[81]. In "London" Johnson shows the value he places on one's self-esteem:

> But thou, should tempting villainy present
> All Marlb'rough hoarded, or all Villiers spent,
> Turn from glitt'ring bribe thy scornful eye,

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80. W.K. Wimsatt, jr., Philosophical Words: A Study of Style and Meaning in the Rambler and Dictionary of Samuel Johnson, (1948; rpt. New York: Archon Books, 1968).

81. Walter Jackson Bate, The Achievement of Samuel Johnson, (New York: Oxford University Press, 1955), pp. 17-23.

George Sherburn, Donald Bond, A Literary History of England; Vol, III, The Restoration & Eighteenth Century, (London: Routledge & Kegan Paul ltd., 1967), pp. 990-991.

> Nor sell for gold, what gold could never buy,
> The peaceful slumber, self-approving day.
> Unsullied fame, and conscience ever gay.
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> 82

Thus, while Johnson is known to place a premium on reputation, it is instructive to follow his arguments primarily for the defense. His achievement is an ability to understand all aspects of an issue, compromise his initial impulses, and conclude by wearing the mask of an advocate. Especially, in these cases there is a constant interplay between his principal legal concerns and those of his own personal struggle.

In Dr. John Memis v. Provost James Jop et al, Manager of the Infirmary of Aberdeen, 12 July, 1776; Faculty Decisions, Johnson writes for the defense. The issue concerns the choice of an appellation or title granted a professional man that is alleged to be degrading. The question is to distinguish whether the use of "Doctor of Medicine" instead of "Physician" is demeaning and if so, whether this diminishes Memis' reputation in the eyes of the community. Naturally, Johnson refers to the tortious quality of interfering with a prospective advantage and then skillfully introduces the legal maxim de minimis non curat lex. He does this by treating Memis' claim as insignificant. However, the texture of his argument relies on the denotative and connotative values in the respective words 'medicine' and 'physician'.

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82. London: A Poem in Imitation of the Third Satire of Juvenal, lines 85-90.

Johnson discerns no significant difference between the two titles and avoids the seduction of tangential argumentation. His brief, though perceptive, comments reflect the concrete nature of his experience and his skill in avoiding mere tautology.

Johnson discusses possible rationales for a rejection of the title 'Doctor of Medicine'. He suggests that one refuses this title "because he supposes himself disgraced by the doctorship, or supposes the doctorship disgraced by himself"[83]. Johnson attempts to point out the illustrious nature and lineage of the title:

> To be disgraced by a title which he shares in common with every illustrious name of his profession, with Boerhaave, with Arbuthnot, and with Cullen, can surely diminish no man's reputation.
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> 84

Johnson avers that in no way may a person's reputation be harmed by the substitution of 'Medicine' for 'Physician'. Indeed, he maintains the same quality of prestige and respect is invested in each word. Johnson's argument cleverly introduces a respect by association.

In the Dictionary Johnson defines 'Doctor' as "a physician: one who undertakes the cure of disease"; 'Medicine' as "physick: any remedy administered by a physician", and 'Physician' as "one who possesses the art of healing". There

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83. Life II, p. 372.

84. Ibid.

exists an interrelationship among all these words that precludes gradations and degree. By offering an examination of the precise meaning of each word, Johnson's tactic is to establish the similarity and compatibility for each term. Thus, Johnson confidently concluded that "a Doctor of Medicine is a physician under the protection of the law, and by the stamp of authority"[85]. From this conclusion, Johnson questions if Memis can legitimately sustain his action since he sought and received his diploma:

> That this gentleman is a Doctor, his diploma makes evident; a diploma not obtruded upon him, but obtained by solicitation, and for which fees were paid. With what countenance any man can refuse the title which he has either begged or bought, is not easily discovered.
> 86

Having successfully qualified as a doctor, Memis is barred from relief on a fictitious difference in the nomenclature. On the basis of this point Johnson pleads that Memis's challenge lacks substance and should be denied.

In his discussion Johnson defines the effect of defamation by slander:

> All verbal injury must comprise in it either some false position, or some unnecessary declaration of defamatory truth.
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85. Ibid.

86. Ibid.

87. Ibid.

Johnson understands the need to carefully scrutinize the truth of potentially corrosive language. His legal understanding of defamation conforms to that of Blackstone:

> injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation.
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> 88

> In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever the offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit.
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> 89

The placement of Johnson's definition at this point in the discussion enables him to set out a framework from which he can effectively concentrate on those elements of the tort he wants to be argued. This tactic permits Johnson to control the direction and tone of the legal argument, and thus, reveals his fine grasp of advocacy.

Johnson focuses on the prestige inherent in the term 'Doctor'. Most clearly, Johnson stresses the rights and privileges vested in 'doctor' and studies the veneration common to that title. A vernacular use of doctor is

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88. Bl. Comm III, p. 123.

89. Bl. Comm. IV, p. 150.

examined in particular to its full implications:

> 'What is implied by the term Doctor is well known. It distinguishes him to whom it is granted, as a man who has attained such knowledge of his profession as qualifies him to instruct others. A Doctor of Laws is a man who can form lawyers by his precepts. A Doctor of Medicine is a man who can teach the art of curing diseases.
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Professionally, the term requires an ability to instruct in the arts of that discipline and thus suggest the maxim nil dat quod non habet. To operate under this principle an assertion of skill in the art is required. And, Johnson maintains "whoever practises physic, not being a Doctor, must practice by a license, but the doctorate conveys a license in itself"[91]. Essentially, this argument appeals to the common sense logic of the "right thinking members of society", and satisfies the legal test for defamation unobtrusively.

Dismissing any suggestion of malicious intent, Johnson avers accident and encourages Memis' appellation to be seen in fact to be the more honorable one. "By what accident it happened that he and the other physicians were mentioned in different terms, where the terms themselves were equivalent, or were in effect that which was applied to him was the more honorable, perhaps they who write the paper cannot now remember"[92]. It is interesting that Johnson speculates on

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90. Life II, p. 373.

91. Ibid.

92. Ibid.

the intent behind the institution of civil proceedings. Any hint of possible abuse of the legal process is denied as is an inadvertent negligence. His argument concludes in a refusal to discern the Infirmary's behavior as evidence of a lack of reasonable foresight. Johnson vigorously maintains that the Infirmary exercised proper judgement as it "consulted only what appeared to them propriety or convenience".

Endeavouring to circumscribe the tort within the frame-work of defamation, Johnson's strategy is to confine the tort to libel and minimize any hint of malice by casually dismissing the basis of the action as irrelevant. Alternatively, Johnson pleads the alleged defamatory words must be read in mitiori sensu. Usually pleaded in spoken defamation actions, the mitior sensus rule would determine the test as to whether the words are not defamatory unless no other sense could be read or construed. Johnson's argument on behalf of the Infirmary reasserts that in substance the two titles for a medical man are equivalent and honorable. Therefore, Johnson maintains that the impact of the language used holds no capacity for injury.

Johnson is not insensitive to the vanity in man that demands accurate and proper recognition for achievement and position. In the Vanity of Human Wishes a dominant theme is the varied manifestations of human pretense and hope:

> With distant voice neglected Virtue calls,
> Less heard and less, the faint remonstrance falls;
> Tir'd with contempt, she quits the slipp'ry reign,

And Pride and Prudence take her seat in vain.

93

Aware of the desires of one's ego, Johnson is concerned with the frustrations inherent in the lack of acknowledgement of personal achievement. While he invests more integrity than was warranted in the Infirmary's activity, Johnson implies the transitoriness of human satisfaction but does not neglect the need for the reassurance of personal worth. Johnson is justified in thinking that fame is "a desire of filling the minds of others with admiration"[94]. In his dictated remarks on the Memis' case, Johnson discerns a false vanity that nevertheless is common even to intelligent minds.

In the next defamation case John, Robert, and David Scotland v. The Reverend Mr. James Thompson, 8 August, 1776, Faculty Decisions, the court held against Mr. Thompson.

Boswell describes the circumstances behind the cause of action:

> In the course of a contested election for the Borough of Dunfermline, which I attended as one of my friend Colonel (afterwards Sir Archibald) Campbell's counsel; one of his political agents, who was charged with having been unfaithful to his employer, and having deserted to the opposite party for a pecuniary reward -- attacked very rudely in a newspaper the Reverend Mr. James Thompson, one of the ministers of that place, on account of a supposed allusion to him in one of his sermons. Upon this the Minister, on a subsequent Sunday, arraigned him by name from the pulpit with some severity; and the agent,

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93. The Vanity of Human Wishes, lines 333-336, p. 46.

94. Rambler 49, p. 265.

> after the sermon was over, rose up and asked the minister aloud, 'What bribe he had received for telling so many lies from the chair of verity.'
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> 95

In retaliation for this attack from the pulpit, the Scotland family brought an action against Thompson in the Court of Session. The Scotlands alleged successfully that they were defamed and sought punitive damages. However, "Johnson was satisfied that the judgement was wrong"[96] and dictated to Boswell an argument in confutation of the court's decision. For Johnson the circumstances in this case are especially grave since both political and religious issues are involved.

As a dedicated religious thinker[97] Johnson's comments on this case are not polemical, but with forensic ingenuity focus on the rights and duties of a minister to advise his congregation. Johnson's remarks reflect a shrewd grasp of the stylized common sense that most effectively persuades a jury. Subtly developed to minimize the confused entanglements of a legal jargon, Johnson'a argument relies on ecclesiastical history as precedent and advances a limited defense of privilege. In addition, his argument expounds a theory of public policy, and intimates the contractual nature inherent in the clergy's duties and position. Naturally, Johnson advances the defense of veritas convicii and weaves all his defense points into a tight and structured fabric. Although the Reverend Mr. Thompson discussed

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95. Life III, p. 58.

96. Ibid. p. 59.

97. James Gray, Johnson's Sermons: A Study, (Oxford: At the Clarendon Press, 1972).

personalities from his pulpit, Johnson is not dismayed as the Court of Session is at the potential abuse of the minister's position. Indeed, Johnson suggests that the office of a clergyman is generally enhanced by a display of moral outrage.

Johnson attempts to frame his discussion by initially confusing the defamation as one of libel per quod, i.e. "with regard to words that do not thus apparently, upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened"[98]. The defense strategy is to mitigate the innuendo, colloquium (an averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them, Carter v. Andrews, 16 Pick., Mass. 6), and to present explanatory circumstances which strengthen Mr. Thompson's position. It is important that Johnson develops and refines most favorably the circumstances from which the minister spoke. Even if the words would be construed as one of libel per se, i.e. "the words must be of such character that presumption of law will arise therefrom that the plaintiff has been degraded in the estimation of his friends or of the public or has suffered some other loss either in his property, character, reputation, or business or in his domestic

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98. Bl. Comm. III, p. 124.

or social relations" Whitcher v. Serbook Distributing Co. 189 S.C. 243, 200 S.E. 848,849, Johnson suggests that Thompson's words were responsible ahd privileged. However, the necessity to lay a foundation for the mitigation of damages is behind the effort to portray the defamation as per quod.

Typical of Johnson's style of argument, the use of exempla and analogy predominate. A characteristic of Johnson's prose is his use of these amplification devices to advance his arguments and to broaden the scope of his speculation on public issues at the same time. In maintaining "the right of censure and rebuke seems necessarily appendant to the pastoral office"[99], Johnson introduces concepts of legally enforceable contractual relationships between minister, church, and congregation. With characteristic insight Johnson adopts three easily apprehended examples to illustrate the extent of contractual relations:

> He, to whom the care of a congregation is entrusted, is considered as the shepherd of a flock, as the teacher of a school, as the father of a family.
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Johnson applies general principles to the facts of the case to suggest those salient principles which are derived from the relationships contained in these examples. Buttressed by the strictures of the Church of Scotland's constitution (Second Book of Discipline Act. 4), the

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99. Life III, p. 59.

100. Ibid.

obligations of Mr. Thompson's office are advanced to form the basis of the contract element, Clearly, by his chosen analogies Johnson avoids entering into the legal niceties of contract. He plays with aspects of contract in his teacher-wage example;

> As a teacher giving instruction for wages and liable to reproach, if those whom he undertakes to inform make no proficiency, he must have the power of enforcing attendance, of awaking negligence, and repressing contradiction,
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> 101

but expands the body of his argument in strong, common sense terms.

Precedents from Church history and accepted custom provide the substance for Johnson's refutation:

> If we enquire into the practice of the primitive church,we shall, I believe, find the ministers of the word exercising the whole authority of this complicated character. We shall find them not only encouraging the good by exhortation, but terrifying the wicked by reproof and denunciation. In the earliest ages of the Church, while religion was yet pure from secular advantages, the punishment of sinners was publick censure, and open penance; penalties, inflicted merely by ecclesiastical authority, at a time while the church had yet no help from the civil power;
> .....
> The hour came at length, when after three hundred years of struggle and distress, Truth took possession of imperial power, and the civil laws lent their aid to the ecclesiastical constitutions .....But the State, when it came to the assistance of the Church, had no intention to diminish its authority.
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> 102

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101. Ibid.

102. Life III, pp. 59-60.

An ecclesiastical authority's viability in a secular court is recalled by Johnson in his statement that: "the Christian magistrate interposed his office, not to rescue sinners from censure, but to supply more powerful means of reformation"[103]. Restricted but not eliminated, the power of the Church to reproach and condemn remained. Manipulation of ecclesiastical interests operated within the laws of secular authority to reinforce each other. A realization of this combination is advanced to underscore those rights to exhort and denounce. Most clearly, Johnson recognized the theocratic character of Scots society[104]. For while his discussion implies the far reaching influence of the Kirk, Johnson treats this factor in such a way as to distinguish the particular situation of his client. Although his argument endeavours to enlarge the scope of civil power by its historical association with the Church, the placing of Thompson's case in this perspective indicates the precarious nature of Kirk responsibility. Moreover, in an effort to balance his argument, Johnson suggests the strength of the clandestine power the Kirk wields by obscuring

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103. Ibid.

104. Life I, 387, The awareness of the interchanging positions of power held by men such as Alexander Wedderburn; II, 28; Life V, p. 41.

its impact into personal terms and ultimately Post Reformation society[105].

While acknowledging the disposition of Pre-Reformation ecclesiastical power, Johnson maintains the existence of a legacy which both permits and requires Thompson's action. "A minister who has in his congregation a man of open and scandalous wickedness may warn his parishioners to shun his conversation. To warn them is not only lawful, but not to warn them would be criminal"[106]. The spectre of negligence or misfeasance is suggested to demonstrate liability against which Thompson is portrayed as a conscientious practitioner. Moreover, the participation of the Scotlands in the Church enforces their voluntary submission to the minister's power and must undermine their standing. To avoid a breach of contract, Thompson must carry out all the duties of his office in good faith, and this clause requires him to exercise his unfettered, honest judgement. In this requirement Johnson admits the opportunity for error or the possibility

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105. J.H.S. Burleigh, A Church History of Scotland, (London: Oxford University Press, 1960), pp. 261-308.

A Ian Dunlop, William Carstares and the Kirk by Law Established The Chalmers Lectures 1964, (Edinburgh: Saint Andrews Press, 1967), pp. 100-147.

Anand C. Chitnis, The Scottish Enlightenment A Social History, (Totowa: Rowman and Littlefield, 1976), pp. 43-74.

J.D. Mackie, A History of Scotland, (1964; rpt. Penguin Books, 1975), pp. 294-306.

Malcom B. Macgregor, The Sources and Literature of Scottish Church History, (Glasgow: John McCallum and Company, 1934).

106. Life III, p. 61.

of abuse:

> ..., if a minister be thus left at liberty to delate sinners from the pulpit, and to publish at will the crimes of a parishioner, he may often blast the innocent, and distress the timorous..... he may be malignant and partial, and gratify his private interest or resentment under the shelter of his pastoral character. Of all this there is possibility, and of all this there is danger. But if possibility of evil be to exclude good, no good can ever be done. If nothing is to be attempted in which there is danger, we must all sink into hopeless inactivity. The evils that may be feared from this practice arise not from any defect in the institution but from the infirmities of human nature,.
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> 107

However, the demands of contract and the status of a minister in a community[108] require that he risks formulating a thoughtful position.

In the case at bar, Johnson urges a defense of veritas convicii and without malice. Mr. Thompson's efforts to vindicate himself were required in his pastoral capacity:

> To be charged with polluting the pastoral office with scandal and falsehood, was a violation of character still more atrocious, as it affected not only his personal but his clerical veracity ..... The crime of which he (Scotland) is accused has frequent opportunities and strong temptations. It has already spread far, with much depravation of private morals, and much injury to

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107. Life III, p. 61.

108. Life II, p. 243.

> publick happiness. To warn the people, therefore, against it was not wanton and officious, but necessary and pastoral.
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> 109

An ordinary defense of privilege is advanced based on the quality and position of clergy. Johnson draws attention to a seeming lack of malice in the remarks and displays Thompson's comments against the background of common knowledge.

Establishing that the statement is not defamatory under this rule; "Slander is a defamatory statement maliciously made to the injury of another, if the statement; however, defamatory is not malicious, it is slander"[110]. Johnson in the alternative pleads a qualified privilege. "But if the occasion be privileged, if the statement be made in the discharge of a duty or in the reasonable attention to man's own business and affairs which gives him legitimate cause to write a speech of his neighbor, the occasion displays the presumption of falsehood, and he is only answerable if malice be shown to have existed in fact, and if the statement be untrue"[111]. Johnson maintains that Thompson did not violate any law:

> His (Thompson's) censure was directed against a breach of morality, against an act which no man justifies. The man who appropriated this censure to himself, is evidently and notoriously guilty.

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109. Op cit., p. 62.

110. John Erskine ..... of Carnock, Principles of the Law of Scotland, (Edinburgh, 1809).

111. Ibid.

> His consciousness of his own wickedness incited him to attack his faithful reprover with open insolence and printed accusations. Such an attack made defence necessary; and we hope it will be at last decided that the means of defence were just and lawful.
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> 112

Indeed, in his remarks Johnson asserts that Thompson would be derelict in his duty had he not commented on the Scotlands. The texture of Johnson's remarks indicate a finely crafted argument for the minister's active role in the community and the correctness of pastoral admonition. An absence of malice and an intent for correction in keeping with the pastoral propriety form the substance of Johnson's defense and Thompson's activity.

The third defamation action involves a form of press freedom. The Society of Procurators had by royal charter changed their name to the Society of Solicitors. In the Edinburgh Gazette[113] this change met with ridicule:

> A correspondent informs us that the Worshipful Society of Chaldeans, Cadies, or Running Stationers of this city are resolved, in imitation, and encouraged by the singular success of their brethren, of an equally respectable Society, to apply for a Charter of their Privileges, particularly of the sole privilege of PROCURING, in the most extensive sense of the word, exclusive of chairmen, porters, penny-post men, and other inferior ranks; their brethren the R_Y_L_S_LL_____RS, alias P__C_____RS, before the INFERIOR courts of this City, always excepted.
> Should the Worshipful Society be successful, they are farther resolved not to be puffed up

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112. Life III, p. 62.

113. Life IV, App. J, p. 497.

> thereby, but to demean themselves with more equanimity and decency than their R_y_l, learned, and very modest brethern above mentioned have done, upon their late dignification and exaltation.
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> 114

This satiric comment rankled in the minds of the Society's members, and they pursued redress as a clearly defined class to whom these allegedly defamatory imputations caused great harm. The members of this royal society took their action against Thomas Robertson, the publisher, and thus attempted to avenge themselves.

Johnson in his comments on the Preses of Society of Solicitors v. Thomas Robertson, 16 November, 1781, Faculty Decisions[115], cites the concepts of de minimis and animus injurandi he previously employed in the Royal Infirmary case and the principle of incognitas aut vagum used in Wilson v. Smith, Armour. Immediately, Johnson distinguishes animus injurandi from irritandi and lays a foundation for pleading both the lack of damages and the loss of potential legal fees. In the alternative Johnson avers that at most the defamation is damnum absque injuria. Fair comment honestly made and one a matter of public interest should certainly prohibit the solicitors's action. And indeed, Johnson, like Blackstone, felt that "freedom of expression itself helped conserve the existing social order"[116]. In this case a

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114. Ibid. p. 128-129.

115. Boswell's legal brief incorporates most of Johnson's actual language, and in this study the text used for the argument is Johnson's.

116. Boorstin, p. 166; Bl. Comm. IV, p. 151.

silencing of expression is noxious especially when attempted by the supposed guardians of the law. For, it is a function of the law to guarantee unfettered expression from the virulence of censorship[117]. But in his cautious manner Johnson understood the need for an unrestrained press so long as it did not endanger his paternalistic view of state authority[118]. In this specific instance, the issue involved does not harm the state but instead pierces the solicitor's conceit.

In this case Johnson pleads that there is no showing of special loss or damage to justify the solicitor's action:

> They (Solicitors) have never gained half-a-crown less in the whole profession since this mischievous paragraph has appeared.
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> 119

If their collective reputations had been harmed, there would be a loss of fees as a demonstrable correlation exists between revenues and reputation for a professional man. The absence of such proof leads Johnson to skillfully play the de minimis non curat Praetor (lex) principle[120]. However,

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117. cf. John Milton, Areopagitica, for his pervasive argument warning of the dangers of censorship.

118. Edward A. Bloom, Samuel Johnson in Grub Street, (Providence: Brown University Press), pp. 233-248.

119. Life IV, p. 129.

120. The law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles. Croke's English King's Bench Reports Tempore Elizabeth, 353.

Johnson realizes a critical attitude that lurks behind the mask of jocundity and must be conscious of the serious intent hidden by the veil of satire. Johnson's treatment of the issue is made prominent by its Horatian urbanity. Fundamentally, Johnson argues that truthful and efficient criticism must be protected as a matter of public interest. But it is essential that the dignity given such an opportunity to voice criticism must not conflict with Johnson's view of the limits of public authority[121].

In this case Johnson contends that the intent of the articles in the journal was not injury but stimulation. His admission that it provoked a violence of resentment encourages a charge of public offence, and thus may undermine his defense. "For every libel has a tendency to the breach of the peace, by provoking the person libeled to breach it; which offence is the same (in point of law) whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification"[122]. However, in his understanding of the elements necessary for the tort to be reasonably introduced, Johnson suggests "all injury is either of the person, the fortune, or the fame", and does not admit physical violence to any degree operative in this case. The proverb "a jest breaks no bones" is advanced in an effort to mitigate any hint of public breach

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121. Life II, 374; Adventurer 67, 126, 128.

122. Bl. Comm III, 125.

and reject the introduction of criminal libel. Johnson finds the solicitors' action annoying and resents their unreasonable attitude and pomposity[123].

The language of Johnson's argument is a series of carefully devised phrases using a mixture of interrogative and statement that throws the solicitors' action into sharp relief. The literary character of his argument reveals a pointed attitude in the texture of ironic import vested in each sentence. The tone fuses with a factual presentation portraying a weak, ignorant printer struggling against the vast and immoral power of the solicitors. An undercurrent of the argument is an awareness of the corrupt misuse of power and authority. There is a suggestion of an established relationship between the court and its officers that implies a mutuality of protection in their shared profession. Therefore, Johnson recognizes that he must flatter the court:

> We consider your Lordships as the protectors of our rights, and the guardians of our virtues; but believe it not included in your high office, that you should flatter our vices, or solace our vanity: and, as vanity only dictates this prosecution, it is humbly hoped your Lordships will dismiss it.
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Johnson's diction is obsequious and penitent as it re-

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123. Life IV, p. 128.

124. Life IV, p. 130.

inforces the irony he sees present in the issue. His delightful handling of the remarks and position of the solicitors is reminiscent of Aristophanes' characterization of ξυνδικασταὶ in the Wasps[125], a sardonic commentary on the law and human nature. Aristophanes develops an ironic comedy that satirizes a decaying system of justice and exposes the venality in a corrupt legal process. Johnson in his characterization of the solicitors and judges broaches a form of fraternal bribery that questions an assurance of justice to all. Johnson despite his understanding of the role of solicitors in court is actually trying to disprove Horace's observation: Naturam expellas furca, tamen usque recurret.

Johnson strengthens the implication that the institution of these proceedings is a cruel abuse of the legal process:

> It was natural for an ignorant printer to appeal from the Lord Ordinary; but from lawyers, the descendants of lawyers, who have practised for three hundred years, and have now raised themselves to a higher denomination, it might be expected, that they should know the reverence due to a judicial determination; and, having been once dismissed, should sit down in silence.
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> 126

Moreover, the persistently litigious activity by the members of the society undermines the authority of the court. Common sense militates against the action since it diminishes the

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125. Aristophanes, The Wasps, ed. and Trans., Benjamin Bickley Rogers, (London: Loeb Classical Library, 1924), Vol.I ; pp. 404-549.

126. Life IV, p. 130-131.

value of the tort and legal proceedings as effective correctiveness in society. It would seem that public policy would recognize the opening of legal processes and those actions that would encourage its veneration, not the subversion which the solicitors indulge. Johnson's perception of the law in this case is based on the formulation of free intellectual discourse. To this end he is aware of the constraints in society but seeks to keep open the available methods of comment permitted. Although Johnson's discussion is cloaked in satire, his understanding of and desire for proper, unencumbered legal process remains paramount.

The pattern of Johnson's comments on these defamation cases goes beyond cliche' and requires the constant realization of his own adjustment to society. He is aggressive in his advocacy and yet is aware of his earlier advice to Boswell:

> .....every cause has a bad side; and a lawyer is not overcome, though the cause which he had endeavoured to support be determined against him.
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> 127

Johnson realizes that many actions in defamation are doomed to failure. However, he understands the positive act of pressing a cause may be the only way one can challenge the remark. What particular jurisprudential thinking does

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127. Life II, p. 214.

emerge can not be systematized. Johnson evaluates each case on its own merits but applies his wide experience with general principles of solid common sense. Johnson's emphasis on understanding the particular circumstances of each case does not minimize his penchant for drawing large scale conclusions. In this instance Johnson illustrates a universal trait of lawyers,and that is the unfailing talent for extrapolation.

Specifically, the expressiveness of the language and the effect it has in a legal sense sets out Johnson's salient observations on the cases. The application and elaboration of word meaning hold the essential quality for any just determination. Johnson is "....more interested in the alignment of reasoning, the relation of premises to conclusions, than in the individuality of the premises themselves"[128]. The structure of his legal argument in these cases employs a mixture of general diction with specific legal terminology. The texture assumes the act of generalization but moves toward abstracted legal thought Johnson uses these legal words and phrases to give a stamp of authority to his disquisitions. Thus, he is able to amplify his general observation and effect a penetrating analysis in favor of the client's position. Johnson;s legal style permits an analytical disposal of his material and thus

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128. Wimsatt, The Prose Style of Samuel Johnson, p. 50.

advances the logic of his argument. While specific legal imagery appears diluted, the language of his defamation cases perceptibly shades the special points expressed in his position. Within the context of his argument, Johnson's interpretations of legal points show how the law functions in its best general sense.

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Johnson's thinking on the morality of the law is evidenced in the great concern he shows on the issue of slavery. His personal connection with Francis Barber may explain an aspect of Johnson's passionate interest; yet, Johnson was horrified by the very concept of involuntary servitude. In this attitude Johnson shares a viewpoint held by most Enlightenment thinkers in their crusade to abolish this institution. "Johnson's abolitionism rose above a humane and angry sympathy for particular victims to general principles and his expression of those principles sounded practically like a plagiarism from a writer whom he detested almost as much as he detested slavery: Jean Jacques Rousseau"[129]. The expression that slavery was against the 'rights of nature'[130] was a manifestation of Johnson's humanism, and shows how he absorbed Enlightenment Thinking.

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129. Gay, Vol II, p. 422; cf. Taxation No Tyranny, where Johnson 'prosecutes' the American Colonists on the issue of slavery.

130. Life III, p. 202.

In his argument on Knight v. Wedderbourne[131], Johnson weaves a moral discourse in the texture of legal principle. Indeed, Johnson's argument extends as its reasoning follows the precedent in the habeas corpus decision of Sommersett v. Stewart, Kings Bench; 12 George III A.D., 1771-1772, which held that:

> The power of a master over his slaves has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

In his own comments on Knight v. Wedderbourne, Johnson was able to expound an argument that expanded the Sommersett holding by moral dictum and specific legal reasoning. The opportunity to examine Johnson's view of slavery must not be limited by his advocate's role because abundant

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131. Life III, pp. 202-203,212; 8 Fac. Coll. 5; 33 Mor. Dic. 14545 (1778)

132. Lord Chief Justice Mansfield, Sommersett v. Stewart;

cf: H. Fischer, 'The Suppression of Slavery in International Law', The International Law Quarterly, 3 January, 1950, pp. 28-32; for a discussion of the legal aspects of Mansfield's judgement.

documentation[133] of his own outlook permits a partial dismissal of the lawyer's mask.

At Boswell's invitation to join in on a question involving slavery, Johnson on 15 January, 1778 dictated his argument on the issues raised in Knight v. Wedderbourne. In these comments on this Scots slavery case, Johnson was able to advance an argument in which his moral feelings were in concert with his legal position. Johnson develops a moral stance which has a foundation in natural rights concepts and drafts a strict legalistic posture against laws that modify his conception of conventional morality. The direction of Johnson's reasoning moves from the general to the particular as it balances a moral position against positive law. A logical, coherent discussion emerges that undermines the acceptance of slavery as a legitimate institution. Johnson realizes that the scope of a rule of law requires the classification of doctrine in controlling cases as well as incorporating contemporary theory and currents in society. Slavery enjoyed an ambiguous status as an institution in the eighteenth century based upon the illusion of economic advantage[134] and the articulate

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133. Irene, line 46, p. 277; 87, 292; 31, 320; Idler 11, p. 36-37; Idler 87, p. 270, The Idler and Adventurer, ed. W.J. Bate, John M. Bullitt, and L.F. Powell, Yale Papers Edition, 1963, 1970

134. Richard Nelson Bean, The British Trans-Atlantic Slave Trade, 1650-1775, (Ann Arbor, Michigan, University Microfilms, 1971).

cf: F.O. Shyllon, Black Slaves in Britain (London: Oxford University Press, 1974), comments on Blackstone's thinking, pp. 55-76.

opposition of enlightened opinion[135]. Johnson's argument may be viewed as a crucible in which moral imperative and positivist jurisprudence are tried.

While acknowledging the existence of slavery in many countries, Johnson questions "whether slavery was ever to be supposed the natural condition of man"[136]. To the answer of his own question Johnson rejects the consensus opinion: "It is impossible not to conceive that men in their original state were equal; and very difficult to imagine how one would be subjected to another but by violent compulsion"[137]. A profound disgust at this imposition of force to effect control is indicated by the sharp tone of the sentence. Emphasizing his despair of humanity in bondage confirms the illegality and moral bankruptcy inherent in this forced institution. Johnson's argument is essentially Lockean in its assertion that slavery was a violation of the natural rights of man.

Johnson's rejection of slavery is strikingly modern in its corollary that men are equal before the law. Lloyd in his treatise somewhat supports Johnson's view of history:

> In most previous ages when inequality, rather than equality was regarded as the fundamental law of human society, freedom operated in law as little more than a concept whereby a man was to be guaranteed, so far as the law could achieve, security in the station of life in which Providence

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135. David Brion Davis, The Problems of Slavery in Western Culture, (Ithaca: Cornell University Press, 1966), pp. 422-445.

136. Life III, p. 202.

137. Ibid.

> had placed him, together with the privileges, if any, to which law or custom has established his entitlement,
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This condition in rude society does not obviate Johnson's basic assertion. Indeed, the element of "violent compulsion" is the key on which Johnson's history depends. This condition violates Johnson's humanitarian and Christian principles. In the context of this case, Johnson echoes Lord Auchinleck's opinion:

> Although, in the plantations, they have laid hold of the poor blacks, and made slaves of them, yet I do not think that <u>that</u> is agreeable to humanity, not to say to the Christian religion. Is a man a slave because he is black? No. He is our brother; and he is a man, although not our colour; he is in a land of liberty, with his wife and his child: let him remain <u>there</u>.
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> 139

Both Auchinleck, Boswell's father, and Johnson, Boswell's father-figure, advance a view of humanity that has a strong Christian component. This historical theory with its essential humanitarian aspect illuminates the philosophical position from which Johnson's principles derive in this case.

While the questionable legality of servitude is hinted at, Johnson accepts that "an individual may, indeed, forfeit his liberty by a crime....."[140]. In this way Johnson maintains that the responsibility for the consequences of an

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138. Lloyd, p. 138.

139. Sir David Dalrymple of Hailes, Bart., Lord Hailes, collected by, <u>Decisions of the Lords of Council and Session, from 1766 to 1791</u>, selected from the original Mss. by M.P. Brown, Esq., Advocate, Vol, I,II, (Edinburgh: Wm. Tait, 1826), p. 777.

140. <u>Life</u> III, p. 202.

action must be borne by an individual himself. It is the nature of society that requires this,

> Hoc enim vinculum est huius dignitatis, qua fruimur in re publica, hoc fundamentum libertatis, hic fons aequitatis: mens et animus et consilium et sententia civitatis posita est in legibus.
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The loss of freedom as part of a legal sentence is distinguished by Johnson from the situation in the Knight case. There is a duty to understand and obey the law for the common good but the legitimacy of the law itself is implied in its governing function. Naturally Johnson accepts that one is not only morally but also legally accountable for one's actions. However, the extent of justification in the law is questioned in this case. For Johnson maintains that "he cannot by that crime forfeit the liberty of his children"[142]. The extension of this argument to a captive enables Johnson to employ certain basic techniques of legal reasoning. His use of "reasoning by example shows the decisive role which the common ideas of the society and the distinctions made by experts can have in shaping the law"[143]. This stylistic quality of using parallel example allows Johnson's personal opinions to be balanced with legal principle.

Concepts from contract theory are introduced in a Lockean manner as well as in a strict legal sense. Locke

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141. Cicero, Pro Cluento, LIII, 146.

142. Op cit.

143. Levi, p. 5.

postulates an essential equality of man in a pre-political society. "In a pre-political society everyone is equal in that none has any power over his fellows. All are subject to the law of nature, according to which no-one ought to harm another in his life, or property"[144]. The argument suggests "that no-one can convey to another a greater right than he has himself, and therefore no-one can convey to another absolute power himself"[145]. This position in Lockean terms determines the right to overthrow such an outmoded institution as slavery on both its inherent immorality and inequality. As a chattel, the slave had no standing to contract himself; yet, an awareness of his humanity vitiates the chattel theory and deems any contract made unenforceable. "The disciples of Locke found moral freedom not in self-denial and transcendence of wordly condition, but in a lack of dependence upon the will of others, in the natural exercise of human faculties, and in the unfettered pursuit of enlightened self-interest"[146]. In this acceptance of Locke, Johnson reaffirms the importance of morality in law and promotes the increase of virtue in society.

Johnson maintains that a slave does not have an adequate legal capacity to enter into a contract:

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144. Stein, Shand, p. 11.

145. Ibid., p. 12.

146. Davis, p. 412.

He is certainly subject by no law, but that of violence, to his present master; who pretends no claim to his obedience, but that he bought him from a merchant of slaves whose right to sell him never was examined. It is said that, according to the constitutions of Jamaica, he was legally enslaved; these constitutions are merely positive, and apparently injurious to the rights of mankind, because whoever is exposed to sale is condemned to slavery without appeal; by whatever fraud or violence he might have been originally brought into the merchant's power.

Legally, if a contract is essentially a promise made for a set of promises which the law will enforce[148], an appreciation of the restriction of duress and undue influence must be considered. "At common law the coercion which will be a sufficient cause for avoiding a contract may consist in duress or menace; that is, either in actual compulsion or in the threat of it"[149]. Johnson does not doubt that the status of a slave imprints its own control and denies any right of action arising from slavery. Juridical observation would find such a contract voidable.

Johnson's illustration of a criminal becoming a captive seems to have its foundation in history. "A man may accept life from a conquering enemy on condition of

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147. Life III, p. 202-203.

148. Restatement of the Law of Contract with Explanatory Notes, edited and compiled by the Members of the Association of American Law Schools, (The American Law Institute, Philadelphia, 1928). @1.

149. Sir Frederick Pollock, Bart., Principles of Contract: being a Treatise on the general Principles Concerning the Validity of Agreements in the law of England, (3rd. ed., London, Stevens, 1881), p. 472.

perpetual servitude; but it is very doubtful whether he can entail that servitude on his descendents; for no man can stipulate without commission for another"[150]. While this position suggests the presence of Roman legal concepts, it also indicates contemporary ideals advanced by major continental philosophers[151]. Indeed, Montesquieu presents a similar acceptance of servitude in conquest:

> There is no such thing as a right of reducing people to slavery, but when it becomes necessary for the preservation of the conquest,... Even in that case it is contrary to the nature of things that the slavery should be perpetual.
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Both Montesquieu and Johnson allow for the condition of temporary slavery as a result of warfare but deny its lasting validity. Nevertheless, while this acceptance of slavery reflects and admits the custom of warfare, the absurdity of the "choice" element present in the theory of contact militates against any proffered justification for the institution.

Bondage in perpetuity is in no way countenanced and finds only a specious foundation in pure contract theory. Slaves may be most favorably considered as participants in a service contract where consideration would occur in the

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150. Ibid.

151. Gay II, 117-118; 330-331; 410-411; 419-421.

152. Montesquieu, The Spirit of Laws, Book X, Chapter III, sec. 8-9.

exchange of an implied or stated obligation to grant life in the action of one party for unrestricted labor in the other. Under this theory of contractual promise any consent to standing and freedom to contract would be repugnant to the norms of civilized society. However, the central question would be of benefit conferred between service and existence as constituting a legitimate or sufficient quid pro quo. Johnson questions the arbitrary nature of the "compact" and perceptively analyzes the terms operative in this case:

> In the present case there is apparent right on one side, and no convenience on the other. Inhabitants of this island can neither gain riches nor power by taking away the liberty of any part of the human species. The sum of the argument is this: -- No man is by nature the property of another: The defendant is, therefore, by nature free: The rights of nature must be some way forfeited before they can be justly taken away: That the defendant has by any act forfeited the rights of nature we require to be proved; and if no proof of such forfeiture can be given, we doubt not but the justice of the court will declare him free.
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Under Johnson's examination the set of legal relations involved do not constitute a bona fide contract either in law or morality.

Though Boswell was not himself counsel in this case, he nevertheless was exceptionally interested in its outcome. Since Johnson and he differed in principle on the issue of

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153. Life III, p. 203.

slavery[154], Boswell is reluctant to concede the value of Johnson's argument. Having charged that Johnson showed "a zeal without knowledge"[155] on the issue of slavery, Boswell's report of Johnson's brief in no way lessens its dignity or impact. If anything, it contributes to Boswell's prestige as a biographer. This report of Johnson's argument provides evidence of his view that all men are or should be equal before the law. The emphasis on this point contrasts with prevailing social custom but shows Johnson to be in the mainstream of enlightened intellectual thought. "Give Wealth to Poverty to Slavery Freedom"[156] manifests the deep humanitarian feeling to which Johnson responds in this case[157].

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Boswell was much vexed by the Scottish Court's gradual relaxation of the ancient doctrine of vicious intromission: "It was held of old and continued for a long period, to be an established principle in that law, that whoever inter-

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154. Boswell, No Abolition of Slavery; or the Universal Empire of Love, 1791; discussed in Frank Brady, Boswell's Political Career; (New Haven: Yale University Press, 1965), pp. 169-170.
Roland E. McFarland, "No Abolition of Slavery: Boswell and The Slave Trade," The New Rambler (spring, 1972), pp. 55-64.

155. Life III, p. 200.

156. Irene, line 13, p. 356.

157. Op. Cit.

meddled with the effects of a person deceased, without the interposition of legal authority to guard against embezzlement, should be subject to pay all debts of the deceased, as having been guilty of what was technically called vicious intromission[158]. The Court of Session in Wilson v. Smith, Armour, 19 June, 1772, Faculty Decisions continued the relaxation of this principle. In this case James Wilson sued Janet Smith and Robert Armour, her husband (representing his debtor Patrick Smith, the deceased father of Janet). Wilson alleged that there was a private super intromission in the effects of Patrick Smith before Wilson's claim could be considered. The defendants had obtained a warrant from the bailie of Kilmarnock to sell some of the articles in order to pay funeral expenses. However, there was a dispute as to what was sold and the amount of money obtained. In London, Boswell sought to consult Johnson on this technical question of intromission raised by Wilson and request his aid in drafting the reclaiming petition. An examination of Johnson's comments reveals his appreciation of human nature which necessitates the development of legal institutions. It is the instructive quality of this application that reveals Johnson's tragic sense of life[159].

Johnson frames his argument by the premise that vicious intromission was a judicially inspired doctrine:

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158. Life II, p. 196.

159. Joseph Wood Krutch, Samuel Johnson, (New York: Henry Holt and Company, 1944), p. 176.

> This, we are told, is a law which has its force only from the long practice of the Court: and may, therefore, be suspended or modified as the Court shall think proper.
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Accepting the court's power to suspend law, he considers "that every just law is dictated by reason, and that the practice of every legal court is regulated by equity"[161]. Moreover, Johnson also suggests a subtle attack on this aspect of judicial review. The question involves the authorization of a judge to "disregard the legal norms in favor of the non-legal ones"[162]. Essentially, Johnson asserts that the law is a rule of action that requires continuity for it to be effective:

> The advantage which humanity derives from law is this: that the law gives every man a rule of action, and prescribes a mode of conduct which shall entitle him to the support and protection of society. That the law may be a rule of action, it is necessary that it be known; it is necessary that it be permanent and stable. The law is the measure or civil right; but if the measure be changeable, the extent of the thing measured never can be settled.
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His quest for stability controls this argument and determines a conservative approach. The Court of Session's function should be to encourage a logical and secure advance in society, and the abandonment of the vicious intromission doctrine undermines the confidence of the citizens. For

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160. Op. cit.

161. Life II, p. 196.

162. Eugene Ehrlich, Fundamental Principles of the Sociology of Law, Tr. W.L. Moll, (Cambridge: Harvard University Press, 1936

163. Life II, p. 196.

this position, Johnson argues in favor of restraint in the court's review of established legal doctrine and process.

Potential abuse in law fashioned by opinion is expressed by the maxim, "misera est servitus ubi est aut incognitum aut vagum"[164]. Under the logic of this principle, Johnson assaults the wisdom of the court in its diminution by a general philosophical argument which it is not unusual for Johnson the supreme general philosopher to do. Nevertheless, in expanding the specific elements in the doctrine to the society at large, Johnson fulminates, "He that is thus governed, lives not by law but by opinion; not by a certain rule to which he can apply his intention before he acts, but by an uncertain and variable opinion which he can never know but after he has committed the act on which that opinion shall be passed"[165]. Stressing iura vaga and iura incognita, Johnson exploits their connative powers to reduce the court's wisdom to a general term of absurdity. At least an appearance of consistency is one requirement for a law to function successfully:

> To permit a law to be modified at discretion, is to leave the community without law. It is to withdraw the direction of that publick wisdom, by which the deficiencies of private understanding are to be supplied. It is to suffer the rash and ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the judge.[166]

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164. Life II, p. 197.

165. Ibid.

166. Ibid.

Johnson understands this need for an application of a rule for any civilized society to function with uniformity. Yet his advocacy on this point may betray his recognized desire for stability in the progress of society[167].

Johnson sees the origin of vicious intromission as a device to protect the individual and society from fraud. He suggests "that society only is well governed, where life is freed from danger and from suspicion; where possession is so sheltered by salutary prohibitions, that violation is prevented more frequently than punished"[168]. Security of property and the desire to protect it reflects a viewpoint prevalent in the eighteenth century:

> For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions; and if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the real and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions
> [169]

Aware of and concurring with the legitimacy of property rights, Johnson's understanding of human nature and his

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167. Life III, 383; 46,n.5 Wilkite Riots; cf Chapter 3 Footnote 109; Boulton, The Language of Politics in the Age of Wilkes and Burke; pp. 32-44; The False Alarm, Volume IV, pp. 30, 104.

168. Life II, p. 197.

169. Bl. Comm. III, p. 145.

passionate conservatism demands the retention of vicious intromission as essential for orderly social and economic progress. Johnson shares Blackstone's view that:

> there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.
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Johnson realizes that the sanctity and preservation of property are at the foundation of his society[171].

Johnson discusses legislative wisdom and its facets that develop methods of administration. Johnson distinguishes vindictive from preventive justice and analyzes the social fallacy in relaxing the doctrine of vicious intromission:

> To punish fraud when it is detected, is the proper act of vindictive justice; but to prevent frauds, and make punishment unnecessary, is the great employment of legislative wisdom.
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In a most modern way and yet with a hint of a stern Christian moralist, Johnson promotes the concept of prevention of crime and suggests that the law of vicious intromission will

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170. Bl. Comm II, p. 7.

171. John H. Middendorf, 'Johnson on Wealth and Commerce', Johnson, Boswell and Their Circle, Essays Presented to L.F. Powell, (Oxford; At the Clarendon Press, 1965), pp. 47-64.

172. Life II, p. 197.

limit temptation. The enticement for illegal gains under a cloak of legality is the danger Johnson associates with a reduced and circumscribed application of this doctrine. Johnson avers:

> The temptation to intromit is frequent and strong; so strong and so frequent, as to require the utmost activity of justice, and vigilance of caution, to withstand its prevalence; and the method by which a man may entitle himself to legal intromission is so open and so facile, that to neglect it is a proof of fraudulent intention: for why should a man omit to do (but for reasons which he will not confess,) that which he can do so easily, and that which he knows to be required by the law? If temptation were rare, a penal law might be deemed unnecessary.
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Johnson's concern with the retention of this device recognizes the non-static nature of property. The appeal of vicious intromission is in its assertion of state protection of the personal freedom which property embodied. In Sermon XXIV, Johnson shows his personal concern on the proper sphere for legal protection of property:

> that established property and inviolable freedom are the greatest of political felicities, no man can be supposed likely to deny.
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By choosing to express his concerns on property in the genre of the sermon, Johnson indicates his insistence on seeing

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173. Life II, p. 199.

174. Samuel Johnson, Sermons, ed., Jean H. Hagstrum and James Gray, (New Haven: Yale University Press, 1978), p. 254.

religion and the material needs of society as indistinguishable.

An extensive quotation from the pen of Henry Home, Lord Kames (Historical Law Tracts, 1761, Tract I, "Criminal Law", p. 46-47) is set in the text of the discussion as evidence of prevailing Scots legal thought on vicious intromission. Kames' words "seem to be considered as irresistibly decisive" and Johnson must argue against them equally presumptively as Kames employs the authoritative quality in language that Johnson favors. In terms of content, Johnson is now given an opportunity to attack the "ameliorative view of human nature held by Kames and others of the Scottish historical school"[175]. Indeed, Johnson must effectively deal with Kames' dismissal of the doctrine:

> It(vicious intromission) is at present so little in repute, that the vicious intromission must be extremely gross which provokes the judges to give way to the law in its utmost extent; and it seldom happens, that vicious intromission is attended with any consequence beyond reparation, and cost of suit.
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After paying proper homage to Kames' intellectual stature and judicial talent, Johnson launches into a refutation of the rule's present interpretation:

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175. Ian Simpson Ross, Lord Kames and the Scotland of his Day, (Oxford: At the Clarendon Press, 1972), p. 255.

176. Lord Kames, Henry Home, Historical Law Tracts, (Edinburgh: 1761), p. 47.

> I find myself under a necessity of observing, that this learned and judicious writer had not accurately distinguished the deficiencies and demands of the different conditions of human life, which from a degree of savageness and independence, in which all laws are vain, passes or may pass, by innumerable gradations, to a state of reciprocal benignity, in which laws are no longer necessary.
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Johnson's understanding of current society determines how he apprehends the social fabric which defines judicial injunctions.

This discussion on vicious intromission uncovers the sordid desire for unjust riches present in human nature. Johnson is certainly distressed that such riches could be obtained at the expense of a dead man. His pessimistic viewpoint reveals a disconcerting note in the human condition which seems to require external law to frustrate temptation. The social conditions present that demand such regulation reflect Johnson's basic Christian theology. Indeed, this omnipresent venality seen in man can only be controlled by the retention of laws such as vicious intromission and those of similar design. Johnson's own poverty ("Slow rises worth, by Poverty depress'd"[178]) and his understanding of the conditions in which people

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177. Life II, p. 198.

178. London: A Poem In Imitation of the Third Satire of Juvenal, line 177, p. 18.

live[179] combine with his appreciation of the social structure to make him aware of the charms of money and power. This violation of fiduciary responsibility is a fear to which Johnson succumbs.

Personal observation leads Johnson to disagree with Kames and distinguish "the deficiencies and demands of the different conditions of human life." Johnson's focus is on the desire to produce general happiness, and on an understanding of the conditions required to achieve this. And this focus determines whether certain laws should remain operative or not. Johnson's brand of conservative pessimism asserts a fault in human interaction. "Men continue to prosecute their own advantages by the nearest way; and the utmost severity of the civil law is necessary to restrain individuals from plundering each other"[180]. As the commercial elements of society become more developed,

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179. Boswell, A Journey To The Western Islands of Scotland, ed. Mary Lascelles, (Yale ed), Vol. IX, p. 28.

M. Dorothy George, London Life in The Eighteenth Century, fifth impression, (New York: Capricorn Books, 1965).

Henry Grey Graham, The Social Life of Scotland in The Eighteenth Century, Fifth edition, ed. Eric Linklater, 2 Vols., (1899: rept. London: Adam and Charles Black, 1969).

Marjorie Plant, The Domestic Life of Scotland in The Eighteenth Century (Edinburgh: At the University Press, 1952).

180. Life II, p. 198.

sophisticated criminality also increases. Exponential growth in civilization is not restricted to its more savory aspect but concurrently advances its sinister side as well. "Those who before invaded pastures and stormed houses; now begin to enrich themselves by unequal contracts and fraudulent intromissions. It is not against the violence of ferocity, but the circumventions of deceit, that this law is framed...."[181]. History forms the basis of Johnson's argument. His view of the evolution of criminality is presented to refute Kames' fundamental assumptions. Johnson is not resistant to change but presents the argument for the necessity of reasoned enquiry first.

Johnson dissects the principle of vicious intromission in terms of its penalty. He reviews the governing quality of a penal law to determine whether it is reasonable and just. Conditions necessary for a criminal penalty to be effective are of its adequacy and the importance of the crime to merit sanction. The argument rests on the prominence of property and an indispensable need for protection in society. "Its end (the law of vicious intromission) is the sanctity of property; and property very often of great value"[182]. Significantly, this law defies refinement as it "keeps guilt and innocence apart by a distinct and definite limitation"[183]. Johnson argues that the motives for fraudulent intention in

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181. Ibid.

182. Life II, p. 199.

183. Ibid.

intromission are easily ascertained. It is precisely for this rationale that individuals and society must be protected from unlawful intervention.

Johnson argues against the capricious and indiscriminate application of this doctrine. "Deviations from the law must be uniformly punished, or no man can be certain when he shall be safe"[184]. Johnson petitions for uniform decrees, and claims the foundation of a just society demands such consistency. While he accepts that varied facts influence a case, Johnson in this instance asks for a rule of action that is clear, concise, and constant. A vigorous adherence to the doctrine of vicious intromission would easily prevent fraud and its commission with impunity. Johnson avers that relaxation of this principle of intromission would encourage the worst aspect of society to assert itself. The major consequence would be the strong and ruthless dominating the weak and helpless. The sanctity of property would become illusory and the fabric of society damaged.

However, Johnson's argument did not take sufficient account of the factual circumstances of the specific cases of this kind that had already come before the crown. In the case Johnson was considering, the court relied on Erskine's treatise:

> Passive titles, in general, and that of vicious intromission, in particular, being

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184. Ibid, p. 200.

> introduced as a check to fraud, and the penalty of vicious intromission being so great, every equitable and favorable circumstance tending to exclude the presumption of fraud is pleadable of the party, and will enter into the consideration of the judge. Where, indeed, there is ground to presume a fraudulent intention, or other unfavorable circumstance attending it. There the sanction of the law will be applied; and, on the other hand, where the presumption of fraud is taken off by any favorable circumstances, for instance, the smallness of the intromission, and where the intromission itself cannot be ascribed to any tortious or fraudulent design, then it will not fall within the rule, nor the reason of introducing this penal passive title.
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Under this rule Johnson's seemingly unanswerable argument was refuted. However, the quality of Johnson's discussion of the issue must be appreciated.[186] His concern for the introduction of a form of judicial review suggests potential constitutional problems. In this discussion Johnson displays a sophisticated understanding of the role of property in eighteenth-century Britain. The salient issue expressed in Johnson's answer stresses the prominence of fraud in society, and concurs with the just and reasonable elements needed for a penal law to exist. "The proper role of government is to guarantee political liberty and the right or possession, but political power can ultimately do no more than set the ground rules and prepare the arena; the individual must regulate his liberty and control his use of property"[187]. Johnson avers that vicious intromission is a

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185. Erskine, 3, Book 3, title 9, @26, cited in Wilson v. Smith, Armour, Faculty Decisions.

186. Life III, p. 102.

principle by which the law can effectively protect property and permit the maximum freedom in the exchange of commerce. His advocacy for the retention of this principle illustrates Johnson's view of how and why a law should function in society.

As an author, Johnson would naturally be interested in the protection of literary output. Therefore, it is not surprising that Boswell's Life of Johnson contains considerable comment on a copyright case that proved to be a landmark in legal history: Donaldson v. Beckett[188]; 4 Burr. 2408, 98 Eng. Rep. 257 (1774), 17 Cobbett Parliamentary History 954. This case discussed the issues of customary or common law right in literary property. The interpretation of a custom that determines a common law right and the force of the copyright statute 8 Anne c. 19[189] forms the background to the technical legal problems involved in this case. Again, the structure of Johnson's remarks reveals an analysis of the case on general common sense principles and reflects his personal interest in the subject[190]. Johnson's view of the issues is balanced

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187. Middendorf, p. 53.

188. Augustine Birrell, Q.C., MP., Seven Lectures on the Law and History of Copyright in Books, (London: Cassell and Co. LTD, 1899), pp. 120-138.

189. F.C. Avis, The First English Copyright Act 1709, (London: Glenview Press, 1965).

Sir. Frank MacKinnon, "Notes on The History of English Copyright," The Oxford Companion to English Literature, ed. Sir Paul Harvey, Fourth Edition, rev. Dorothy Eagle, (Oxford: Oxford University Press, 1967), pp. 921-931.

as he realizes the ramifications of a perpetual copyright and the potential abuse that could ensue. An examination of Johnson's comments indicates his desire to promote the free access for learning and information in society, and yet support the author of a work in maintaining control over the dissemination of his output. Significantly, a tension develops between property and its control on society. Johnson's observations on the nature and function of copyright[191] perceive its role in a society that is just experiencing an explosion of knowledge.

In his initial comments on this case, Johnson recognizes the potentiality of abuse in legal process. The situation involved a "Mr. Alexander Donaldson, bookseller or Edinburgh, had for some time opened a shop in London, and sold his cheap editions of the most popular English books, in defiance of the supposed common-law right of Literary Property[192]. Johnson opines that:

> He (Alexander Donaldson) is a fellow who takes advantage of the law to injure his brethren; for, notwithstanding that the statute secures only fourteen years of exclusive right, it has always been understood by the trade, that he who buys the copyright of a book from the authour, obtains a perpetual property; and upon that belief, numberless bargains are made to transfer that property after the expiration of the statutory term.
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190. J.A. Cochrane, Dr. Johnson's Printer; The Life of William Strahan, (Cambridge:Harvard University Press,1964),pp.134-135.

191. Paulette Nichot, 'Dr. Johnson on Copyright', Revue des langues Vivantes, (Brussels) xxiii (1957), pp. 137-147.

192. Life I, p. 437.

In addition to this opinion Boswell interposes that "Dr. Johnson was zealous against a perpetuity; but he thought that the term of the exclusive right of authors should be considerably enlarged. He was then for granting a hundred years"[194]. In essence Johnson's focus is on the nature of a monopoly and its character and desirability is both in economic and intellectual terms. Johnson attempts to distinguish the need for economic benefits from an ambition to encourage intellectual discourse. Moreover, Johnson is constant in the assumption that the primary concern of copyright is authorial protection. Indeed, Johnson's analysis of the role of copyright and his concern for the protection of the artist has modern support:

> Authours, musicians, painters are among the greatest benefactors of the race. So we incline to protect them. Yet the very effect of protecting them is to make the enjoyment of their creations more costly and hence to limit the possibility of that enjoyment especially by persons of slender purses. Moreover, a monopoly, here, as always, makes it possible for the wares to be kept off the market altogether.
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> [195]

The general principles from which Johnson formulates his analysis of the issues in this Donaldson case embrace the conflicts which arise between author and society.

On 8 May, 1773 Boswell records Johnson's elaboration of his view against a perpetual copyright:

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193. Ibid. p. 438.

194. Ibid. p. 439.

> No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world, therefore, whatever valuable work has once been created by an authour, and issued out by him, should be understood as no longer in his power, but as belonging to the publick; at the same time the authour is entitled to an adequate reward.
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> 195

For most of his comments on copyright, Johnson adopts the persona of an academic with the underscored desire for access to another's work. The availability of texts is a major component of Johnson's argument, and the texture of his language intimates the personal conflict between author and critic. While Johnson sincerely wants to encourage an economic return for the artist, he sees substantial advantage in facilitating all forms of intellectual exchange. Behind Johnson's argument lies his understanding that the statute 8 Anne c. 19 benefits publishers more than it does authors, for whom the statute was designed. The structure and emphasis of his language in these comments on Donaldson indicate a deep concern "for the interests of learning". However, if Johnson accepts a metaphysical right of property over its creation, it would seem that his motive reflects the salutary and altruistic argument that would appeal to the populace of a jury.

Johnson's reiteration of his argument against perpetual copyright is preceded by a comment on the nature of literary property. "There seems, (said he), to be in authours a

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195. Zechariah Chafee, jr., "Reflections On The Law of Copyright"; XLV Columbia Law Review (1945) p. 505.

stronger right of property than that by occupancy; a metaphysical right, as it were; of creation, which should from its nature be perpetual....[197]. In part Johnson concurs with Blackstone who in his treatise considers the origin of copyright to derive from that occupancy based on a Roman Law concept of occupation.[198] While Johnson accepts this concept, his attitude on the foundation of copyright is almost mystical. The reverence which property rights enjoyed in eighteenth-century thought is evidenced in Johnson's apprehension of copyright concepts. The foundation of copyright is a mixture of legal and philosophical ideas where conflict abounds in function and vested interests[199]. The sense with which Johnson balances the inherent burdens and benefits contained in this peculiar monopoly rests on the experience he gained from the varied professions he assumes in his career. Johnson's discussion of copyright enabled him to widen the scope of Donaldson to include natural law concepts from which his own general principles of justice derive.

Johnson's most concise statement on copyright or literary property is to be found in a letter dated 7 March 1774, to William Strahan, Johnson's printer. Here, Johnson is forthright and detailed in his discussion of copyright:

> The Authour has a natural and peculiar right to the profits of his own work.

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196. Life II, p. 259.

197. Life II, 259.

198. Justinian, Digest 4 I.2.I.I.; Bl Comm II, pp. 405-407; cf. Blackstone as counsel in Millar v. Taylor, 4 Burr 2303 (1769).

> But as every Man who claims the protection of Society, must purchase it by resigning some part of his natural right, the authour must recede from so much of his claim as shall be deemed injurious or inconvenient to Society.
>
> It is inconvenient to Society that an useful book should become perpetual and exclusive property. .....
>
> But the authours enjoyment of his natural right might without any inconvenience be protracted beyond the term settled by the Statute. And it is, I think, to be desired.
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While Johnson repeats much of the quality of comment found in the Life, the logic of his argument is developed, and maintains a Johnsonian aura of its being the definitive word on the subject. Indeed, the appeal to natural right concepts is still perceived as a problem:

> The difficulty of transforming the natural justice of copyright into positive law is shown by the enormous differences of opinion about the proper length of the monopoly.
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> 201

Johnson's letter addresses itself to the peculiarities of this question, and his examination both forecasts and considers an intriguing modern issue of reversion.

In this letter Johnson advances a practical and intelligent approach to the nature of copyright. Essential elements of a copyright law must be reconciled with the interests of society at large, yet protect the unique

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199. Augustine Birrell, Q.C.M.P., Seven Lectures on The Law and History of Copyright in Books, (London: Cassell & Company, Ltd., 1899), p. 121-138.

200. Johnson Miscellanies, ed. G.B. Hill, (1897; rpt. New York: Barnes and Noble, Inc., 1966) Vol. II, pp. 442-444.

property relationship existing between the author and his work. Johnson maintains that "the author has a natural and peculiar right to the profits of his own work". In this Johnson shares Blackstone's understanding that copyright is based on a natural claim of an author over the product of his own labor:

> And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make a profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property.
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> 202

Accepting this premise, Johnson understands the contractual aspects in protecting an author from society. While an author must relinquish part of his natural right to ownership in exchange for remuneration and protection, the question is the limit to which this resignation would harm the author and thus society at large. Johnson's social compact militates against any "perpetual and exclusive property". Indeed, the legal and political implications of copyright and literary property demand such a balanced position. It is therefore consistent in this letter for Johnson to affirm the House of Lords decision in Donaldson v. Beckett.

However, Johnson extends the limits of the decision in Donaldson as well as the wisdom of the statute which he scrutinizes. The balance of this letter sets out Johnson's

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201. Chafee, p. 719.

proposal for what the law should be. Enumeration of the specific clauses in this letter reflect the need to maintain an equilibrium between what is "agreeable to moral right, and not inconvenient to the public interest....". The reasonableness of his draft is evident in its consideration of terms of years, renewals, economic concerns, and alienation. Of all these clauses the most significant is the third: "that, when after fourteen years the copy shall revert to the authour, he be allowed to alienate it again only seven years at a time"[203]. Protection for an author who assigns his property rights away early and may not be aware of the potentiality of his work provides the motive behind the reversion. The attention to authors' or artists who should maintain a legal interest in their work parallels the direction of present day copyright theory. Johnson foreshadows the concern for a remainder interest in a work and thereby adds a new dimension to the protection copyright affords. The third clause recognized the injustice to an author who assigns his rights away only to discover he can also lose artistic control as well as a prospective economic advantage. By statutory reversion, Johnson offers a defense to the author who must out of immediate circumstances sell his property disadvantageously. Although it is speculative, Johnson's sympathy for the author in this condition is witnessed by his own Grub-Street experiences[204].

The scope of copyright protection should include an encouragement for an author to revise and amend his work. "It is proper that the authour always be incited to polish

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202. Bl. Comm. II, pp. 405-406.

203. Johnsonian Miscellanies II, p. 444.

and improve his work, by that prospect of accruing interest which those shorter periods of alienation will afford him[205]. The unique protection of monopoly is a privilege that entails a corresponding obligation for the author to serve the public better in his vocation. A form of constructive notice of establishing the full implications in one's mind is served on the author in terms of this responsibility. An opportunity to re-examine and provide for critical commentary would eventually be required for most major work. Johnson arbitrarily assigns a period of fifty years within which one should enjoy the right to perform this type of work. The material part of his discussion is in the necessity to protect a reciprocal right in author and society. Johnson's reasonable approach stresses the value of compromise in order to effect a situation that is fair to publisher and author alike. The nuances that may be gleaned from Johnson's position indicate that such a compromised position benefits most the society at large.

Trust concepts vested in the public for an author's guardianship sustain their common interests. Johnson's legal talent is apparent in his ability to perceive the need to understand the "negative right of preventing the copying of physical material in the field of literature and the arts"[206]. A positive approach to an understanding of all aspects in copyright theory is the effect Johnson

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204. Bloom, Samuel Johnson in Grub Street, (Providence: Brown University Press, 1957).

A.S. Collins, Authorship in the Days of Johnson, Being a Study of the Relation Between Author, Patron, Publisher and Public 1726-1780, (London: George Routledge & Sons, 1927.)

205. Op. cit.

desires. His specific proposals outlined in the Strahan letter endeavour to create accessibility to texts and preserve any present or latent rights to ownership that may remain in the author, his heirs, or assigns. In particular Johnson realizes that the statute 8 Anne c. 19 extinguishes any vestige of common law copyright as these rights are merged into the statute. However, the incompleteness of the Lords' decision requires a refinement of the legal concepts in their opinion. Thus, Johnson's interpretation of this decision in Donaldson provides necessary corollaries in the function of copyright and points out the philosophical and legal technicalities inadequately considered.

Many of Johnson's thoughts on copyright evolve from the advice he gave Edward Cave while writing for his magazine in 1739 (published in 1787). Cave published some extracts from the sermons of Joseph Trapp and queried Johnson on the best method to handle a potential threat of prosecution. Johnson responded with a comprehensive brief that guided Cave on the complexities of literary abridgements. Johnson, who operates from a revered concept of property, nevertheless offers incisive comment on the disposition of this form of personal property and understands the peculiar relationships involved in individual reputation. Johnson is careful to distinguish the rights of authors and proprietors as he suggests that their inherent "liberties are encouraged and allowed for the same reason with writing itself, for the discovery and propagation of truth, though,

like other human goods, they have their alloys and ill consequences; yet, as their advantages abundantly preponderate, they have never yet been abolished or restrained"[207].

The nature of a literary abridgement requires an altered set of rules and practice in terms of copyright law. Johnson advances and details the exceptions and variances needed under a reasoned principle for the common good.

Johnson does not deny that a book is the primary property of the author and that he enjoys the right to transfer and assign that right. Moreover, he stresses that this right vested in the author must be protected and encouraged. Balanced against the position of the author is that of the proprietor who also has an argument of merit. "He that purchases the copy of a book, purchases the sole right of printing it, and of vending the books printed according to it, but has no right to add to it, or take from it, without the authour's consent, who still preserves such a right in it, as follows from the right every man has to preserve his own reputation."[208] However, Johnson does aver that every book purchased becomes the property of the buyer. He realizes the reader accepts the major rights in the book and understands the disadvantages that may accrue to both author and proprietor. Since the reader holds the ultimate disposition of a book, Johnson argues about the nature of this determination in the following

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206. Walter Arthur Copinger, The Law of Copyright in Works of Literature and Art, (London: Sweet and Maxwell, 1870), @4.

207. "Considerations on the Case of Dr. T (rapp's) Sermons. Abridged by Mr. Cave 1739", The Works of Samuel Johnson, LL.D., p. 463. Vol. 5, 1825; rpt. New York: AMS Press, Inc., 1970).

terms:

> Thus every book, when it falls into the hands of the reader, is liable to be examined, confuted, censured, translated, and abridged; any of which may destroy the credit of the authour, or hinder the sale of the book.
>
> That all these liberties are allowed, and cannot be prohibited without manifest disadvantage to the publick, may be easily proved; but we shall confine ourselves to the liberty of making epitomes, which gives occasion to our present inquiry.
>
> 209

He sees an overriding interest on behalf of the society in the free exchange of ideas. Any limitation on a reader's freedom harms the fabric of intellectual discourse. Johnson sees the value of precedent and natural right behind this protection for the reader and understands the need to encourage potential readers to respond.

In this brief for Cave Johnson presents an abbreviated history of literary abridgements with supporting exempla:

> The numberless abridgements that are to be found of all kinds of writing afford sufficient evidence that they were always thought legal, for they are printed with the names of the - - abbreviators and publishers, and without the least appearance of a clandestine transaction. Many of the books, so abridged, were the properties of men who wanted neither wealth, nor interest, nor spirit, to sue, to sue for justice, if they had thought themselves injured. Many of these abridgements must have been made by men whom we can least suspect of illegal practices, for there are few books of late that are not abridged.
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208. Ibid, p. 462.

209. Ibid., pp. 463-464.

210. Ibid, p. 464.

This element of good faith which Johnson sees in the initial process of abridgement coincides with his understanding of public policy. In essence Johnson holds such abridgements as a liberating influence lessening the dependence on wealth that can control the realm of ideas. In the development toward literacy in the eighteenth century, the literary abridgement opened additional avenues to encourage a reading public. Johnson maintains that:

> The design of an abridgement is, to benefit mankind by facilitating the attainment of knowledge; and by contracting arguments, relations, or descriptions, into a narrow compass, to convey instruction in the easiest method, without fatiguing the attention, burdening the memory, or impairing the health of the student.
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> 21[4]

Though presented as a rudimentary educational tool, Johnson suggests that literary abridgements accelerate the cultural progress of society by an approved and additional access to books. His pragmatic response dismisses trivial, entrenched legalistic principles.

In his discussion Johnson established the right of abridgement by both custom and reason. Then he quickly shifts the focus of his argument to an understanding of what prohibition would mean:

> If abridgements be condemned, as injurious to the proprietor of the copy, where will

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214. Ibid., p. 465.

> this argument end? Must not confutations be, likewise, prohibited for the same reason? Or, in writings of entertainment, will not criticisms, at least, be entirely suppressed, as equally hurtful to the proprietor, and certainly not more necessary to the public?
>
> Will not authours, who write for pay, and who are rewarded, commonly, according to the bulk of their work, be tempted to fill their works with superfluities and digressions, when the dread of an abridgement is taken away, as doubtless more negligences would be committed, and more falsehoods published, if men were not restrained by the fear of censure and confutation.
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> 212

Johnson's structure of argument effectively frames each category against his controlling premise. Each example or analogy in his position mixes with ideals common to an educated and civilized society. In this process Johnson allows the discovery of his own logic to prevail. The movement of his argument illustrates a constant idea set off against its converse to eventually return and emphasize his initial point. Thus, Johnson's presentation of the various aspects of this controversy illustrates his forensic skills. In this instance he utilizes his literary judgements to produce a well-designed legal memorandum. Johnson's systematic analysis epitomizes the manner of argumentation that refutes and forecloses an adverse position. Indeed, this memorandum articulates a substantial and persuasive argument for the practice and style of literary abridgement that Cave wants to continue.

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212. Ibid, p. 466.

Johnson was aware of and interested in the problems that occur in the transfer and maintenance of real property. In 1776, Lord Auchinleck wanted to entail his estate to heirs general instead of a succession of heirs male as his son James Boswell desired. Seeking support for his preference for male succession, Boswell sought Johnson's advice and counsel. Johnson, naturally aware of the discord caused by this issue in Boswell's family, politely tried to withhold an opinion. Nevertheless, intrigued by the legal question involved, Johnson sent a reply to Boswell's letter three weeks later.[213] Unsure of the specific technicalities in Scots inheritance and land law, Johnson's discussion is of a general nature. Unfortunately for Boswell, this surrogate father-figure Johnson supported his own father Auchinleck in the admission of succession by heirs general. Most significantly, Johnson advances an enlightened view of the status of women, yet continues to endow property with a mystique that expresses its function in eighteenth-century society and law.

Exhibiting an unusual diffidence in his ability to fully understand the issue, Johnson then launches into a discussion that examines the intricate relationship between law and real property. Johnson frames his discussion by asserting that "land is, like any other possession, by natural right wholly in the power of the present owner[214]".

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213. Life II, p. 416-420.

Yet he immediately refines the freedom to exercise personal discretion and unfettered control over its possession. "But the natural right would avail little without the protection of law; and the primary motive of law is restraint in the exercise of natural right"[215]. The limitation on the private manipulation of property is necessitated by the restrictions developed pro bono publico[216]. Johnson takes the opportunity in this problem of Boswell's to focus his attention on the function of law for property in determining man's relationship with society.

In his appreciation of the position property enjoyed in present society, Johnson concurs with Blackstone: "The permanent right of property is no natural but merely a civil right"[217]. Johnson amends this thought as he adopts a view of the natural right to property where society must have an interest and some measure of control. His discussion reflects a doctrine of the general function of law in society, and from property derives the fundamental concerns of that society as well as the attendant role of moral obligation[218]. For additional authority Johnson reflects Grotius's concept of 'dominium eminens" which asserts a universal right in the public over property. The recognition of this concept does not constitute an invasion of property but considers the issue as one of conflicting individual

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214. Ibid. p. 416.

215. Ibid.

216. Erskine, John... of Cardross, The Principles of the Law of Scotland, in the order of Sir George Mackenzie's Institutions of that Law, (Edinburgh: Elphingston Balfour 1802 ed.) Bk II T.T.I. p. 114.

217. Bl. Comm. II, p. 2.

rights to be settled by indemnification and damages. Thus the public right is seen in the context of a privileged case but does not deny the private right for redress. There is a legitimate right to private property but that incurs certain obligations to the society at large.

While Johnson asserts as most natural philosophers did that all rights emanate from a Supreme source[219]; yet he accepts a fundamental principle common to Roman and English legal systems that one is limited by the supposition: "the conveyance of no greater right than one enjoys himself"[220]. Under the proposition of this tenet, Johnson admits Boswell's status: "When he (Auchinleck) extends his power beyond his own life, by settling the order of succession, the law makes your consent necessary"[221]. Johnson understands the vested rights created in the modification of the natural law by the compelling interests of society. The security of property rights is a basic constituent of eighteenth-century thought and one which Johnson has constantly been seen to embrace. In framing the present circumstances of alienation and remainder rights, Johnson is prepared to explore the problem further.

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218. Francis Hutcheson, A Short Introduction to Moral Philosophy, in Three Books; containing the Elements of Ethicks and The Law of Nature, (Glasgow: Robert Foulis, 1747) chap. VIII Bk. II pp. 171-3.

219. cf. Sermon 24, where Johnson writes about the institutions of government and political rights in a religious context. He suggests that any "deficiencies in civil life" can only be corrected by an acceptance of religion.

220. Life II, p. 420.

221. Ibid, p. 416.

The most revealing sentence in the text:

> Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes: the limitation of feudal succession to the male arose from the obligation of the tenant to attend his chief in war;[222]

presents a capsule history of land tenures with an analysis of the relevance of present legal institutions. Here, Johnson questions the viability of maintaining certain legal institutions and legal fictions. The tenure relationship which provides much of the foundation for land law is criticized because of the burdens and confusion it adds to legal administration. In his argument Johnson suggests that the use of obsolete legal fictions[223] may interfere with the ability of the law to adjust to modern requirements. However, he accepts the common practice of ignoring these fictions if they constitute too great an impediment to judicial action.

Johnson's rhetorical question: "Is land to be treated with more reverence than liberty?" reflects the values of eighteenth-century progressive thought. Freedom and free-will in the exercise of choice for the dispersion of property is the central issue. In his appraisal of the general aspects of

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222. Ibid. pp. 416-417

223. Ibid; cf. Erwin Hexner, Studies in Legal Terminology, (Chapel Hill: University of North Carolina Press, 1941), pp. 50-55, for a discussion both historical and theoretical on legal fictions and how legal rules are manifested in a human language.

this issue, Blackstone wrote:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community.
>
> 224

An interaction between property and freedom to contract is created in the tension developed by the interest of the society at large. Johnson moves from an acceptance of the rightful origin of property to the more advanced understanding of its social function. Specific consideration of the order and nature of succession determines the dialectic of Johnson's argument. There is a constant balance maintained between Boswell's and Auchinleck's respective views on testate succession. And by framing the issue in terms of freedom, Johnson is able to introduce concepts of individual right and its reciprocal responsibility to the society. Johnson avers that both parties must be cognizant of the effect that limitations on succession would induce. Executory limitations on future interests would be of questionable legality and if eventually destructible, undermine the control that is attempting to be established. In his understanding of the question Johnson displays his grasp of the legal and personal aspects that characterize Boswell's interest [225].

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224. Bl. Comm. II, p. 139.

225. cf. John Murray,"Some Civil Cases of James Boswell, 1772-1774", 52 Juridical Review (1940), pp. 222-251, for a discussion of Boswell's remarks on entails in Sir Alexander Mackenzie v. Hector Mackenzie and Roderick Mackenzie (150 S.P. 4).

For the most part Johnson ignores the technicalities of strict settlement of land to concentrate on the desirability of entailment in gender[226]. In this context he clashes with Boswell's predilection for antique and conservative prejudice against improving the legal status of women[227]. Boswell's attachment to the theory that the purity of the line is maintained or transmitted through the male is at the center of his argument. Working from the precedent established by his ancestor's decision on succession in tail male, Boswell relies on this position to argue for the retention and strengthening of this tradition[228]. However, Johnson questions the need and wisdom to perpetuate this line of reasoning especially since Auchinleck holds the fee. Johnson also questions whether Boswell's ancestor had the legal capacity to exclude his daughters, and if not, whether this was not merely an arbitrary act. Johnson supports the probably capricious succession document drafted by Boswell's ancestor when he bypasses his daughters; but it no more follows that he intended his act as a rule for posterity than the disinheriting of his brother[229]. Nevertheless, to answer this question Johnson again disclaims knowledge of the peculiarities of Scots legal technicalities in the rules for succession. But Johnson's ignorance does not stop him from framing an opinion on the general merits raised by the issue.

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226. Stair, III, 4, p. 33.

227 Life II, p. 419.

228. Ibid,pp. 412-414.

229. Ibid. p. 418.

Johnson assumes that the succession of heirs general would be the law in Scotland, and this position would correspond with his view of free alienation and succession. Arguing from this assumption Johnson arrives at this resolution:

> It appears, upon reflection, that your father excludes nobody; he only admits near females to inherit before males more remote; and the exclusion is purely consequential.
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> 230

Aware of the illogical and jumbled nature of land laws, Johnson intelligently suggests that Boswell seek specific and accurate advice from the more knowledgeable Lord Hailes. The response from Hailes advised:

> the succession of heirs general was the succession, by the law of Scotland from the throne to the cottage, as far as we can learn it by record.
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> 231

Thus, both Johnson's assumptions and approach were well supported by Hailes' opinion on this issue. What Johnson's first letter does reveal is his habit of mind and the procedure he chose in dealing with a problem. This is the most striking instance in the Life which admits the sequence and kinds of questions Johnson considered in formulating an answer.

In the letter which contained Hailes' remarks, Johnson outlines his reasoning and shows the structure of his analysis. Johnson reiterates his lack of acquaintance with the

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230. Life II, p. 418

231. Ibid.

appropriate Scots law, and states that his response is determined by the application of general principles. This is evidence of his habit of generalization and shows how he ascertains the common principles inherent in any discussion. Johnson presents two propositions that neatly summarize the issue. The first considers "He who inherits a fief unlimited by his ancestor" and enjoys the unfettered exercise of power over that fief. The second accepts the unlimited fief and an interest "that gives his heirs some reason to complain if he does not transmit it unlimited to posterity". Johnson balances these propositions in respect to the specific issues and concluded that neither Auchinleck nor Boswell would be entirely correct. However, Johnson suggests an equitable settlement would rest on Auchinleck's least violation of the rules for legal succession.

Boswell's opposition to vesting the estate on Auchinleck's terms is based on the inclusion of females in the line of succession. Johnson, however, is unusually modern in his contention: "Women have natural and equitable claims as well as men, and these claims are not to be capriciously or lightly superseded or infringed"[232]. To appreciate Johnson's advanced thinking one must accept the virtual non-status of women in political and legal areas[233].

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232. Ibid. p. 419.

233. Arthur Rackham Cleveland, Woman under the English Law; from the Landing of the Saxons to the Present Time, (London: Hurst and Blackett, Ltd., 1896); Janelle Greenberg, "The Legal Status of the English Women in Early Eighteenth-Century Common Law and Equity", Studies in Eighteenth-Century Cultures, ed. H.E. Pagliaro, (Madison: American Society for Eighteenth-Century Studies, 1975), v. IV, pp. 171-181.

In his statement Johnson indicates a sociological understanding of legal fashion: "As manners make laws, manners likewise repeal them"[234]. The viability of the legal process admits change in status that either reflects currents in society or anticipates them.

Johnson concludes his thoughts on the question of Boswell's estate by asserting that:

> he who inherits an estate, inherits all the power legally concomitant,..... he who gives or leaves unlimited an estate legally limitable, must be presumed to give that power of limitation which he omitted to take away, and to commit future contingencies to future prudence.
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> [235]

A balanced view of perpetuating the potential abuse of free alienation is the essence of Johnson's disquisition. It is important to realize Johnson strongly advocated entails for landed estates, and the perpetuation of both property rights and social order. Johnson was cognizant of the effect entails have in maintaining the social structure and therefore political stability. "Entails are good, because it is good to preserve in a country, series of men, to whom the people are accustomed to look up to as their leaders".[236] This sentiment exposes the connection between the formulation of legal rules and the demands required

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234. Life II, p. 419.

235. Ibid.,pp. 419-420.

236. Life II, p. 428.

for social order. Johnson's viewpoint clearly expresses not only a desire for stability but recognizes the law to be an essential instrument to maintain and develop legitimate processes of government. This is especially evident in the complex realm of land law where the power structure can strengthen its position in the social order[237] and accomplish its aim with a mixture of confusion and legality that seduces moral principle. Johnson with his penchant for a reasoned and conservative approach to society is not immune to such seductive blandishments. It is in this way that Johnson fits the Tory cloak tailored by his critics.

Although Johnson approached Boswell's problem from the perspective of a generalist whose forte rests with philosophy and English law, it is important to consider his remarks on property with some understanding of Scots legal thought. Stein writes that Scottish institutional writers:

> followed the natural law line, which on the one hand regarded strict adherence to agreements as dictated by nature and the contractual obligation as something sacred, and, on the other hand, considered the holder of property to be subject to such restriction imposed by nature in the public interest that he was theoretically almost a trustee of his property on behalf of the community.
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> [238]

For the most part Johnson's remarks agree with both aspects

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237. L.B. Namier, England in the Age of the American Revolution, (London: Macmillan and Co.,Ltd., 1930), pp. 20-29.

238. Peter Stein,'The General Notions of Contract and Property in Eighteenth-Century Scottish Thought',8 Juridical Review (1963), p.5.

of this assessment and in this way seem to modify his natural law thinking into that of a more rational and comparative one[239]. While Johnson usually supported the inviolability of contract, he also maintained that the needs of the community must be considered. This does not mean that Johnson enthusiastically sought government interferences but that he recognized those aspects of social contract theory that would permit an intrusion if it were essential. Johnson's innate conservatism and respect for property would make the requirements for any intrusion exceedingly stiff. Such rigorous requirements and the question of legitimate intervention are surveyed in Kames' essay on property[240].

In his approach to the history of property Kames suggests the influence of the justice of right reason that characterized his own view of morality[241]. This moral base is not an extraneous consideration since property concerns form a determinant in the action of man and specifically, the questionable disposition of Auchinleck's property. Also, to Johnson the underlying moral imperatives in any action were always relevant. The wisdom and discretion

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239. cf. F.T.H. Fletcher, Monesquieu and English Politics (1750-1800), (London: Edward Arnold& Co., 1939). Johnson's thinking on this point is clearly influenced by the ideas of Montesquieu despite Johnson's reluctance to admit such an occurence.

240. Henry Home, Lord Kames, Historical Law Tracts, (Edinburgh: T. Cadell; and J. Bell and W. Creech 3rd ed. ,1776), pp. 87-154; Life II, p. 198.

241. Henry Home, Lord Kames, Essays on Principles of Morality and National Religion, (Edinburgh; 1751).

with which Auchinleck desires to disperse his estate is the fundamental issue in Boswell's opinion. Since Johnson has been consulted on this matter, the moral aspect of Boswell's problem is within the proper realm of Johnson's enquiry. It is his strengths as a generalist that Johnson must reconcile with his limited acquaintance with Scots law.

Despite Johnson's limited knowledge of the technicalities of Scots law, the specific legal value of his opinion on the personal disposal of real property is paradoxically significant because of the nature of Scots law. While the common law system that reigns supreme in England would require him to search out the previous line of cases and evaluate their judgments, the philosophical nature of Scots law would render this process less important. The Scots legal system with its prominent use of general principles, philosophy, and institutional writers is more in harmony with Johnson's own thought process. Johnson's approach to this case may be characterized by the analysis of the general philosophical questions raised in the use, enjoyment, and disposition of real property. The sympathy with which the Scots legal system admits the contributions of philosophical enquiry enables Johnson to make a substantial advance not only on Boswell's problem but on the general issue of property dispersion itself.

This question involving both the ability and choice of passing on one's wealth raises problems that affect the basic structures of society. In the eighteenth century the

complexity of these issues are treated by French Physiocrats, Adam Smith, and the larger community of legal and moral philosophers[242]. Although the achievements of these thinkers rests with their shift of economic emphasis from the Auchinleck type of estate to larger agricultural, commercial, and industrial concerns, the fundamental questions of property and ownership remain. And while Johnson was cognizant of this shift in economic thinking[243], he, nevertheless, was vitally interested in such individual cases as Boswell's. For Johnson understood that these individual estates created a class of persons that contributed to the strengthening and maintenance of the society[244]. The quality of this fabric of society is a prime concern of Johnson's in his desire to continue an orderly evolution toward general happiness in Britain.

While Johnson's often expressed concerns about the nature and composition of society appear to parallel some of the points raised in Boswell's argument, the particular choice and manner of entail discussed here can be distinguished from the broader implications of the theory of

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242. Ronald L. Meek, The Economics of Physiocracy: Essays and Translations, (London: George Allen & Unwin Ltd., 1962), especially pp. 345-398.

Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776), ed. Edwin Cannan, (New York: Modern Library, 1937).

243 cf. footnote 171.

244. cf. Chapter III, pp.275-7 & Kings 84, Part I : Lect: XII "Of Civil Rank, Order, & Precedence".

entail. The father-son relationship and Auchinleck's freedom to dispose of his estate contribute to Johnson's inconsistency of argument. Johnson, wearing the mask of a good counselor, must narrowly scrutinize Boswell's problem and be sensitive to his own relationship with him. The resulting, conflicting themes evident in Johnson's remarks must be understood in terms of the specific issues raised by Auchinleck's plan and its impact on the family. In essence, the threads of Johnson's argument contain many colours and appear to be woven into a strange geometric design, when actually they do nothing more than indicate the thought process of a wise and patient counsel.

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A cause célèbre that engrossed much of Scotland came to be known as the Douglas Cause[245]. This tangled and protracted legal case involved the factual determination of birth. The conflicting claim of Archibald Douglas putative son of Lady Jean Douglas was set against the interests of the collateral heir the Duke of Hamilton. The issue was whether Archibald Douglas was the legitimate son of Lady Jean as she maintained and thus would inherit the estates of her brother or whether this son was an imposter and the rightful heir of the Douglas estates was the Duke of Hamilton. Elaborate arguments were made on behalf of

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245. Archibald Douglas v. Duke of Hamilton, House of Lords, 2 Paton 143, Scots Revised Reprints 1. 405.

both sides[246], and the legal aspects of this case found their way into the House of Lords[247] which reversed the Court of Session's ruling in favor of Hamilton[248]. Boswell as a young advocate became an active partisan[249] on the victorious

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246. (Sir Adam Fergusson, Bart.), Memorial for George-James Duke of Hamilton, Marquis of Dougalas, Earl of Angus, & c. Lord Douglas Hamilton, and their Tutors, and Sir Hew Dalrymple of Northberwick, Baronet, Pursuers, AGAINST The Person pretending to be Archibald Steward, alias Douglas, only son now on life of the marriage between Colonel John Stewart, afterwards Sir John Stewart of Grandtully, and Lady Jane Douglas, sister-german of Archibald Duke of Douglas, Defender. TO WHICH ARE ANNEXED, Sequel of the Memorial: In which the Objections urged by the Defender to the Conduct of the Cause, on the part of the Pursuers, considered; AND APPENDIX: containing Parallel Cases suppositio partus: and Remarks on the French Cases quoted by the Defender. (24 January 1767).

A Summary of the Speeches, Arguments, and Determinations of the Right Honourable the Lords of Council and Session in Scotland, upon that important Cause, wherein His Grace the Duke of Hamilton and Others were Plaintiffs, and Archibald Douglas of Douglas, Esq., Defendant. With an Introductory Preface, giving an impartial and distinct Account of this Suit. By a Barrister at Law, (London: J. Almon, 1767).
-----This work is attributed to James Boswell, cf: Pottle, The Literary Career of James Boswell, esq., pp. 293-294.

Percy Fitzgerald, Lady Jean: A Study of the Douglas Cause, (London: T. Fisher Unwin, 1904).

Lady Jean Douglas, Letters

247. 27 February 1769; Archibold Francis Steuart, The Douglas Cause, pp. 136-177.

248. July 1767; Steuart, pp. 41-135.

249. James Boswell, Dorando, ed. Robert Hunting,(Orono: Puckerbush Press, 1974).
Frederick A. Pottle, "The Incredible Boswell", Blackwoods Magazine, August 1925, vol. 218, pp. 149-165.
----,"Three New Legal Ballads by James Boswell", 37 Juridical Review (1925), pp. 201-211.

Douglas side. Boswell's passion and enthusiasm for Douglas encouraged him to try to inveigle Johnson into his camp. Although the final legal determination was made in the Lords, Boswell the patriotic Scot, considered the Douglas case to be a landmark in Scottish civil litigation and history[250].

It was for this reason that Boswell recognized that the vigorous propaganda campaign would always continue, and he clearly hoped to add the moral force and judgment of Johnson to the Douglas banner. Unfortunately for Boswell, Johnson had little comment on or interest in this case[251]. However, Boswell did succeed in drawing out from Johnson his opinion on the considerations that should be reviewed in formulating a judgment:

> The great Douglas Cause was at this time a very general subject of discussion. I found he (Johnson) had not studied it with very much attention, but had only heard parts of it occasionally. He,however, talked of it, and said, 'I am of opinion that positive proof of fraud should not be required of the plaintiff, but that the Judges should decide according as probability shall appear to preponderate, granting to the defendant the presumption of filiation to be strong in his favor. And I think too, that a good deal of weight should be allowed to the dying declarations, because they were spontaneous. There is a great difference between what is said without our being urged to it, and what is said from a kind of compulsion.[252]

The significant legal points in these remarks focus on the test for fraud and what should be considered in deter-

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250. Life V, p. 28

251. Life II, p. 230, n. 1.

252. Ibid., pp. 50-51.

mining the veracity of testimony. For the testing of fraudulent filiation, Johnson echoes the opinion of Lord Strichen's citation ffom Stair:

> Filiation is presumed from marriage, whereby the children are presumed to be the lawful children of those who are proved to have been married; which is yet more pregnant and favourable on the part of the children, to give them the right of aliment and succession, and is the probation of the marriage betwixt those who are presumed parents, which is so strong a presumption, ...
> 253

Johnson's judgment on the degree of truth inherent in dying declarations reflects his religious inclinations. He seems reluctant to impugn the statements made by Lady Jean and her husband Sir John while they rest on their deathbeds. The seriousness with which Johnson approached religion and conscience cannot necessarily be ascribed to Lady Jean or Sir John. Moreover, the successful completion of such an elaborate and profitable scheme militates against the severe examination of motive and truth. At the very least, the affection engendered in the relationship between an adopted child and these parents as well as vanity and pride would encourage the Steuarts to affirm their testimony.

Boswell, whose interest in Douglas was as intense as
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his advocacy of Paoli , tried to elicit more remarks

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253. quoted in Steuart, The Douglas Cause, p. 53; Lord Stair, The Institutions of the Laws of Scotland, Bk. 4, Tit. 45.

254. James Boswell, The Journal of a Tour to Corsica; & Memoirs of Pascal Paoli, ed. S.C. Roberts, (Cambridge, 1923). Moray McLaren, Corsica Boswell: Paoli, Johnson and Freedom, (London: Secker & Warburg, 1966).

from Johnson. However, when Boswell was successful, he could not have been pleased:

> If Mr. Douglas be indeed the son of Lady Jane, he cannot be hurt; if he be not her son, and yet has the great estate of the family of Douglas, he may well submit to have a pamphlet against him by Andrew Stuart. Sir, I think such a publication does good, as it does good to show us the possibilities of human life. And, Sir, you will not say that the Douglas cause was a cause of easy decision, when it divided your Court as much as it could do, to be determined at all. When your Judges were seven and seven, the casting vote of the President must be given on one side or other; no matter, for my argument, on which; one of the other must be taken; as when I am to move, there is no matter which leg I move first. And then, Sir, it was otherwise determined here. No, Sir, a more dubious determination of any question cannot be imagined.[255]

Indeed, Johnson's remarks should not be read as pique at Boswell's insistence or his antipathy toward Mansfield who vigorously supported Douglas[256]. But rather Johnson's honest opinion on this scandal and his dismay at the mob and riot in Edinburgh that accompanied the affair.

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Sir Allan Maclean v. the Duke of Argyle (Faculty Decisions, 29 June 1781) is another case of protracted litigation over landed property. The complicated dispute involved Maclean trying to regain parts of his family estate now in the control

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255. Life II, p. 230.

256. Steuart, pp. 142-150; Life IV, p. 178.

of the Duke of Argyle. Johnson does not comment on the merits of the action but does exhibit sympathetic concern for his friend [257] entangled in the legal process:

> Of lawsuits there is no end; poor Sir Allan must have another trial, for which, however, his antagonist cannot be much blamed, having two Judges on his side. I am more afraid of the debts than of the House of Lords. It is scarcely to be imagined to what debts will swell, that are daily increasing by small additions, and how carelessly in a state of desperation debts are contracted. [258]

What these comments do indicate is the interest of the practical man of affairs who is aware of and disturbed at the expense and trouble that going to the law incurs.

Moreover, Johnson understands in this case as in both the Auchinleck matter and the Douglas Cause the attraction and needs of family tradition. In these cases the issues of property are entwined with inheritance and social position. Boswell, Douglas, and Maclean are men to whom social position and family history are bound up with landed estates. These cases corroborate the argument that "a concept of property-inseparable-from-personality- served well the social polity of a pre-industrial era" [259]. And this abstraction is not lost on Johnson who maintained that civilization required a committed class of persons to

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257. Life V, pp. 343,373,380.

258. LifeIII, p. 127.

259. Walton H. Hamilton, "Property-According to Locke", 41 Yale Law Journal (1931-32), p. 896.

ensure stability in Society[260]. Although Johnson's legal contributions to these cases were not uniform, the philoscphical and social questions raised find their way into his general jurisprudential thinking. All of these concerns and questions constitute the foundation for Johnson's understanding of relationships among law, individual, and society.

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The major legal comments of Johnson recorded by Boswell in the Life must always be read with a caveat in respect to the reporting[261]. Boswell created a personality that presents his own view of Johnson[262]; nevertheless, skepticism should not run rampant. The value of Johnson's comments lies in the reflection and indication of his habits of mind. Despite the incidents of Boswell's shaping, the quality of Johnson's legal comments remains true to the fundamental concerns expressed in his own writings. The inconsistency, his moral emphasis, the advocate's mask, and an understanding of the vicissitudes of life are threads that appear in the tapestry that reveals Johnson the man and the writer.

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260. cf. footnote 245.

261. Life II, p. 220: "Talking of law cases, he said,'the English reports, in general, are very poor; only the half of what has been said is taken down; and of that half,much is mistaken, whereas, in Scotland, the arguments on each side are deliberately put in writing, to be considered by the Court. I think a collection of your cases; upon subjects of importance with the opinions of the judges upon them, would be valuable."

262. Richard B. Schwartz, Boswell's Johnson: A Preface to the Life, (Madison: Univ. of Wisconsin, 1978); William R. Siebenschuh, Form and Purpose in Boswell's Biographical Works, (Berkeley: Univ. of California, 1972).

A picture of the style of Johnson's legal reasoning emerges from these cases. Johnson shows humanitarian impulses that resemble those of the philosophes,[263] yet evolve from the writings of 17th-century Christian humanists. These impulses give definition to the moral component Johnson finds in the jurisprudential aspects of the law. However, Johnson appreciates the dichotomy between what the law is and what the law should be. For he respects the paradoxes inherent in any legal system controlled by man, and one that is based primarily on the principles governing advocacy proceedings. Certainly, there is a logic in Johnson's approach to an individual case, but this approach is confined by the specific terms on which each case is argued. There is no pattern or system to the specific legal positions Johnson advances, but there is an adherence to the principles of the working advocate[264]. This does not mean that Johnson abdicates his moral presumption, for ultimately his moral outlook affects his legal reasoning. And it is the problem of reconciling his moral disposition with the demands of the advocate's role that distinguishes Johnson's idiosyncratic positions. It is this feature in Johnson's legal argumentation that illuminates the broad, general quality of his mind which grasps the range of 'justifying reasons' for the actions of man. These cases require Johnson to operate in the practical world of conflicting interests, and to confront the world of legal demands with moral judgments.

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263. Gay, II, p. 31.

264. Life II, p. 47; Life V, pp. 26-27.

Chapter Three

Chambers who succeeded Blackstone as Vinerian Professor of Law at Oxford[1] was a protege[2] of Johnson's. Although Chambers was a skilled attorney and former judge in Bengal, he, nevertheless, required assistance from Johnson in framing the lectures he delivered as Vinerian Professor. While it may be logical to assume that Johnson's counsel took the form of organizing material and shaping language, it was not limited to those functions but included substantive comment on legal philosophy and on the law itself. This is particularly evident in those passages that are of antiquarian and historical interest. Johnson's contribution to these lectures is attested to by Mrs. Thrale[3] and intimated by Boswell[4] in his catalogue of Johnson's associations. E. L. McAdam[5] has gathered together and collated much of

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1. Sir William Blackstone (1723-1780) held the first Vinerian chair (1758-1763) and was also principal of New Inn in 1761.
   Sir Robert Chambers (1737-1803) succeeded Blackstone in 1766 and held the Vinerian chair until 1774, but received special permission from the University to hold it for three more years. Chambers was elected principal of New Inn in 1766.

2. Life V, p. 482, 16- travel to New Castle; Life I, p. 274- affectionate letters; Life II, p. 264- New Castle trip.

3. Mrs. Thrale, Thraliana: The Diary of Mrs. Hester Lynch Thrale (Later Mrs. Piozzi) 1776-1806, ed. Katharine C. Balderston, 2 vols, (Oxford: Clarendon Press, 1942), p. 204.

4. Life V, pp. 62, 482.

5. E.L. McAdam, 'Johnson's Law Lectures for Chambers: An Addition to the Canon', 15 Review of English Studies 1939, pp. 385-391.
   _____, 'Dr. Johnson's Law Lectures for Chamber, II', 16 Review of English Studies 1940, pp.159-168.
   _____, Dr. Johnson and the English Law, (Syracuse: Syracuse University Press, 1951).

the information on the relationship between Johnson and Chambers. However, two distinguished legal scholars Sir Arnold McNair[6] and H.G. Hanbury[7] disclaim Johnson's involvement to the extent that McAdam and others accept.[8] Also it is to be noted that Sir John Hawkins makes no mention of this aspect of the Johnson-Chambers relationship in his biography.[9]

There has been no proper investigation or analysis of Johnson's contribution to these lectures in terms of his own jurisprudential thinking. Johnson's jurisprudence must be seen as an integral part of his general philosophical outlook regardless of its conflicting and idiosyncratic nature. No coherent system of Johnson's legal philosophy emerges from these lectures. However, what may be discerned is the conservative jurisprudence of a forceful moral philosopher. This conservative dis-

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6. Sir Arnold McNair, K.C., Dr. Johnson and the Law, (Cambridge: At the University Press, 1948), pp.77-79.

7. H.G. Hanbury, The Vinerian Chair and Legal Education, (Oxford: Blackwell, 1958), pp. 14, 52-56.

8. W.J. Bate, Samuel Johnson, (New York and London: Harcourt Brace Jovanovich, 1977), pp. 418-421.
Paul Fussel, Samuel Johnson and the Life of Writing, (New York: Harcourt Brace Jovanovich, 1971), p. 29.
Donald J. Greene, The Politics of Samuel Johnson, (1960; rpt. New York and London: Kennikat Press, 1973), pp. 192-197, 317, note 27.
Samuel Johnson, Political Writings, ed. Donald J. Greene, The Yale Edition of the Works of Samuel Johnson Vol. X, (New Haven: Yale University Press, 1977), pp. 290, 303.
S. Krishamunti, 'Johnson and the Law Lectures of Robert Chambers', 44 Modern Language Review 1949.

9. Sir John Hawkins, Knt., The Life of Samuel Johnson, ed. Bertram H. Davis, (London: Jonathan Cape, 1962).

position predominates especially in the discussion of historical events and in an appreciation of natural law concepts. An emphasis on the concept of property and its legal and social ramifications maintains a traditional approach to the central issue of the lectures.[10] The lectures reflect Johnson's influence in its effort to concur with the ideas of Blackstone especially where they develop questions of property law. The basic structure of these lectures of course closely parallels that of Blackstone's commentaries as well as following the scheme of issues and topics covered by Justinian's Corpus Juris Civis.[11] However as in many positions that Johnson advances, his view of the sanctity of these rights is elastic and can temper this unusual conservative trend to the factual situation.[12] Again this evidences Johnson's intellectual fluctuations and underscores the lack of a coherent systematic philosophy. It is actually a tribute to Johnson's intellectual perspicacity that he is willing to view a situation in particular, then generalize rather

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10. cf. Daniel J. Boorstin, The Mysterious Science of the Law, (1941; rpt. Gloucester, Mass.: Peter Smith, 1973), pp. 167-180, for a discussion of property in the eighteenth century.

11. cf. appendix II.

12. cf. Sir William Blackstone, Commentaries on the Laws of England, 4 vols., 4th edition (Oxford, 1770),

J.W. Gough, Fundamental Law in English Constitutional History, (Oxford: Clarendon Press, 1955), pp. 160-213,
Alan Harding, A Social History of English Law, 1955; rpt. Gloucester, Mass.: Peter Smith, 1973),
W.S. Holdsworth, A History of English Law, 16 Volumes, (London: Methuen & Co., 1903).

than fit the particular into a preconceived system or theory. Here Johnson shows a style of mental flexibility that is common to the best practicing advocates.[13]

These lectures provide an opportunity to see Johnson as a moral philosopher in the Enlightenment tradition. The law permits scientific enquiry into the way general principles can govern factual situations, and Johnson's jurisprudential writings show these connections most clearly in his exposition of legal-historical events. While his observations are not always lucid from the perspective of the twentieth century, the legal principles on which Johnson's explanations are based indicate an appreciation for systematic characterization. Yet, Johnson's method and thought process lend credence to Adam Smith's comment:

> Every system of a positive law may be regarded as a more or less imperfect attempt towards a system of natural jurisprudence, or towards an enumeration of the particular rules of justice....[14]

What exists in these passages of legal-historical activity is the realization that the rules of justice can defy proper organization. Indeed, Johnson's great interest in concepts of equity[15] underscores problems in the reconciliation of fact, law, and justice.

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13. Joseph Wood Krutch, Samuel Johnson, (New York: Henry Holt and Company, 1944), p. 370.

14. Adam Smith, The Theory of Moral Sentiments, (London, 1759), p. 608.

15. cf. Life III, p. 22; Johnson's relationship with Henry Ballow who published A Treatise of Equity (London,1737).

The text of A Course of Lectures on the English Law is housed in the manuscript collection of the British Library.[16] The manuscript comprises eighteen volumes bound and in the legible script of an amanuensis. The few marginal notes are written in the same hand, and must be considered addenda of the scribe and probably inserted by Chambers' dictation or that of an editor.[17] These lectures attempt to amplify Blackstone's Commentaries and develop a reasoned approach toward a more modern outlook of the law. Also it attempts to rectify Blackstone's neglect of important historical considerations as well as suggest additional reasons and interpretations of important legal principles. The introductory lecture to each section frames the issues on the individual topics to be offered. Each lecture discusses the range of historical, philosophical, and technical questions involved. The tone and texture are of more general concerns than Blackstone's, yet do not neglect making a substantial contribution to the body of legal reasoning.

Following Blackstone's seminal work, Chambers' lectures have been ignored.[18] For us, however, the prime value lies in the influence and considerable contribution Johnson made to these lectures. Not all the lectures were

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16. Kings Mss., volumes 80-97, approximately 1600 pages.

17. cf. Sir Charles Harcourt Chambers, Knt., editor, A Treatise on Estates and Tenures by the late Sir Robert Chambers, Knt., Chief Justice of Bengal, (London: Joseph Butterworth and Son, and Dublin: J.Cooke,1824).

18. Dr. Thomas M. Curley of Bridgewater State College is now doing research for a two-volume edition of Sir Robert Chambers' A Course of Lectures on the English Law.

written or influenced by Johnson, and it is difficult to distinguish clearly which were fully written by whom. Moreover, as McAdam has indicated, this can only be ascertained by stylistic investigation and comparison.[19] In the description of the results of his research, McAdam writes:

> The major fault in Chambers is longwindedness. He is rarely able to make a point succinctly. At times there is a trace of Johnsonian balance and periodicity, but it is the form without the substance. Habitual readers of Johnson will recall that his style never seems mechanical or contrived: however formal, it is his natural manner of speech. Moreover, when Johnson generalizes, he never leads the reader for long through a cloud of abstractions: at frequent intervals an apt illustration, a simple example, lights the way. So also with his latinity of vocabulary, which has been much exaggerated. He seldom, unless he is being jocular, uses more than a few learned words without some blunt Anglo-Saxon to set them off.[20]

Unfortunately, there are many passages which seem neutral or cannot be attributed with any assurance to Johnson. But what is clear is that Johnson did aid Chambers and was aware of the problems Chambers had with 'beginning':

> I suppose you are dining and supping, and lying in bed. Come up to town, and lock yourself up from all but me, and I doubt not but Lectures will be produced. You must not miss another term.[21]

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19. cf. Appendix I, for my analysis of the writing styles of Johnson and Chambers.

20. McAdam, p. 72.

21. Samuel Johnson, The Letters of Samuel Johnson, ed. R.W. Chapman, vol 1. 1719-1774, (Oxford: Clarendon Press, 1952), Letters 187.2; 211.1.

    cf. Thraliana p. 20, for hints of Johnson's collaboration with Chambers.

Indeed, Johnson's own professed procrastination[22] and inertia enabled him to empathize with Chambers and provide both the encouragement and the guidance needed to complete the lectures.

In Chambers' scheme for the lectures, the mind of Johnson is most evident in its subtle expression of societal values. Moral beliefs that Johnson not only accepts but wishes to inculcate are woven into the fabric of these lectures. The lectures also reveal that they have absorbed basic principles of Blackstone's method. In his discussion of Blackstone, Boorstin understands the attempt to find a rational structure of law and society:

> In this quest for the rational principles of the law, Blackstone was satisfying the eighteenth-century desire to methodize and make a 'science' of the data of experience. The charm of the Science of Law was great; it was witness to the power of man's reason, to the beauty of English Institutions and, ultimately, to the Intelligence of God.[23]

Naturally, Johnson could not resist the intellectual exercise and the potential for influence that these lectures would provide.[24] Johnson, who was proud of his legal acumen, was not immune from this type of Ciceronian pride:

> Igitur doctissimis viris proficisci placuit a lege, haud scio an recte, si modo, ut

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22. Samuel Johnson, Diaries, Prayers, and Annals, ed. E.L. McAdam, Jr., with Donald and Mary Hyde, The Yale Edition of the Works of Samuel Johnson, vol I, (New Haven and London: Yale Univ. Press, 1958), Easter Eve April 18, 1772, p. 146.

23. Boorstin, p. 23.

24. Life III, p. 309-310.

> idem definiunt, lex est ratio summa insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria. eadem ratio cum est in hominis mente confirmata et confecta, lex est.[25]

The opportunity to help Chambers fashion his treatise fulfills Johnson's internal desire to influence not only the general culture but clearly also the way in which the law affects society.[26] It is the large scope of human activity which the law covers that attracts Johnson.[27] Concepts of law, justice, man, and God constitute the substance of jurisprudence. These lectures enable Johnson to project an overview of society and analyze its metaphysical and historical components in a broad sweep. While Johnson's interest includes the minutiae of the legal process, the introductory lectures especially reflect a broad vision and authority.

Naturally, it is Chambers who provides the scrutiny of the workings of the legal process and procedure. However, Chambers' collaboration with Johnson admits not only Johnson's broad structure but also incidents of his familiarity with specific facets of legal lore.[28] It is

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25. Cicero, De Legibus, Book I, v. 18, ed. Clinton Walker Keyes, (Cambridge, Mass., Harvard Univ. Press, 1977), p. 316.

26. G.B. Hill, Johnsonian Miscellanies, Sir Brooke Boothby, i. 223.

27. W.J. Bate, The Achievement of Samuel Johnson, (New York and London: Oxford Univ. Press, 1955).

28. E.S. Roscoe, 'Dr. Johnson and the Law', Johnson Club Papers by Various Hands, (London: Fisher Unwin, 1920), pp. 125-136.

for this reason that in significant portions of the lectures Chambers can only be described as the nominal author. Nevertheless, where in the lectures there is a systematic treatment of the law, this must usually be attributed to Chambers. In spite of the difficulties there are enough passages where Johnson's style and ideas predominate to attempt an analysis of his jurisprudence. The focus of this chapter will be on those passages that are clearly Johnsonian but will not ignore those sections which show either close collaboration or indicate authorial dispute.

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With Chambers' inability to begin working on the lectures recognized, it is natural that the first lecture clearly shows Johnson's influence. "Lecture 1 of the Law of Nature, the Revealed Law and the Law of Nations, the Primary Sources of the Law of England" is illustrative of Johnson's language and his thought process. Johnson, a skilled writer of introductions and prefaces,[29] employs a style and language free from the encumbrances of legal terminology. Since the lectures were expected to be read aloud as well as studied, it is natural that Johnson's conversational style would determine the structure and diction of the lectures.[30] In this introductory lecture Johnson's catalogue of stylistic devices, i.e.

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29. Allen T. Hazen, Samuel Johnson's Prefaces and Dedications, (New Haven: Yale Univ. Press, 1937).

30. W. K. Wimsatt, Jr., The Prose Style of Samuel Johnson, (New Haven: Yale Univ. Press, 1941), pp. 74-78.

parallelism, antithesis, and inversion[31] mix pleasantly to suggest an ease and elegance of expression. The characteristic style is readily apprehended in the apologia:

> My fears proceed from Discouragements peculiar to myself. Professors like Princes are exposed to censure not only by their own defects, but by the virtues of their own Predecessors. I am to read and explain the Laws of England, from a place just vacated, by a man equally eminent for extent of knowledge and Elegance of diction, for strength of Comprehension and clearness of Explanation. That by the choice of this learned University I am called into his office, as it depresses my Hopes, must excite my Diligence. Abilities no man has the Power of conferring on himself, but Fidelity and Industry are always attainable. I hope to erect such a Fabrick of Juridical knowledge as may stand firm by its Solidity, though it should not please by its Elegance, and shall think it sufficient to mould those materials into strength, which only the Genius of a BLACKSTONE could polish into Lustre.[32]

Language structure that is easy and clear obviously appeals to auditory reception. As the abstract quoted above indicates, Johnson's presentation proves to be most effective.[33] Both the style and diction are appropriate to facilitate retention and to confirm the learning process. This sleek and understandable language differentiates Johnson's wording from the usual contortions of Chambers' diction.

It is Johnson's ability to set out succinctly the historical precedents and explain legal concepts that

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31. Ibid, pp. 15-23, 38-45, 67-71.

32. Kings 80, pp. 3-4.

33. Life IV, pp. 236-237- remarks on Johnson's conversational methods and style.

constitute his principal function in the writing of these lectures. However, the focus of this investigation is on those ideas of Johnson's that can be discerned in the text. 'Lecture 1' is a discussion of natural law concepts and the origin of positive institutions:

> The Laws of England like those of other Christian Nations, consist partly of local and occasional Rules framed or adopted for the Government of this particular Society, partly of those which oblige men considered as Men, independantly of the Revealed Law of God. In order therefore to trace to this Fountain Head our Juridical Constitution, I shall in the present Discourse consider the Foundation of Natural Law and the
>
> Difference of Obligation between that and the revealed Law of God, the original of Government & of Positive Institutions, that general Division of Positive Law which I propose hereafter to observe in explaining the Law of England.....
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This lecture begins its discussion with an exposition of the relationship between legal morality and natural law. An attempt to articulate the demands of human activity within the need for governance and the impact of a Superior Being forms the basis of legal theory. Utility is not lost sight of nor is the understanding of human conduct that determines a merciful sense of justice. In his criticism of Blackstone, Bentham as well as Johnson understands this problem in the attempt to find an answer in the principle of utility:

> It is the principle of utility, accurately apprehended and steadily applied, that affords the only clue to guide a man through

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34. Kings 80, pp. 6-7.

> these straits. It is for that, if any, and for that alone to furnish a decision which neither party shall dare in theory to disavow. It is something to reconcile men even in theory. They are at least, something nearer to an effecutal union, than when at variance as well in respect of theory as of practice.[35]

While Bentham's response differs slightly from the approach of Johnson,[36] they both appreciate the problems inherent in the conflicts between the revealed natural law and the positive law of man. This enlightened viewpoint reflects the complexity of Johnson's political and sociological thinking.[37]

Johnson's position in this debate on the validity and relevance of concepts of natural law theory[38] rests on his ability to evade religious-bound ideology and to concentrate on demands made by changing social and philosophical ideas. This is not to say that Johnson did not use aspects of natural law theory to evaluate or determine a rational standard from which the law can operate, but he utilized the many doctrines associated with the natural law to derive workable legal theory and procedure. Johnson treads an ambiguous path between the

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35. Jeremy Bentham, A Fragment on Government, ed. F.C. Montague, (1891, rpt. Oxford: Lowe & Brydone, Ltd., 1951), XX, p. 214.

36. Robert Voitle, Samuel Johnson the Moralist, (Cambridge: Harvard Univ. Press., 1961), pp. 68-69: The importance of Bentham lies in his use of utility and the way Johnson's thinking fits into the development of this concept.

37. Greene, The Politics of Samuel Johnson, p. 195.

38. Gay, The Enlightenment: An Interpretation, vol 2 The Science of Freedom, pp. 455-461; for a discussion of the debate on the natural law raging among Enlightenment figures.

natural law revealed by a Superior Being and the natural law created by the repository of common ideals articulated by wise men. In this way Johnson, the strict adherent of Christian principles, is able to accommodate Bentham to utilitarianism with those substantive principles of the natural law that he deems relevant and reasonable. In essence, Johnson offers a continual reconstruction of natural law principles and terminology along the lines set down by Grotius, yet is content to adapt method and language to sustain the traditional goals of natural law theory.

Debate between natural law and positivist law concepts constitutes the substance of this introduction. Johnson's language provides a subtle loophole through which many may exercise control:

> Law if taken in its largest Sense, for any kind of Rule or Canon whereby Actions are directed, is common to man with that Being who hath created and governs all things, not arbitrarily, not according to his Will only but according to the counsel of his Will, according to that Rule of acting which unlimited Wisdom hath prescribed to unlimited Power [39]

It is by making use of this loophole that society is able to adapt and prosper. Johnson recognizes the need for a sense of justice that is not rigid. In this way Johnson reflects Grotius' thought that "the assertion that command is not the essence of law". [40] This maxim on the nature

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39. Kings 80, p. 7.

40. A.P. D'Entreves, Natural Law: An Historical Survey, (1951; rpt., New York: Harper and Row, 1965),p.70.

of natural law indicates a Johnsonian theme that runs through the lectures. But most important the wisdom of this maxim underscores Johnson's affection for Grotius and enables him to embrace natural law concepts that are consistent with non-Catholic thought. "The Nominalist doctrine that the will of God is the ultimate source of morality had played a prominent part in Protestant Theology and ethics. Grotius was a Protestant, but as a follower of Arminius, he rejects the extreme Calvinist view of the absolute sovereignty of God. But he was also a jurist, and his vindication of natural law was further devised to meet the new and dangerous challenge of the absolute sovereignty of the State".[41] In this tradition of Grotius, Johnson advances a secular natural law theory whose function is based on reason and avoids internecine ecclesiastical controversy or interference.[42]

At the beginning of the lectures it is proper to question the ramifications of the natural law and to set out a position for evaluation. The terms and scope of the enquiry in this area Johnson frames in a way that echoes Aquinas:

> .....the Laws then with which we have any concern, and which indeed are most properly termed Laws, are those only that flow either expressly or by influence from the Will of a Superior.[43]

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41. Life II, p. 430.

42. D'Entreves, p. 71.

43. Kings 80, p. 8.

Johnson begins to probe the question about the essence of the law. "The old discussion about the nature of ius - whether ius quia iustum or ius quia iussum was more than an etymological quibble".[44] The discussion which pays attention and obliquely homage to the presence of a Supreme Being is at the foundation of the legitimacy of the natural law. Nature functions as a guiding power that allows man to navigate among the demands of society and the sometime troublesome requirements of theology. In his discussion of natural law Bryce sums up the essence of this concept in a way similar to that which Johnson accepts:

> Being the work of Nature, they are not only wider in their area, but also of earlier origin than any other rules or customs. They are essentially anterior in thought as well as in date to the laws each community makes for itself, for they belong to the human race as a whole. Hence they are also deemed to be higher in moral authority than the laws which are peculiar to particular communities, for these may be enacted today and repealed tomorrow, and have force only within certain local limits.[45]

The ethical force which Johnson believes to be the power behind the law must have its direction understood in the action of men. Imperfection in man requires the guidance of God as Johnson suggests:

> By the Laws of his Creator howsoever promulgated, man as a created Being is naturally and necessarily bound, and as an Imperfect

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44. D'Entreves, p. 64.

45. James Bryce, Studies in History and Jurisprudence, (New York: Oxford Univ. Press American Branch, 1901), pp. 564-565.

> Being he is the proper Subject of their Direction. For to say nothing of the Corruption of human nature by the Fall of our first Parents, every Man, I believe, is conscious that he is not what he might be and would wish to be, that he is, to speak with the Schoolmen, Potentially more perfect and more happy than he is in Reality. And since Perfection and happiness are unquestionably most desirable, he who believes God to be the Authour and Giver of these, Cannot but wish to Know his will, and unless seduced by sensual Appetites or inordinate Desires, Cannot but choose to follow it. The will of God cannot be known but[9]
>
> but by Revelation or by the Light of Reason.[46]

In this way Johnson is able to acknowledge God, yet utilize a free will[47] that requires man-made laws for society to operate.

In this period the question of natural law was an important and controversial one. Lloyd in his discussion of legal ideas writes:

> This new age, far from leading to the rejection of natural law, may be regarded as the Golden Age of natural law, and endured until the end of the eighteenth century. The whole emphasis now was placed on the rational character of natural law. It may be, in the remote sense that God created the world and everything in it, that natural law was God-given, but even this was not essential, for Grotius, one of the leading exponents of the law of nature and the founder of international law on a natural-law basis, argued that natural law would still apply even if God did not exist. This was because the unique quality of man lay in his reason and this rational element is shared by all mankind. Hence reason dictated a rational order in human affairs, an order which could be elicited by reasoning

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46. Kings 80, pp. 9-10.

47. Life II, pp. 82, 104.

> alone, and which, at any rate in broad outline should operate everywhere. [48]

Johnson as the Schoolmen would say is a man in transition since he supports the power of reason yet maintains an equally strong belief in God.[49] It can be said that in the area of natural law, Johnson sees an evolution of legal reasoning from an arch-determinism toward a realism that qualifies the terms on which the natural law functions.

Since this important philosophical tension is reviewed in terms of the medieval schoolmen's notion of "Potentially (p.9) more perfect and more happy than he is in Reality", Johnson respects the need for a legal system that emanates from the framework of a divinely ordered vision. It is the precise inability to discern God's expressed Will yet requires one to act in accordance with it that forms the basis of the philosophical problem present in natural law theory. The argument Johnson advances is loyal to the tradition of Aquinas:

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48. Dennis Lloyd, The Idea of Law, (Harmondsworth, Middlesex: Penguin Books Ltd., 1973), p. 82.

49. cf. James Gray, Johnson's Sermons: A Study, (Oxford Clarendon Press, 1972);

    Paul Alkon, Samuel Johnson and Moral Discipline, (Evanston: Northwestern Univ. Press, 1967);

    Chester F. Chapin, The Religious Thought of Samuel Johnson, (Ann Arbor: University of Michigan Press, 1968);

    Leopold Damrosch, Samuel Johnson and the Tragic Sense, (Princeton: Princeton Univ. Press, 1972);

    Maurice J. Quinlan, Samuel Johnson: A Layman's Religion, (Madison: Univ. of Wisconsin Press, 1964); for studies on the nature of Johnson's religious thinking.

> Cum omnia, quae divinae providentiae subduntur, a lege aeterna regulentur et mensurentur, ut ex dictis patet; manifestum est quod omnia participant aliqualiter legem aeternam, inquantum scilicet ex impressione eius habent inclinationes in proprios actus et fines. Inter cetera autem rationalis creatura excellentiori quodam modo divinae providentiae subiacet, inquantum et ipsa fit providentiae particeps, sibi ipsi et aliis providens. Unde et in ipsa participatur ratio aeterna, per quam habet naturalem inclinationem ad debitum actum et finem. Et talis participatio legis aeternae in rationali creatura lex naturalis dicitur.
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The significant aspect of Johnson's position is that he assumes a substantial investment in the moral component of the law. While this may appear obvious in light of Johnson's character and religious writings, it will be seen in his comments on positive law that this thread runs through all facets of his legal thinking. And this thread is not peculiar to these lectures, but it is also present in varying strengths when Johnson assumes the

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50. St. Thomas Aquinas, Summa Theologica, Questio XCI.- De Diversitate Legum, Art. 2: Utrum sit in nobis aliqua lex naturalis:

> Wherefore, since all things subject to Divine providence are ruled and measured by the eternal law, as was stated above (A.I.); it is evident that all things partake somewhat of the eternal law, insofar as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, insofar as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.

advocate's mask.[51]

Cicero offers a line of argument for law and right reason that is also followed in this lecture. When in De Re Publica Cicero writes:

> ..... est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat;[52]

he articulates the guiding terms on which the natural law operates. And it is this principle that seems to lie behind Johnson's writing on and understanding of natural law theory. While concepts of natural law were controversial in the eighteenth century,[53] some important aspects of natural law theory was accepted. What is striking is the extent to which Johnson utilizes principles of the natural law and weaves them into the texture of all the lectures. The substance of which comes primarily from the intrinsic value of moral virtues and less from external commands. It is the ethical component of the theory of law that appeals to Johnson. However, this does not mean that Johnson advocates a theocratic style for the laws that operate in the secular society.[54] But

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51. cf. passim chapter on Boswell, where Johnson is most clearly seen in the advocate's role.

52. Cicero, De Re Publica, Bk., III, XXII.

53. cf. footnote 38.

54. Greene, The Politics of Samuel Johnson, p.246, 215; In writing that "Johnson's conception of the state as a purely secular and rational institution", Greene not only suggests Hobbes but also implies the invalidity of theocratic based natural law.

what Johnson does advance is a utilitarian aspect necessary to legal enforcement that requires an ethical foundation for any legal system to be effective. He does this by not denying the value or importance of a God-head but by emphasizing reason and history:

> ..... And though human minds thus poorly instructed might, and did, fall into gross Errors concerning the Nature and Attributes of the Deity, and into shocking Abominations in their Religious worship, yet History will tell us that they (ancient people) had no incompetent knowledge of Right and Wrong, of the Will of Heaven so far as it regards the conduct of Individuals towards each other. This knowledge, like that of all other general and abstract truth must have been acquired either, first, by Investigation of the Causes why certain Actions (are) 11
>
> are good and others evil, or secondly, by observing their consequences and concluding, a posteriori, those actions to be good, the effects of which are good, and those Effects to be good which all men agree to account so. The former of these modes of Enquiry demands such an Acquaintance with the divine Attributes, such a thorough and clear conception of the Relations in w-ch creatures stand to their Creator, and of those that subsist between the Creatures themselves, as belongs to few even of the most enlightened Reasoners in the most enlighten'd Ages. It was by means of the latter kind of Argumentation therefore that we must suppose the principal and most important Rules of Natural Law were first learnt, or perhaps we ought rather (to) 12
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> To say, have been without Interruption acknowledged, by those who were unacquainted with any heavenly Instructor. 55

In this way Johnson certainly pays attention to a divine element in natural law theory but suggests an ethical

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55. Kings 80, pp. 11-13.

component is not dependent on the quality of relationship between man and deity. Under the cloak of this religious element lies utility as a major determinant in the ethical quality of a man in his society.

Voitle raises the question of this relationship between natural law and human nature:

> Of course, much depends upon how natural law is defined. If, for instance, it is thought of as some complex body of abstract principles which govern the behavior of men in society, Johnson could hardly have any faith in it and at the same time be so pragmatic and utilitarian in his approach to political and social problems. On the other hand, if nature means human nature, as it did to the thinkers who most profoundly influenced Johnson, and natural law, accordingly, signifies certain very simple principles of behavior towards others, present, but not dominant, in the human psyche, tendencies which mankind will more or less uniformly concede to be correct and beneficial, because, as Johnson always insists, the essential nature of mankind is everywhere the same; then, there need be no conflict.
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It is, of course, evident that Johnson's utilization requires the blend of the practical with the theoretical; however, this does not obviate theological speculation on the natural law as a foundation to the principles covered in the lectures. Johnson's theoretical speculation on natural law principles does conform to the current eighteenth-century view that fundamental rights were protected by the natural law. Lloyd maintains that Locke's theory of social contract is based on:

> This view of natural rights clearly

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56. Voitle, pp. 70-71.

> depended upon belief in the existence of natural law, for such rights could only be valid and binding by reason of the law of nature. None the less, a distinct change of emphasis emerged, for in the past natural law was largely conceived as imposing duties and prohibitions where as now it was looked to as the source of fundamental democratic rights restricting the freedom of rulers, hitherto treated as enjoying virtually absolute authority.[57]

It is in this tradition that Johnson's ideas on the natural law flourish. These lectures utilize a God-given reason to encourage the drive for happiness to be justly achieved:

> Indeed so manifest is the tendency of Justice, and other social virtues to promote the Happiness of the whole, and of every Individual, that no one however ignorant, can help assenting to the Position that Principles which are productive of such effects, must be beneficial to mankind in general, and therefore pleasing to God: .....
>
> Here then we see the Foundation of Natural Law, or as some Writers call it, The Law of Reason, which, as I have endeavoured to show, may be considered as (the) [13]
>
> The Will of the Creator, manifested by its Conformity to Reason, and by its Utility to his Creatures.[58]

Arguing from this theoretical base, Johnson evolves a concept of natural law thinking whose liberality is impressive.[59] He is able to suggest an opportunity for broad freedoms to be present within the confines of a

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57. Lloyd, p. 84.

58. Kings 80, pp. 13-14.

59. Alkon, pp. 85-108.

usually conservative system. Essentially, Johnson is interested in a type of internal morality for the law which must take its initial force from a Supreme Being. Thus, it is necessary for this first lecture to set out terms which show this to be true.

Johnson's emphasis on 'happiness' as a basic quality for legal determinations is a theme that runs through much of his writing. Not only does this idea of happiness have its corollary in utilitarianism[60] but for Johnson it provides a key to an understanding of his general jurisprudential thinking. For example, in Rasselas Johnson's analysis reflects the desire for happiness as well as the societal constraints that impede its achievement. It is this tension that the law must guide, control, and arbitrate. By describing man in general and his pursuit of happiness, Johnson sets a course where the joys of Eden must navigate among the treacheries of human endeavours. Observing the nature of things, the characters in Rasselas use their reason to discover natural laws and the way in which they operate. Imlac points out that:

> To know anything....., we must know its effects; to see men we must see their works, that we may learn what reason has dictated, or passion has incited, and find what are the most powerful motives of action. To judge rightly of the present

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60. cf. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, for a discussion of his principle of greatest happiness and its reflection in its utility.

> we must oppose it to the past; for all judgment is comparative, and of the future nothing can be known. [61]

The implication is that not only does reason play a part in the formulation of natural law but that inevitability, the inconsistency in law and behaviour, indicate the recourse to a concept of God. It is this theme of illusive happiness in Rasselas that provides justification for the reconciliation of happiness and utility which gives validity to natural law.

Johnson's understanding of the "Revealed Law of God" is not that of a theological dogmatist or ardent apologist.[62] He permits this revelation to continue throughout his work on a path of right reason that is somewhat optimistic. Moreover, in arriving at his position Johnson first discerns the variances in intention within other recognized positions:

> The sole object of Natural Law is the Happiness of man in this life, the principal aim of Religion is to teach him the way to Eternal Felicity, and as the Performance of moral Duties conduces to both those Ends, they are strongly enjoin'd by the precepts of each; though with this remarkable Difference, that where God himself has condescended by express Revelation to direct the conduct of men, his Commands thus notified, (being)[14] being in themselves likewise such as the mind cannot but approve, have certainly a higher claim to obedience than the mere

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61. Rasselas, ed. J.P. Hardy, pp. 73-74.

62. Chester F. Chapin, The Religious Thought of Samuel Johnson, (Ann Arbor: Univ. of Michigan Press, 1968).

> Dictates of Reason, just in the same Proportion as the accumulated Evidence for the Truth of Scripture, joined to the internal Proofs arising from the Fitness of the Rules themselves, produce a stronger conviction of their divine origin and Authority than Arguments drawn from that fitness alone. [63]

In his argument Johnson puts an emphasis on a concept of happiness that manifests itself in reasonable human relationships. Johnson's juridical vision develops empirically as he works from the nature of man to the activity of individuals in society on the basis of ethical judgements. In other words, in this extract Johnson seeks a limited freedom from an external authority in the exercise of moral choice. However, he does not predicate this argument on an absence of a Supreme Being but allows a sense of a religious authority to stimulate man in his choice of moral action.

Grotius understood that:

> ius naturale est dictatum rectae rationis, indicans actui alicui, ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac sociali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari, aut praecipi. [64]

Working from this statement of Grotius, Johnson in his introductory lecture posits a strong sense of a religious authority for the foundation of the natural law. And from this position he develops a thesis for civil govern-

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63. Kings 80, pp. 14-15.

64. Hugo Grotius, De Jure Belli et Pacis, ed. William Whewell, (Cambridge: At the Univ. Press, 1853), vol. I, Chap. 1, X, p. 10.

ment. The imprecise nature of historical antecedents allows speculation on the motive, need, and evolution of civil authority. Here Johnson is able to adopt the skills and methods of an anthropologist in his investigation into the origin and structure of varied societal groupings. The upshot of his conjectures is the concise statement of two principles:

> ..... But by whatever means Political Bodies were first framed, they are clearly supported by these two Foundations, 1. A Desire of social life, to which both Reason and Instinct, (If I may be allow'd the Expression) incline Men, and 2. a certain Rule of obedience established in every State, to which every member of it chooses rather silently to submit, than to exchange the Protection and Pleasures of Society) [17]
>
> Society for the Solitude and Horrors of a desert.
>
> [65]

Johnson maintains that the desire for happiness is a prime factor in establishing order for society. This thesis for happiness provides the underlying foundation for the co-operation required to have a legal system function. Individual rights as well as duties owed to society form the fundamental issues to be resolved in any legal system. From his acute understanding of human nature, Johnson is able to present the dilemma:

> ..... To the Happiness of the whole, it will be frequently necessary to sacrifice the Happiness of a Part, and as no man is naturally willing that his Happiness should be diminished to

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65. Kings 80, pp. 17-18.

> encrease another's, or that the Profit should be divided among many, when the Labour or the Danger is all his own, it is apparent that some publick Authority must be necessary to over-rule single Opinion, or private Interest. Nothing is more evident from daily Experience, than that in every undertaking, in which many (are) [18]
>
> are employed there must be one presiding & superintendant Mind. [66]

This view of happiness embodies an organizing principle in the nature of society that must balance individual aspirations with group interest. This essentially utilitarian argument has its antecedents in the ideas of Aristotle:

> Now all the various pronouncements of the law aim either at the common interest of all, or at the interest of a ruling class determined either by excellence or in some other similar way; so that in one of its senses the term 'just' is applied to anything that produces and preserves the happiness, or the component parts of the happiness, of the political community. [67]

To understand Johnson's use of Aristotle in this lecture, it is necessary to review the way in which he develops the concept of happiness in Rasselas.

Both in this lecture and in Rasselas, Johnson's line of reasoning advances along the nebulous path of the desire for happiness which is explored by the actions of his characters. In Rasselas the desire and need for happiness becomes the predominant value for society. In this

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66. Kings 80, pp. 18-19.

67. Aristotle, Nicomachean Ethics, ed. H. Rackham, (Cambridge: Harvard Univ. Press, Loeb Classical Library, 1939), v,i, 13 p. 259.

way a theological argument is avoided and a secular thrust is permitted to break through. There exists a Hobbesian element that contradicts Johnson's usual attitude to Hobbes.[68] This element is evident in the supposition concerning a government among fallen men and "that the sovereign exists to maintain peace".[69] However, Johnson does not completely succumb to this Hobbesian thought in his desire to promulgate an objective good.[70] As usual, Johnson's ideas are an amalgam of bits and pieces taken from the theory of others. Yet Johnson's eclectic approach firmly follows the Christian tradition which encourages rulers to promote the aspiration for happiness in their subjects.

In Leviathan Hobbes formulates a definition of Natural Law:

> A Law of Nature, (Lex Naturalis) is a Precept, or general Rule, found out by Reason, by which a man is forbidden to do that,

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68. cf. 'Sheffield' in Lives of the English Poets, ed. G.B. Hill, (Oxford, Clarendon Press, 1905) II 174:

> "[Sheffield's] character is not to be proposed as worthy of imitation. His religion he may be supposed to have learned from Hobbes, and his morality was such as naturally proceeds from loose opinions."

69. M.M. Goldsmith, Hobbes's Science of Politics, (New York: Columbia Univ. Press, 1966), p. 177.

70. Voitle, p. 67.

> which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.
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While Johnson does not completely accept this formulation, he does not reject it entirely. This is not to say that there is an assensio mentium between Johnson and Hobbes; yet, one must pay close attention to the truth of the maxim animus hominis est anima scripti. The process of legal reasoning behind Johnson's response to this definition[72] is explained more fully earlier. What he does scrutinize is the relationship between justice and happiness. Since Johnson advances a position imitative of Hobbes, he is essentially in the mainstream of legal thought in this period. Harris points out that:

> In this way the eighteenth century modified the doctrine of Hobbes. The motive force of human action was indeed 'that man should pursue his own happiness' but that pursuit was not contrary to the well-being of society, and indeed could be achieved only in the social context.
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Because Johnson understood Blackstone's idea of 'corrupt reason'[74] in man, he must develop a position that relates the evolution of natural law to the need for positive

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71. Thomas Hobbes, Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil, ed. Michael Oakeshott, (London: Collier Macmillan Publishers, 1975), Chap. 14, p. 103.

72. cf. footnote 49.

73. R.W. Harris, Reason and Nature in 18th Century Thought, (London: Blandford Press, 1968), p.66.

74. Bl. Comm., Bk. I, p. 41.

law and institutions.

The transition to positive institutions and the laws required for a society to operate is swiftly established by Johnson. Succinctly and with an air of intellectual defiance, he directs attention to the human conflict in rude society that requires the mediation of a 'superintending force'. Johnson's solid common sense derived from observation and experience provides the impetus to his words on the need for such governing control:

> There is therefore a necessity of some governing Power, by which those who are inclined to be happy at the cost of others may be compelled to their part of the general task,-and of a publick wisdom, by which private judgement shall be directed and controwled. Those to whom this Power is entrusted, and this wisdom is imputed, are the Governours of Society: the first care therefore of every new Society must be to select and establish Governours, and it's first Law must constitute the Power by which future Laws are to be made.
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Historically, this indicates the rudiments on which a constitutional structure can be fashioned. From the human need to settle disputes or reconcile conflicting interests, Johnson derives the incipient legislative process.

Having established this basic idea of a constitutional state, Johnson calls all the forms and manifestations emanating from it the "Politick Law" (p. 20). He defines the control inherent in the 'Politick Law' as well as its function:

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75. Kings 80, p. 19.

> The Legislative Power thus establish'd is hereafter to be exerted in the Security of its Constituents from all those evils which men can bring upon one another, or which the Care and Labour of Men, whence soever they proceed, can divert or remove, we never hurt each other but by Error or by Malice (to)
>
> 20
>
> To the Errors of individual Legislative Wisdom is opposed, and to their Malice Legislative Power. From our Endeavours to secure Happiness against Error, arise all the forms of conveying and securing Property; which all in the society are supposed to know, ...
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> 76

Again, Johnson suggests that concepts of happiness form the basis for a contract of which the prime constituent is a well developed sense of property. An emphasis on the utilitarian character[77] in the 'publick law' yields an organizing principle for society. The composition of this is determined by the set of legal relations and attitudes involved in property. In this focus on property, Johnson in the same way as does Blackstone, sees the structure of law and the regulation of society governed and guided by its protection.[78] Indeed, Johnson sees an intricate relationship between law and economic concerns.[79]

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76. Kings 80, pp. 20-21.

77. William Whewell, Lectures on the History of Moral Philosophy in England, (Cambridge: Cambridge Univ. Press, 1852).

78. Bl. Comm., Bk II, p. 400.

79. John H. Middendorf, 'Johnson on Wealth and Commerce', in Johnson, Boswell and Their Circle: Essays Presented to Lawrence Fitzroy Powell in Honour of his Eighty-Fourth Birthday, (Oxford: At the Clarendon Press, 1955), pp. 47-64.

    cf. Adventurer 119; Voitle, p. 97.

This connection is at the heart of civil society and the implication is underscored continually in this discussion of natural law and positive law.

In his dissertation on Blackstone's Commentaries, Boorstin writes:

> Thus, whatever confusion there may at first seem to have been in saying at once that property had been commanded by Nature and had been created by the state, Blackstone actually made the two ideas complementary. The law of nature had made property possible and necessary, but the laws of England had fulfilled the possibility, and had shown new aspects of ownership which nature herself had not dreamed of. By attributing property to this double source, the Commentaries had strengthened its sanctions. Every right of property which was protected by the law of England in Blackstone's day thus had ultimately the protection of Nature and of Nature's God.
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Since these lectures of Chambers followed Blackstone's work, it is easy to understand the tradition in which Johnson is working. Throughout the lectures Johnson endeavours to refine and articulate the need for security of both real and personal property. This desire is not only expressed philosophically but is also scrutinized in the actual workings of the legal process. The protection and security of property is an important current running in Johnson's general political consciousness as well.[81]

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80. Boorstin, p. 180.

81. Greene, 'Johnsonian Critics', Essays in Criticism, Oct. 1960.

    cf. Larkin, Property in the Eighteenth Century, pp. 112-124, for a discussion of the political aspects of Locke's theory on property which provides background understanding for Johnson's thinking.

After introducing the idea of property, Johnson must refine his conceptions of the 'Politick Law'. The constituents of the publick law are outlined in detail:

> ..... that law of Government by which the Supreme Power in a state regulates its own Conduct and that of its subordinate officers, which constitutes the Existence, and modifies the Operations of the Supreme Legislative Magistrates, which directs & limits (where it is limited) the Agency of the Supreme Executive, which prescribes the mode of Delegation and the Authority delegated to all inferior publick officers, and Consequently comprises all the rules relating to the Publick (property) [22] Property and Revenue, to councils of State and Commerce, to Publick Messengers, Courts of Justice, inferior territorial Magistrates, the Civil state of Men with their various Ranks and Privileges, the different Rights of Aliens and Native subjects, the territory whose Inhabitants constitute the State and such subordinate Governments and Societies as are either contained in the State or dependent upon it. [82]

While this abstract of political law is more descriptive than analytical, it, nevertheless, suggests broad philosophical implications. Though casting himself as an historian, Johnson suggests by the texture of these remarks that he is more the scholarly theoretician. The diction is free from legal jargon and exhibits a thoughtful stylized idiom that effectively conveys both historical and ideological viewpoints.[83] This catalogue of elements indicates Johnson's understanding of the range of

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82. Kings 80, pp. 22-23.

83. cf. William Vesterman, The Stylistic Life of Samuel Johnson, (New Brunswick: Rutgers Univ. Press, 1977).

political law. The scope of these remarks reflects, once again, his sophisticated understanding of law and how it guides society.

In this definition Johnson sets out a structure for political law that is based on a law-giving God-head. The regulatory powers ceded to the state and the individuals in it are able to be perfected within the terms permitted by the Supreme Power. This legislative contract eclipses the position of a Supreme Being and replaces it with a dominating social structure. From this grant of power, Johnson sees the evolution of institutions that must consider the various demands made by society. Delegated authority requires the establishment of the machinery for the civilization to function. Here, Johnson does not provide the specific provisions in which this machinery operates but suggests the rules that confer legislative powers. Johnson's list of the salient features of public law illuminates the tenuous balance inherent in dealing with the conflicting interests present in a legal system.

After this need for public law has been established, the sanctions that require the development of a criminal law are quickly apprehended. It is society's need for both regulation and protection that encourages the criminal law to grow. In the guise of an historian, Johnson narrates the function of the criminal law:

> The End of Criminal Law is to prevent those mischiefs which the Depravity of the human Heart unaned & unrestrained would frequently occasion. Its subjects therefore must be the general and special (nature)
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> 24

> nature of crimes whether against the Laws of God, the Law of Nations, or the Municipal Laws of the State, the different Degrees of guilt, the Means of Prevention and the Degrees as well as modes of Punishment, ... Crimes are considered as more publick in their nature and as offences principally against him who is either the supreme magistrate in the State, or has the Local Jurisdiction over that spot in which the peace of the Society has been infringed. Every Publick (Crime) Crime is indeed a private Injury and Sometimes what more, Murder, Robbery and Maihem (for instance) are at the same time very great Injuries to him whose natural & civil rights are thereby invaded, and very atrocious offences against the Peace & good order of the Commonwealth. I have therefore chosen in my general Distribution of Law, to consider this as a distinct part both from the Publick Law of Government, and that Private Law by which the particular Rights of Subjects are protected.
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> 84

This presentation is conclusive in its arrangement of the contingencies that form the demand for the criminal law. In the criminal law the desire for order and protection of the individual finds its regulation and order.[85] Stein suggests that "the first aim of legal rules is to ensure that members of the community are safeguarded in their persons and property so that their energies are not exhausted by the business of self-protection".[86] It is this objective that requires the society to develop an effective system to regulate behavior. In this lecture

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84. Kings 80, pp. 24-26.

85. cf. Jerome Hall, Theft, Law and Society, pp. 34-79 for a discussion of the growth of the criminal law in the eighteenth century.

86. Peter Stein, John Shand, Legal Values in Western Society, (Edinburgh: Edin. Univ. Press, 1974),p.31.

Johnson understands that it is incumbent upon the chosen structure of government to ensure peace and security. And it is with this in mind that he offers his description of the criminal law as separate from the basic elements of public law.

In suggesting a distinction between 'Publick Law' and 'Private Law', Johnson is working in the tradition of Roman law.[87] This Roman law influence shadows much of his thought on the development of natural and positive law concepts.[88] By employing this distinction in his analysis, Johnson provides a framework which will enable him to concentrate his discussion on the multitudinous aspects of the private law. The numerous and intricate problems of the private law have their moral and criminal aspects. In later lectures Johnson scrutinizes 'the Consideration of this Species' (80, p.27). But in this introductory lecture Johnson's attention is directed to the general principles of moral behavior that determine rights and wrongs. Returning the discussion to concepts of moral behavior allows Johnson to affirm his theme of the pursuit of human happiness.

In this regard there develops a connection between individuals and the state with a fused idea of the law of nations, of reason, and of nature. Johnson writes:

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87. Ibid., p. 33.

88. cf. W.W. Buckland, Arnold McNair, Roman Law and Common Law, 2nd. ed. revised by F.H. Lawson, (Cambridge: Cambridge Univ. Press, 1965),- a treatise that reviews essential rules and institutions of Roman and Common law and offers a comparative treatment of legal methods.

> ..... But whilst the subjects of each state are governed by these its positive Institutions, as the Rule of their Civil Conduct, and owe an Obedience to the laws of God and of Nature, (as) as the Rule of their Moral Behavior. the State itself considered as a single Person is bound to observe a certain Rule of Political Conduct (if I may so speak) called the Law of Nations, which may be defined to be so much of the Law of Reason (or, which is the same thing the Law of Nature) as Nations have perceived and acknowledge they have perceived, with the Addition of so much positive Institution as may ascertain and modify the Exercise of Natural Rights.[27]

Johnson's thinking here is reminiscent of Pufendorf's idea of a rational system of natural law,[90] and leads to Grotius' system based on scientific legal principles. The influence of these natural law thinkers is evident in the assertion that the corpus of the natural law can be ascertained through man's exercise of his powers of reason. This becomes clearer when the language Johnson chooses becomes less expository and more advocatory.

In a carefully phrased and concise abstract, Johnson outlines his understanding of the compact that forms the law of nations:

> ..... For since all Men are Subject to the Laws of Nature, and since as I have just observed their Union in Civil Society does not free them from that subjection; an entire State, whose common will is only the united wills of a Number of men, must likewise be

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89. Kings 80, pp. 27-28; Johnson reflects 17th century formulation rather than a Roman one.

90. Samuel Pufendorf, De Iure Naturae et Gentium, (1672).

> Subject to those Laws, and obliged to Observe them in its Dealings with others. The first, original and necessary Law of Nations therefore, is no other than the 'Law of Nature' "applied to transactions between independent states", which is therefore called by some writers the Natural Law of Nations, and by Grotius the Interval Law of Nations;
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> 91

Careful consideration is drawn to the relationship between natural justice and public policy. What Johnson suggests is a working premise that involves a contract among men, among men to form a civil society, and at the top of the political pyramid, the relations among nations. The terms of this contract are not specifically delineated; however, the philosophical implications are substantially present.

Johnson does not claim that a Hobbesian 'law is a command' is operating here, but sets up the independent authority from which the law does take its power. Within this context Johnson is able to suggest the presence of an important rule that acts as a determinant for the contract. This rule is described as:

> That Rule of Action which depends on the express Agreement is called the Conventional Law of Nations, that which is founded on Custom is called the Customary Law.
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> 92

Since he is working within natural law theory and primarily concerned with a law of nations, Johnson's discussion embraces a natural form of government for a people

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91. Kings 80, pp. 28-29.

92. Kings 80, p. 30.

that is best suited for them.[93] For Johnson also writes:

> ..... There are undoubtedly many Rules, depending on positive Institution merely, which nations are obliged to observe in their conduct towards each other, the subject matter by which is left indifferent by the natural law, and can only be right or wrong, lawful or unlawful, by virtue either of express compacts, or of certain customs consecrated by long use and Acquiescence, which imply a kind of tacit compact in those who acquiesce.
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> 94

The implication here is an order based not on any external coercion but on a complex set of duties developed through tacit and expressed exchanges of rights. An adequacy of accommodation qualifies the power and limitations that regulate the varied exchanges between persons and nations. The actual formulations are left to the parties involved as Johnson suggests in his citing of military examples. In stating that:

> the Customary differs from the natural Law of Nations as depending more on choice and less on necessity, that which partakes more of necessity must be more general, that which partakes more of choice must be more confined;
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> 95

Johnson allows for flexibility in the conditions of com-

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93. Baron de Montesquieu, The Spirit of Laws, Book I, Chap. 3, "Of Positive Law".
cf. Fletcher, Montesquieu and English Politics (1750-1800), for a discussion of the influence Montesquieu exerted on politics and legal theory in Scotland and England.

94. Kings 80, p. 30.

95. Kings 80, p. 32.

pacts and indicates it is often necessary to modify contract terms. In doing this Johnson realizes that nations as well as people have changing aspirations and therefore require laws to adapt to both capacities and capabilities.

When in the realm of international relations it is necessary to alter relationships among nations, the required negotiations are carried on by an ambassador.[96] And this is the method Johnson uses to introduce the diplomatic vehicle and its attendant rights, privileges, and functions:

> that law by which the Person of an Embassadour is secured from violation we find observed amidst the fiercest Hostility by all nations in the least acquainted with social Duties; it is universally observed, because Universal Reason has demonstrated that of war there could be no End unless some men might safely propound terms of Peace, and that of mutual wants there could be no supply (unless)
>
> [32]
>
> unless some men might safely offer Articles of commerce.[97]

Johnson's discussion of the rights, duties, and privileges of an Ambassador range from a reasonable man's understanding of the function of an envoy to the statutory description contained in '7th: Anne C. 12' (p.33). Since military conflict is the most dramatic act that can occur between nations, this discussion of the role of an Ambassa-

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96. Kings 85, pp. 2-39. Lect: XIII "Of the Rights of Embassadours", Chambers provides historical background for the rights and privileges ambassadors enjoy.

97. Kings 80, pp. 32-33.

dor provides the transition to his important disquisition on the conduct and nature of war.

In time of war and the subsequent process of peace, diplomatic exchange among conflicting parties is ritualized and elaborate. Proceeding from this idea, Johnson writes unrealistically[98] on the way in which war is regulated:

> ..... men incited by injuries and heated by opposition if resigned to the violence of their Passions without regard to compacts or to Precedents, would think only by what possible means they might destroy or injure one another. But there are laws by which the Rage of War is mitigated, where Civility prevails. Thus it is forborn on either side to destroy a General by the treachery of his Followers. The use of Poison is universally forborn. It is generally agreed on both sides to do no injury to those who are not in Arms. And those who in the field of Battle were Yesterday pointing their swords at one another, are today Friends and Companions in a neutral City.[99]

Johnson is not writing of war as a legal remedy but on its conduct according to his understanding of the terms of natural law theory. Moreover, as Fussell points out, a discussion of this type gives Johnson an opportunity to combine several interests:

> Of all the Augustan humanists, Johnson is undoubtedly the most learned in the exact technical materials of warfare, just as

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98. Ranyard West, Conscience and Society: A Study of the Psychological Prerequisites of Law and Order, (London: Methuen & Co., Ltd., 1942), pp. 186-187.

99. Kings 80, p. 34.

> he seems the most ready to exploit them in ethical images.
>
> 100

This discussion on the legal and moral values in the conduct of war encourages Johnson not only to indulge his interest in military affairs but to speculate about human drives and those sanctions which develop to control them.

The salient points in the list of prohibitions Johnson mentions come directly from Grotius' De Jure Belli et Pacis. These concerns are addressed by Grotius in Book III of his treatise:

> An vero hostem interficere immisso percussore per jus gentium liceat, quaeri solet. Sed omnino discrimen adhibendum est inter percussores, qui fidem expressam vel tacitam violant, ut subditi in regem, vasalli in seniorem, milites in eum cui militant,
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> 101

> at jus gentium, si non omnium, certe meliorum, jam olim est, ne hostem veneno interficere liceat
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> 102

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100. Paul Fussell, The Rhetorical World of Augustan Humanism: Ethics and Imagery from Swift to Burke, (Oxford: O.U.P. paperback, 1969), p. 147.

101. Grotius, ed. Whewell, Book III,Chap.4, 18.1,pp.88-89:

> The question is frequently discussed whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him. But a distinction must be made between assassins who violate an express or tacit obligation of good faith, as subjects resorting to violence against a king, vassals against a lord, soldiers against him whom they serve.

102. Ibid. 3.4.15.1, p. 86.

> Nevertheless from old times the law of nations,- if not of all nations, certainly of those of the better sort- has been that it is not permissible to kill an enemy by poison.

> Interfici ergo possunt impune in sole proprio, in solo hostili, in solo nullius, in mari. In territorio autem pacato, quod eos interficere aut violare non licet, id jus non ex ipsorum venit persona, sed ex jure ejus qui ibi imperium habet. Nam civiles societates constituere potuerunt in eos qui in aliquo sunt territorio nihil per vim agi, nisi judicio tentato:
> 103

As indicated Johnson adopts the viewpoint espoused by Grotius, and it is significant that when Johnson recognizes the conditions that warrant war, he advocates that its conduct must be properly regulated. Johnson permits the waging of war as a prerogative power of a state, but writes in"The Vanity of Human Wishes": "Yet Reason frowns on War's unequal game".[104] With his penetrating common sense, Johnson must accept the idea of military conflict as a possible and valid remedy in international relations, but he is not blind to its folly.

Johnson does not fully accept Vattel's concept of a

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103. Ibid. 3.4.8.2, p.79.

> Such persons (deserters, enemies) therefore may be slain with impunity in their own land, in the land of an enemy, on land under the jurisdiction of no one, or on the sea. The fact that it is not permissible to slay or injure such persons in territory which is in a state of peace is based on a right derived not from their persons but from the right of him who exercises sovereignty there. For political societies were able to agree that no violent measures should be taken against persons who are in territory at peace except by recourse to legal proceedings:

104. Samuel Johnson, The Poems of Samuel Johnson, ed David Nichol Smith and Edward L. McAdam, (Oxford: Clarendon Press, 1941 rpt. 1968), p. 39, line 185.

voluntary law[105] of Nations (80 p.36) stipulated in time of war. Johnson suggests that the relationship among belligerents is determined by natural justice and practical considerations. Johnson's refutation of Vattel's concept is assertive and definitive. Johnson declares that:

> The impartiality of neutral states being founded on natural Justice, and the Forbearance of hostile powers on Self-Preservation; We are not entitled by natural Justice to make ourselves the Universal Arbiters of Mankind, to punish those who have never injured us, and for whose conduct we are not responsible; to (vindicate)
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> 36
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> vindicate Law which we never gave, or to guard the Boundaries which we did not fix. The Mildness of Hostility proceeds only from the Fear of establishing a Precedent which may in time become fatal to ourselves.
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> 106

Johnson uses a most utilitarian argument in advancing an important principle governing behavior between nations. Again Johnson shows his rigorous common sense in his

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105. E.de Vattel, The Law of Nations on the Principles of Natural Law: Applied to the conduct and to the affairs of nations and of sovereigns, translated 1758 ed. by Charles G. Fenwick, (Washington: Carnegie Institution of Washington, 1916), Book I, Chapter XVI, p.IIa:

> The necessary law of nations and the voluntary law have therefore both been established by nature, but each in its own way: the former as a sacred law to be respected and obeyed by nations and sovereigns in all their actions; the latter as a rule of conduct which the common good and welfare obliged them to accept in their mutual intercourse. The necessary law is derived immediately from nature; while this common mother of men merely recommends the observance of the voluntary law of nations in view of the circumstances in which nations happen to find themselves, and to their common good.

106. Kings 80, pp. 36-37.

position that a police function for a nation is inappropriate and has the potential for severe or uncontrolled problems. This indicates Johnson's utilitarian notion expressed in a self-conscious and rational desire to conserve society.[107] The sentiment is not a moralizing one but illustrates a cautious approach to international affairs.

This discussion continues to stress the vested interests governments have in maintaining the status quo. To refrain from uninvited police action is a providential course for a nation to follow:

> ..... And since the Vicissitude of human Affairs puts every Nation in Danger of feeling some time the Miseries of unsuccessful War, every Nation has an interest in providing that those miseries may be mitigated and softened. As all Government is the Power of few over the many, all Government subsists upon Opinion, it is therefore the Interest of the Supreme Power(to)
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> [37]
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> to preserve some Degree of Reverence for all Powers equally Supreme; and to treat those who act under Sovereign Authority as performing a lawful Duty, though they are sent to execute Commands oppressive and unjust. This practice is therefore not voluntary but necessary, so necessary that its neglect would make the world a Desart, and the Nation, that should violate it first, would probably be extirpated by a general confederacy of mankind against it.[108]

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107. Ernest Albee, The Beginnings of English Utilitarianism, Diss. Cornell 1894 (Boston: Ginn & Co., The Athenaeum Press, 1897), p. 3.

108. Kings 80, pp. 37-38.

This commentary was a clear disservice to those enlightened principles that questioned a repressive order.[109] However, Johnson is essentially deferring to the idea of authority which he deems necessary for a society to have if it is to function.[110] The question Johnson neglects to analyze is what determines the nature and legitimacy of that authority.

Since these lectures were written in the unsettled time of the 1760's and 1770's, Johnson's stress on the need for a clear concept of authority is understandable. This is the period when Johnson penned his two major political tracts, The False Alarm and Taxation No Tyranny. Both Johnson's personal and political need for stability and authority is evident in the pamphlet "Taxation No Tyranny":

> Liberty is the birthright of man, and where obedience is compelled, there is no liberty. The answer is equally simple. Government is necessary to man, and where obedience is not compelled, there is no government. If the subject refuses to obey, it is the duty of authority to use compulsion. Society cannot subsist but by the power, first of making laws, and then of enforcing them.[111]

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109. cf. The John Wilkes Affair of 1763 where his publication of North Briton 45 created a political, legal, and social explosion. Rex v. Wilkes, 2 Wils K.B. 151; 4 Bro. P.C. 360; 19 How St. Tr.: 1075; 4 Burr, 2527; (Easter Term 3 Geo III, 1763) Wilkes v. Wood, 98, Eng. Rept. 489 (Michaelmas Term, 3 Geo. 3, 1763, C.B.); Sir. William Holdsworth, Some Makers of English Law, (Cambridge: Cambridge U. Press, 1938) . George Rude, Wilkes and Liberty: A Social Study 1763-1774. (Oxford: Clarendon Press, 1962).

110. Sermon 24, pp.250-251.

111. "Taxation No Tyranny", Samuel Johnson Political Writings ed. Donald J. Greene, Yale Edition Vol X, (New Haven: Yale Univ. Press, 1977), p. 448.

This plea for a rigid adherence to authority and strong government complements the type of practical politics Johnson advocates to ensure harmonious international relations. Concerning this problem of subordination and independence, Bronson writes:

> His (Johnson's) political attitude from this time forward can be fixed with comparative distinctness. Order and stability are the ends to be sought, because they best promote the good of the whole society. Abuses on the part of the governors, individual injustices, are inevitable. They are insignificant and partial evils compared to the ills of a society which is not anchored to a supreme, unchallengeable authority.
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> 112

The nexus of this argument is revealed in this remark to Boswell:

> "Sir, I am a friend to subordination, as most conducive to the happiness of society. There is a reciprocal pleasure in governing and being governed".
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> 113

Johnson shows that he has less real interest in the rights of man than in the maintenance of international order based on natural law theory. Whatever ambiguity may exist in the consequences of his attitude, Johnson commits himself to the principle of total support for the public order and common welfare.[114] In this regard Johnson is embracing the major tenets of Richard Cumberland's

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112. Bertrand H. Bronson, Johnson Agonistes and Other Essays, (Berkeley and Los Angeles: Univ. of California Press, 1965), p. 20.

113. Life I, p. 408.

114. Albee, p. 17.

ethical system which supports this conservative outlook.[115]

Johnson ends his introductory lecture with a discussion of the distinctions between the law of nations and the law of nature. To refute those who refuse to distinguish these laws, Johnson cites Justinian:

> ....., they should have remembered that in the very next Paragraph (Inst: 1,2,2) the Emperour adds the following observation "ius autem gentium omni humano
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> 39
>
> "humano generi commune est, nam usu exigente humanis necessitatibus, Gentes humana jura "quadam sibi constituerunt". By which he plainly intimates the Existence of that Law which by Civilians is called the Secondary and by writers on general jurisprudence, the Positive Law of Nations;
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> [116]

The idea is that there is an internal validity in international law expressed for all mankind. Johnson explores the lack of qualification in the presence and substance of natural law in the law of nations. This points up the need for an expressed positive law which whether recognized or not is intricately involved with aspects of the natural law. Johnson suggests that the elements of this dispute are essentially semantic. For he claims that those who deny that it is substantially a law "allow it the force of a tacit compact" (p. 41). In this way he introduces elements of contract that determine its legal standing. Johnson attacks Barbeyrac and seeks support by

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115. Voitle, pp. 58-93; cf. Richard Cumberland, De Legibus Naturae, trans. John Maxwell, (London, 1727).

116. Kings 80, pp. 38-39.

citing Vattel, Burlamaque, Grotius, and Pufendorf.[117]

In this connection Johnson fashions another encomium on Grotius:

> ..... in whose Commendation it ought to be observed that when he does err, (and on such subjects every writer must sometimes err) it is on the side of Virtue and Piety, whereas some of the more Modern Authours are not only desirous to shew how near a man may approach to vice without being vicious, but even allow in some cases such an Approximation to it, as is at least dangerous if not positively immoral.[118]

The texture of this comment enables Johnson to re-establish his own moral presence and authority. Concepts of natural law are developed on moral considerations in this lecture, and Johnson does not want this point to be neglected. The association of legal and political principles that form the doctrine of natural law qualifies and defines legal morality. "The enterprise of subjecting human conduct to the governance of rules"[119] is the problem in reasoning out what exactly constitutes the natural law. Assumptions of the morality that underlie the various relationships in society and those among nations are the issues that concern Johnson. The determination of these issues occupy Johnson throughout these

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117. Johnson cites these writings on natural law theory to strengthen his argument.

118. Kings 80, p. 40.

119. Lon L. Fuller, The Morality of Law, Storrs Lectures on Jurisprudence Yale Law School, 1963, (New Haven and London: Yale Univ. Press,1964, revised 1969)p.96.

lectures in his discussion of both the natural and the positive law.

In this introductory lecture, Johnson gives:

> a short account of the origin & foundation of those general Principles of Jurisprudence, which either are or ought to be received in all strata,
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> 120

His attempt in this lecture to articulate these general principles is characteristic of Johnson's moral writing and preoccupation. His enquiry into the experiences of human nature and human institutions gives an understanding of the law and the way in which it functions. Johnson's grasp of the basic principles of natural law theory is presented with severe authority. In this first and most important of Johnson's lectures, the juridical aspects are expressed in his usual carefully crafted and precise language. The structure of this lecture is replete with a technical confidence that is sustained only in those passages of the other lectures that are undoubtedly Johnson's. Johnson's manner is appropriate for an informative and appealing introduction to a series of lectures on jurisprudence and legal history.

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After the first lecture, this next lecture the "Origin of Anglo-Saxon Government Lect: II of the Origin of Feudal Government, and of the Anglo-Saxon Government and Laws" is the most complete of Johnson's contributions

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120. Kings 80, p. 42.

to the Chambers's series. Johnson functions primarily as a legal historian and antiquary[121] in this lecture which I believe to be written almost entirely by him. While the initial lecture dealt with various principles of jurisprudence, in this lecture the subject is legal history. Immediately, Johnson states the purpose of this lecture:

> I proceed now to investigate the sources of our own peculiar positive Institutions, by examining those systems from which they have been borrowed, and tracing back, as far as they can be traced, the Rudiments of our Civil Polity.[122]

The principal focus of this lecture is on pre-conquest legal history and tradition which in itself is highly speculative and somewhat obscure. Johnson's investigation is not free from dogma and his interpretations betray his generally conservative outlook.[123] It must be acknowledged, however, that his history is masterful within the limits of eighteenth-century sources and methodology.[124]

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121. cf. Life I, p. 454, for Johnson's observations on history and the role of an historian.

122. Kings 80, p. 42.

123. T.F.T. Plucknett, Early English Legal Literature, (Cambridge: At the University Press, 1958), pp.5-6; Plucknett writes about the tendency of legal historians to color their work according to their temperament and period. This is a vice from which Johnson was not immune.

124. cf. J.G.A. Pocock. The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century, (Cambridge: At the Univ. Press, 1957), pp. 1-29; for a discussion of historical methods though established in the sixteenth and seventeenth centuries also intruded into the eighteenth century.

Johnson does not accept that the "customary Law of England is in great measure derived" (p. 44) from the early Britons:

> For besides the testimony of Roman Historians and Poets who speak of the Inhabitants of this country as Latia sub lege Britannos (Selden on Fortescue Cap. 17) and that of a Passage in Dio Cassius (ap: Selden: in Diss: ad Fletam cap: 4
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> Fletam (ap:4) which shews that Papinian himself the greatest of Roman Lawyers, presided in Britain as Prefect, I think it may be inferred from the constant operations of conquest and subjection, that in a country which was subject to the government of Rome for near four centuries, the Imperial Law must have taken deep Root, and have expelled in some measure the antient legal usages. It is therefore, I think most reasonable to believe that the Laws, as well as other Learning of the Druids were lost at the time when all the most venerable and learned sages of that order, who led a refined and collegiate life in the Isle of Anglesea, were massacred by Suetonius.
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> 125

Having established in this lecture his historical view of the extirpation of pre-Roman intellectual life, Johnson writes of the pervasive influence of Roman law on the very early foundation of English law. In his view of pre-Saxon Britain, Johnson admits no romantic ideas as to the substance of any lasting legal contribution these early Britons might have made. Rigorous logic reminiscent of the

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125. Kings 80, pp. 43-44. Although there is no reference in text for these suppositions on the Druids, speculation on the Druids was part of the eighteenth century interest on history and antiquary. cf: Aidan Lloyd Owen, The Famous Druids: A Survey of Three Centuries of English Literature on the Druids, (Oxon: Clarendon Press, 1962), and Stuart Piggott, The Druids, (1968, rpt. Harmondsworth: Penguin Books, 1977); William Stukeley: An Eighteenth-Century Antiquary, (Oxford: At the Clarendon Press, 1950), pp. 92-135.

style of his remarks on the Ossian controversy[126] is applied to produce Johnson's argument that Druidical learning was wiped out by the Romans. However, "For Hale, the irrelevance of positive inquiry into remote times, and hence of the errors begotten on its tenuousness was the vital point to establish".[127] But Johnson was never one to fear rendering an opinion on even the most slender evidence.[128] For the strength of Johnson's own logic tells him that the barbaric state of pre-Saxon Britain could not maintain anything approaching a comprehensive system of law. Indeed, the tone and texture of Johnson's remarks on this type of speculation is hard, incisive, and borders on the polemical.

However, modern commentators point out that Johnson was not quite correct in some of these historical assessments. Pollock and Maitland[129] dissent from Johnson's viewpoint on the extent of this early Roman influence especially when they consider the conditions in the last two centuries of the empire. On the other hand, Schultz[130]

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126. Life II, pp. 296-297.

127. Sir Matthem Hale, The History of the Common Law of England, ed. Charles M. Gray, (Chicago and London: Univ.of Chicago Press, 1971), p. XXViii.

128. cf. Chapter on the Boswell cases where Johnson clearly functions as an advocate who often dictates his brief with little knowledge or preparation on the specifics of the case.

129. Sir Frederick Pollock and Frederick William Maitland, The History of English Law: Before the Time of Edward I, 2 volumes, (Cambridge: At the University Press, 1923), vol I, p. 2.

130. Fritz Schultz, History of Roman Legal Science, (1946: rpt. Oxford: At the Clarendon Press), p. 263.

suggests that a metamorphosis occurred in the nature of Roman law which encouraged the development of a bureaucratic system that remained viable and was able to exert a considerable influence even in the provinces. Yet, Maitland[131] in an earlier work established his opinion that principles of Roman law were not operating to this extent. Plucknett[132] rejects Johnson's assertion that aspects of the Roman law were absorbed or were able to survive in any atavistic form. Nevertheless, Reeves's earlier though highly technical treatise (1784-85)[133] concurs with Johnson's supposition that the Roman law dominated the formulation of early English legal institutions and maintains that a continual influence existed by a process of gradual absorption in the development of the Saxon system. What they all eventually accept, however, is that there is discernible evidence of Roman legal principles introduced into Britain by way of the Christian church. Since this section of the lecture deals extensively with legal history, it is important to set Johnson's thinking against that of professional legal historians. What this process reveals is that Johnson's

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131. Frederick William Maitland, The Constitutional History of England, (Cambridge: At the University Press, 1913).

132. Theodore F.T. Plucknett, A Concise History of the Common Law, Fifth ed.(Boston, Little, Brown & Co., 1956).

133. J. Reeves, History of the English Law: from the Time of the Romans to the End of the Reign of Elizabeth, ed. W.F. Finlason, A New American Edition, 5 Vols., (Philadelphia: Murphy, 1880), vol I, pp. XX-LXXVII.

view of history is limited by the state of the art as well as his own prejudices and assumptions.

After having buried the early Britons, Johnson does the same to the last vestiges of Imperial Rome. Moreover, Johnson must modify his discussion of the pervasiveness of the Roman influence when he writes of the Saxon invasion and settlement:

> But by what laws soever the Britons were governed before the arrival of these German tribes whom we generally call by the common name of Saxons, the subsequent expulsion of the Britons themselves by those Northern invaders must undoubtedly have been attended with the expulsion of their Laws. Hardly any conquest was ever followed by such fateful Consequences to the conquered, or any change so total ever produced as those which were effected by that ferocious (people) 46

People

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His discussion of these barbarians lacks no censure on moral grounds and expresses dismay at the violence of their customs and habits. Johnson refers to the barbarians' migration which caused them to:

> rise as a single man and thousands and myriads determine together to quit their habitations and possessions to abandon known and certain means of Life; and transport themselves, their wives & their children into countries, in that state of universal Ignorance, utterly unknown; where whenever they settled they must obtain their settlement by violence, (after)
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> after a contest with nations of whose Numbers of Disposition they had never

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134. Kings 80, pp. 46-47.

> been informed.
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> It was natural to suppose that an Event so contrary to all moral Principles and civil Institutions, could only be the effect of physical necessity; ..... But this cause has always appeared to me to be assumed without proof, only because no other could be found.
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> 135

In making this judgment Johnson suggests that "It may be suspected with great probability that the Nations who burst upon the South and West of Europe, fled before some Nation fiercer than themselves" (p. 50) and "we must however suppose mankind to be differently disposed from the present Race" (p. 50). His recitation of the movement of European tribes is classical (Plutarch, p. 51) and is also based on Johnson's historical view of the place of agriculture and the desire for safety. While Johnson displays some sympathy for the motivation behind this migration, he strongly suggests the harm it caused. Furthermore, Johnson intelligently utilizes this discussion of the invasion to dismiss the early Britons and Romans, and to lay the foundation for the introduction of Saxon government.

By virtue not only of conquest but also eventual colonization, the Saxons and other German tribes (pp. 57-58) were able to redefine and restructure the constitutions of most of the territories they entered. Writing of the results of this process, Johnson says:

> ..... these are facts within our own knowledge which might serve to

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135. Kings 80, p. 47-48.

> confirm it and to convince us that the Saxons did not, could not, borrow their civil Institutions from the Britons. To mention only a few of Them; — the technical terms of the (Law) 58 Law, are either Saxon or Norman, none of them British, nor any of them I think Roman but such as have evidently been introduced in later Ages. 136

The essential point is that England is indebted to the Saxons for "the first Rudiments of our Civil Polity" (p. 59). Such a statement seems to conflict with his earlier emphasis on the strength of the Roman influence, but this refers mostly to pre-Saxon England. What may be suggested, however, is that a fundamental yet untraceable groundwork had been laid by earlier contact with Roman institutions.[137] It must be remembered that in this discussion of that debt, Johnson relies heavily on Tacitus

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136. Kings 80, pp. 57–59.

137. cf. William Stubbs, Select Characters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First, ninth ed. revised by H.W.C. Davis, (Oxford: Clarendon Press, 1951), pp. 5-6; contra: "Between the age of Tacitus and Ptolemy and that of Bede we have very few distinct data....that during the period the name of Saxon was extended to a great aggregation of North German tribes, which retained their independence of Rome, their ancient religion and seats, and very much of their antient barbarism. ... it is certain that whatever progress was made was free from Roman elements: it is probable that the Saxons were behind the rest of the Germans in the distinctness of polity which belongs to the tribes with which the Romans were better acquainted."

But Johnson's suggestion is that elements of Roman influence were absorbed by the Saxons in their contact with other tribes who had some associations with Rome.

from[138] whom he reconstructs the evolution of Princeps as a military commander to the status of a king. By doing this Johnson is able to conduct his lecture quickly to the subject of the early Kentish Kings and begin to point out features that are related to English legal institutions.

The discussion of the origin of kingship[139] permits Johnson to study the continuity in constitutional development. The hereditary rights and duties existing between king and nobles whose fluctuations, at times, allowed the people to bargain for themselves is the beginning of the modern constitution:

> ..... thus whoever was in danger, whether King or Nobles, the (People)
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> 61
>
> People were sure to sell their Assistance at a higher price as they were more needed. This we may fairly consider as the Origin of that Constitution that hath been preserved though under different appearances, and with various and great mutations, even to the present Time. What were the Customs of those our Pagan Forefathers concerning Civil

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138. Although Johnson relies heavily on Tacitus, he cites Caesar De Bello Gallico; Lambard, Archaionomia (1568) probably the Whelock edition (Cantab. 1644) on page 65; Wilkins, Leges Anglo-Saxonicae (1721) also found on page 65; Spelman's works (entry 218 in the Greene annotated catalogue of his library), Bede, Whelock ed. (Greene 348), Hume's History of England p. 65.

139. cf. Fritz Kern, Kingship and Law in the Middle Ages: The Divine Right of Kings and the Right of Resistance in the early Middle Ages, II. Law and Constitution in the Middle Ages, trans. by S.B. Chrimes, (1956; rpt. New York: Harper and Row, Inc., 1970).

> and Criminal Questions, since they had no written Laws, we cannot say with any precision.
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> 140

This bargaining process is the first shadow of a political consciousness. Johnson points out that introduction of rudimentary 'compromise' shows the development of sophisticated political activity. Johnson sees the motives behind granting support to either King or Nobles as those of pure self-interest devoid of any suggestion for the greater good. This extreme personal interest in Saxon times appears at its rawest in the criminal law.

Writing on the nature of the criminal law in this society, Johnson shows a clear understanding of its relation to the lex talionis:

> ....., they considered Crimes rather as the objects of Private Vengeance than of Publick Justice; a Notion that gave rise to those compensations for offences of which subsequent Anglo-Saxon Laws (are)
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> 62

> are full; a notion which it was so difficult entirely to eradicate, that even Christian Legislators were obliged to comply with it, so that as late as the Reign of Edmond, we find a law enacted which expressly subjects a Murderer that could not raise money enough to pay the settled price of impunity to the deadly vengeance of those who had lost their kinsmen, and only exempts his Relations from it on condition that they do not harbour him nor furnish him with bread.
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> 141

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140. Kings 80, pp. 61-62.

141. Kings 80, pp. 62-63.

This severe form of liability is characteristic of an underdeveloped society which had, at best, the most rude system of criminal procedure. Writing of early criminal procedure, Stephen says:

> ..... it should be remembered that in early times the really efficient check upon crimes of violence was the fear of private vengeance, which rapidly degenerated into private war, blood feuds, and anarchy. The institution of the Wer in itself implies this. I have described it in connection with the subject of punishment, but it belongs properly to a period when the idea of public punishment for crimes had not yet become familiar; a period when a crime was still regarded to a great extent as an act of war, and in which the object of the law-maker was rather to reconcile antagonists upon established terms than to put down crimes by the establishment of a system of criminal law, as we understand the term.
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> 142

At this point in the lecture Johnson does not offer any other sense of procedure until the palliative forces of Christianity emerge.

The introduction of a written body of law is credited to "Ethelberth, who was the king of Kent about the year 560, and who was the first Christian Prince among the Saxons" (p. 64). However, Johnson does not completely accept this accreditation "for there is Reason to believe that the first Laws of the Burgundians, Visigoths and others, whom I shall mention in my next Lecture, were compiled before the Time of Ethelberth" (p. 65). Further-

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142. Sir James Fitzjames Stephen, A History of the Criminal Law of England, 3 vols., (London: Macmillan and Company, 1883), vol. I, pp. 59-60.

more, Johnson[143] attributes these written laws to the influence of the clergy:

> ..... But the learning of Savage Nations newly converted must necessarily for a long time reside among the Clergy. And that the Clergy were the first Authours of the Saxon Laws we have Reason to believe, because we find them chiefly formed for the Regulation of Ecclesiastical Discipline which would be the first Consideration amongst the Clergy, whose chief care must be the Establishment of proper subordination (amongst) 65
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> amongst themselves; and for the Punishment of crimes, which would claim the second attention of those who were to reform and superintend the Manner of the People. The modifications and adjustment of Civil Property, in which they had less interest and less skill, were deferred to an Age in which by the diffusion of knowledge those who were possessed of Riches and Power became able to think and write for themselves, to discover the causes of their own Distresses, and the means by which they might be prevented or removed. That the first Precedents of our Religion were likewise the first Authours of our Laws, is yet further evident because our Laws and our Religion are drawn alike from the Volumes of Revelation; 144

Johnson's brief comment on Aethelberht stresses the power and status of the clergy. His remarks imply that they

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143. cf. H.G. Richardson and G.O. Sayles, Law and Legislation: from Aethelberht to Magna Carta,

(Edinburgh: At the University Press, 1966):
"On the contrary, the evidence, in our view, points in the opposite direction, Aethelberht's legislation was in no sense Christian but, if an offensive word may be used inoffensively, pagan." (p. 1).
"We must make it clear that there is no evidence that Roman law had any direct influence upon English law before the reign of Henry II." (p. 71).

144. Kings 80, pp. 65-66.

had a fine grasp of the hierarchical nature of society and were able to utilize their talents to make their own position more secure. Moreover, modern scholarship determines that these special laws for the clergy were made because "the foreign clergy, venturing into a rough and pagan society, had to be given an appropriate status and protection for the property they would acquire from noble patrons".[145] However, Johnson's language seems to indicate that general learning was not encouraged despite laws written in English in order to guard the mystery of knowledge and to strengthen this early form of the relationship between church and state.

Johnson feels it is necessary within the scope of this lecture to comment on the laws of Alfred. In his review of Alfred, Johnson writes of distinctions between intention and effect:

> Of the Laws which have given so much renown to the name of Alfred, it will naturally be expected that something should be said. So far as we can judge of his code by the Fragments which time had left us, it seems to be the Effort of benevolent Power endeavouring to rescue a People yet unformed from the Insecurity and unhappiness of Savage license. He seems to have it more in his thoughts to avert Evil than to procure Good)[67]
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> Good. His institutions are such as the sense of present Inconvenience would naturally dictate, but the Nation had not then experience or knowledge sufficient to open Prospects into remote Futurity, to fix the exact Bounds of Civil Rights, or regulate with nice adjustment the Distributions,

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145. Harding, p. 13.

> of Property and Evolutions of succession;[146]

It is not surprising that Johnson's analysis of Alfred relies on practical politics and moral imperatives. Both concepts appeal to Johnson's historical and cultural bias. This analysis illustrates McAdam's observation that "the introduction of Christianity and consequent spread of learning were subjects irresistible to Johnson".[147] Because as a moral philosopher Johnson's curiosity would certainly be aroused by the way in which ethics were first introduced into the early Saxon state, he focuses on the relationship between learning and morals in Alfred's prologue. Johnson's point that the "first forty-nine laws in the Code of Alfred are transcribed from the Mosaic institution" (p. 67) suggests the acceptance of divine revelation. This point is especially important for Johnson since it implies that divine wisdom rather than human thought alone marks the significant beginning of what he eventually considers to be the philosophical foundation to modern English law.

The substance of this comment is the degree of purity which Johnson attaches to Christian revelation. Chapin points out:

> In general, the great value of revelation for Johnson, so far as its bearing on

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146. Kings 80, pp. 67-69.

147. Life IV, p. 124, Johnson on original sin, punishment, moral law, and precepts of purity.

> morality is concerned, is not that it brings into the world an ethic wholly unknown before, nor an ethic sharply in opposition to non-Christian ethical systems, but rather that it strengthens men in the practice of virtues already known.
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> 148

This Law Code of Alfred is significant because it attempts to inculcate certain Christian values such as the promotion of a moral structure, dealing with the problems of evil, and suggesting a sense of the divine, within the system of the Kings' peace. Although "it is noteworthy that in Alfred's Dooms the protection (borg) of the King's Majesty had a higher value than that of the head of the Christian Church",[149] the point is that this alliance between King and Church, nevertheless, tried to develop moral precepts under the auspices of the Christian religion. In this code Johnson recognized the political nature of the Church which under the guise of promoting good actually proves itself adept at securing its own postition. This is a point Johnson realizes but does not too closely investigate lest he harm the perception of the Church as an agent for good.

The next section of this lecture which deals with the "usurpation of the Danes" (p. 69) must be attributed to Chambers. The style differs markedly from those passages clearly written by Johnson. Not only is this section highly technical but the language is convoluted and mannered. McAdam writes:

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148. Chapin, The Religious Thought of Samuel Johnson, p.94.

149. Stephenson and Marples, Law in the Light of History: Book II England in the Middle Ages, (London: Williams and Norgate, LTD., 1940), p. 32.

> Chambers concludes the lecture with a few paragraphs on the Code of Edward the Confessor and the coming of the Normans. The proportion of Johnson's contributions to Chambers' is about the same (two-fifths) as in the first lecture, and again we see Johnson choosing general and historical topics on which to elaborate, and leaving more technical matters to Chambers.
> 150

While McAdam is essentially correct in ascribing the sections on the Code of Edward and the Norman influence to Chambers, the completeness of this assertion is vulnerable to criticism. Both on stylistic and on philosophical evidence it can be maintained that Johnson wrote the concluding remarks on the extent of the Norman debt to the Saxons. Not only does this become clear when the summation is examined but also when Johnson's talents of synopsis and organization are recalled.

In this summing up Johnson writes:

> ..... So much of your Private Law therefore as depends on general and immemorial usage, must be acknowledged to be in great measure Norman; the great outlines however of our Publick Law, like the bulk of our people, are manifestly of Saxon origin; the Executive Power of the Crown and Legislative Authority of the King and Great Council, the Civil Division of England in Counties, Hundreds and Townships, with the Courts incident to them, as well as the general Form of its Ecclesiastical Division, the whole subordination of our Civil Magistracy, the Establishment of Manors, our usual form of Trial by Jury, as well as that by Combat, which though now disused has not been formally abolished, are all derived
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>
> derived to us from that Source, though

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150. McAdam, p. 89.

> varied polished and improved by the
> Wisdom of Successive Ages.
> 151

An examination of the diction and sentence structure indicates a pattern of expression characteristic of Johnson. Unlike the verbal entanglements common in Chambers' writing, Johnson's description of these legal institutions is simple and without ornament. Here as in the other quoted passages, Johnson's phrasing is distinguished by his knowledge and authority. Important points in the text are arranged with a balance and parallelism that is indicative of Johnson's philosophical style of expression and writing.[152] An equality of emphasis is evident in his placement of ideas to create a forceful yet concise position. The texture of Johnson's language and the substance of his remarks reflect his interest in the Saxon contributions to British legal institutions. His stress on these public institutions which came to dominate the basic political structure attracts Johnson's interest in understanding the composition of society. Government and society which have their modern origin in these Saxon innovations provides the necessary tools to analyze the operation of moral precepts. Johnson who had studied on Alfred's will[153] demonstrates the range of his understand-

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151. Kings 80, pp. 74-75.

152. W.K. Wimsatt, jr., Philosophical Words: A Study of and Meaning in the Rambler and Dictionary of Samuel Johnson, pp. 70-93.

153. Life IV, p. 133: "Your (Thomas Astle) notes on Alfred appear to me very judicious and accurate, but they are too few."

ing of the Saxon times in this lecture.

The passages in this lecture that are clearly Johnson's are polished and elegant. Not only do these passages show Johnson's grasp of the available knowledge of the period, but they also reveal an ability to shape language and suggest his own interests. This is a talent which Chambers does not possess. Chambers' writing is heavy and lacks the subtlety needed to fashion effective nuances and positioning. There is a sense of rhythm in Johnson's language and this contrasts sharply with Chambers' stolidity. Within the context of the lecture format, Johnson's contributions are distinguished not only by his learning but by a style suitable for effectively expressing his positions. In this lecture Johnson reveals traces of cultural and political bias, yet is able to weave his prejudices into an historical subject that produces an impressive and forceful discussion of early legal history. In his usual masterful way Johnson writes with an aura of authority that distracts attention from his occasional inaccuracies, and distinguishes an element of what he in other circumstances might have stigmatized as 'cant'.

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The third of this important series of introductory lectures is entitled: "Of the Feudal Law Lect: III of the Feudal Law Strictly so Called, and of the Effects of that Law on our Constitution & Government". In this lec-

ture there are flashes of Johnsonian prose and only some short sections not written by Chambers. This is an assessment with which McAdam[154] and I for the most part agree. However, it is necessary to review those passages either written by Johnson or influenced by him to see how they fit into the pattern of his jurisprudential thinking.

Johnson's ability to comment, organize, and articulate the underlying propositions of different legal systems is illustrated in this lecture. After Chambers's presentation and discussion of the primary elements of feudal law found in several continental systems, it is Johnson who clearly sets out their general nature:

> Their general character is this, that being formed for nations in which private quiet was more endangered by violence than subtlety, they have chiefly endeavoured to restrain crimes, and have made very few provisions for ascertaining property or deciding disputes. It may be supposed that when they first occupied the lands of conquered nations, according to a distribution publickly made, while every man's title was recent, it was undisputed; and that for some time whoever desired more than he had, found it easier to take it from an old inhabitant than a fellow soldier. By degrees, however, military violence began to subside, and the strangers coalesced into one system of government with the original people. At this time, or rather as this time was advancing, it became necessary to protect the Romans from the outrages of their conquerors and therefore many laws were made ne fortior omnia posset. By degrees, as they had no enemies to oppose, they would naturally form claims upon one another; and as intermarriages diffused relation, the order of

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154. McAdam, p. 89:of the excerpts from Johnson's contributions cited in the rest of this chapter, I accept McAdam's designations of what is most important.

> inheritance would be more perplexed; We may then reasonably suppose that the rules of descent, which had been preserved hitherto by custom and tradition, were first deduced into regular subordination; and in the decrees of emperors, registered in the later laws of the Lombards, may plainly be discovered the first rudiments of feudal tenures.
> 155

This excerpt not only indicates Johnson's ability in synthesizing and formulating general impressions, but continues to suggest several sociological ideas that can be derived from the early development of feudal laws.

Both the law of society and the law of progress develop concepts of self-preservation, the demands of the larger society, the maintenance of accomplishment, and the movement toward progress. By stressing the needs of individuals and the origin of their formation into groups,[156] Johnson shows how a rude social organization moves toward a more complex one. This process of forming an integrated society requires violence to be controlled and eventually ritualized. Johnson suggests that this is accomplished by developing a legal system and social structure that channels dispute into an accepted framework for resolution. With the diminution of external threat, internal discord becomes prominent and such unease must be resolved within a system that is, at least, perceived to be regular. Thus, society develops both laws and structures which not only

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155. Kings 80, pp. 89-91.

156. Adam Ferguson, An Essay on the History of Civil Society (1767), ed. Duncan Forbes, (Edinburgh: University Press, 1966), pp. 1-17.

provide stability but direction as well. As Johnson understands from his history, it is this need for society to function that requires man to fashion some sense of a civil society.

This civil society finds its base in the institution of feudal tenures. It is Chambers's task to define the "Ages of Feudal law" (p. 92). Chambers analyzes three of these periods: 1. "the Lands given to soldiers which were not yet called Feuds and perhaps had no general denomination, were held by the mere will and pleasure of the Lord (p. 92); 2. "some regard was had to descent" (p. 93); 3. "those possessions which while they were granted only for Life, or at most with very strict limitations, had been termed Beneficia; began to be made indefinitely inheritable and took the name of Feuds (pp. 95-96). However, it is Johnson who summarizes these periods and names the fourth:

> The three periods of the Feudal Law which have been mentioned are called its Infancy, Childhood and Youth. Now begins its Fourth Age or its Maturity; the Order of Descent was now settled, collateral Relations were admitted to Inheritance, the reciprocal obligations by Lord and Tenant were fully understood, and some Princes, the first of whom was the Emperour Conrad, and published edicts in writing for regulating feudal successions (Giannonci Hist: of Nap. B: 9 C.1.S.) but no Code of feudal law had yet been digested, by which any deviation from Right might be rectified, as to which either Lord (or)
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> or tenant could appeal. In this period happened that great Revolution commonly called the Norman Conquest, soon after which the Feudal Law was established amongst

Us with compleat Prevalence.

157

This grouping of the ages of feudal law illustrates the way in which Johnson and Chambers work together. In this partnership Chambers provides technical information and Johnson puts together its summary.

> Throughout this lecture there are several short, though incisive contributions made by Johnson. Of these the most characteristic is this comment on the power and authority of the king:

> > The king was maintained in times of peace, not by taxes or imposts, but by the profits of his own lands, which in reigns of luxury and negligence were diminished by wanton grants, or profuse alienations, and in times of contest or tyranny, were increased by seizures and forfeitures. As he subsisted upon his own revenues, he had very little dependence on his people. But in time of war, whether impelled by ambition or enforced by necessity, he was compelled to summon his feudatory Lords, whose greatness was such that when they combined against him he had scarcely power to compel their attendance. In later times, it was found necessary to levy subsidies for the payment of the army, and as subsidies could not regularly be levied but by concurrence of the Great Men, these were the times at which they stipulated for redress of grievances and reformation of government.

158

This paragraph allows Johnson to comment on two of his main interests: economics[159] and kingship.[160] Moreover,

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157. Kings 80, pp. 99-100.

158. Kings 80, pp. 114-115.

159. cf. Greene, Politics, p. 280; Middendorf, 'Johnson on Wealth and Commerce', pp. 47-64.

160. cf. footnotes 139 and 140.

it also permits Johnson to explore the relationship between obligation and power. Although set in an historical context, these remarks reflect his views on the political position a king occupies[161] and suggests the restraints imposed by practical politics and legal development. For Johnson sees the constraints operating on a king, at this time, to be primarily determined by finance. This emphasis on finance is important because from this evolves the power struggles that force political concessions. Certainly, Johnson appropriates some of the cause to regal profligacy yet intimates that loyalty is a somewhat elastic concept. From his experience and observation of human nature, Johnson realizes that power relationships are fashioned by necessity and opportunity. And in this excerpt, he suggests how political compromise contributes to change and transformation in the development of feudal rights and duties.

This lecture which focused on the feudal law has, as I have said, few important contributions by Johnson. What may be gleaned, however, is a clear understanding of the way in which the Johnson-Chambers collaboration works. The general organizational plan and the periodic summaries of the ideas covered are Johnson's. The technical legal information and laborious detail make up Chamber's contribution. While most of this lecture is assuredly written by Chambers, Johnson's remarks punctuate the text and

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161. Life I, pp. 423-424; Life III, pp. 155-156.

give it its flashes of life. Mostly Johnson writes on those themes that have either great personal interest for him or are able to be expanded along general lines of thought. Moreover, this lecture may be seen as a paradigm for the way in which Johnson functions in most of the remaining lectures.

"Division of the Laws of England: Lect IV. on The General Division of the Laws of England" is the fourth and final lecture of the important introductory series. Although Johnson's written contribution is quite small, as McAdam points out, his structural help must have been considerable.[162] This lecture discusses some of the differences between common and statutory law. And it is further subdivided into a detailed look by Chambers at civil, canon, and maritime law. While these subjects may have had some interest to Johnson, the style, the treatment, and the broad review of early legal authorities indicate this to be the work of Chambers.

However, the introductory remarks which set out the scheme followed in the lecture and some preliminary comment on the common law have the hallmark of Johnson. Certainly, this opening is written by Johnson:

> The two most obvious Ways of dividing any System of Laws are with respect to their Form, or with Relation to their Subject Matter.
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> The Law of England with Regard to its Form may be considered as General or Particular. 1. The General Law is again

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162. McAdam, p. 91.

> divided into 1st the Common Law, or Law unwritten and 2ndly Statutes or Law written..
> 1. The Unwritten or Common Law, being begun by Necessity, amidst the Darkness of barbarous Ages and the Tumults of fluctuating Dominion, when we have pursued it as far as History will guide our search, ends, like the Nation that received it, in Fable and Uncertainty (some)
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> 120
>
> Some Sources may however be discovered from which it may with great Probability be derived.
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> 163

Johnson amplifies his remarks on the nature of:

> , The common Law, in its strict Acceptation, which consists of Customs derived from immemorial Tradition, and of Maxims established by immemorial Practice. Of these whether they were derived from the Saxons or the Normans, or were common to both Nations, it is for the most part vain to enquire. Where there is a Resemblance in the great Principles of Government, it may be supposed that there was some Likeness in subordinate Institutions, and that therefore
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> 123
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> the Norman and Saxon Law easily coalesced. But of their Resemblances and Differences, if much is known, much likewise is forgotten.
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> 164

In this assessment of the common law, Johnson suggests an element of cultural mysticism which somehow accounts for the origin of this law. By following this approach to the origin of the common law, Johnson is essentially correct. As Hogue points out:

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163. Kings 80, pp. 120-121.

164. Kings 80, pp. 123-124; cf. Bl Comm. I.3, pp.45-46.

> Social change and legal change are more easily discerned than accounted for, and the process by which legal changes are made is often far from clear. The mystery surrounding many legal changes may be particularly baffling when we deal with a system of judge-made law.
> 165

This judge-made law is actually determined by the relationships present in any community. For when Johnson writes that the common law is derived from custom and practice, he is correctly suggesting that because of changing social relations the law must adapt and respond. In this way he recognizes that the demands made by social interaction require the law to react in an understanding manner. It is this unwritten or common law which originally had the necessary flexibility. Although the origin of certain legal principles may be discerned, it is by judicial interpretation that the common law is made. In his brief remarks on the common law, Johnson raises the question of history but focuses on the important relationship between law and society that governs the common law and the way in which it functions.

I have concentrated on this introductory series of lectures because this is where Johnson was most needed and exerted the most influence. These four lectures give the clearest picture of the way in which the Johnson-Chambers collaboration works. Johnson has been seen in this series as the one who set out their general plan and organization. Topics that have either personal interest

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165. Arthur R. Hogue, Origins of the Common Law, (Bloomington and London: Indiana Univ. Press, 1966), p.4.

or complement his political ideas are the ones where he supplies the actual text. He discusses the general settings and broad impressions created by the way the law operated in its historical context and how it now functions. At the same time, Johnson avoids detailed analysis or history,[166] but develops the underlying suppositions that accompany their presentation. These early lectures show Johnson in the role of a catalyst and guide. There is a strain of sturdy common sense running throughout this series that cuts through the legal jargon and endows these lectures with a substantial core. Naturally, Chambers, who was both lawyer and judge, writes the greater part of the text but his prose lacks the decision and strength of Johnson's style of presentation.

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"Part I. Containing the Publick Law of England Lec-

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166. cf. Life II, p. 195; pp. 365-366 for Johnson's comments on history; Also in the lectures he warns: "of the small information that laws and historians afford us, the dubiousness and darkness is sufficiently proved by remaking that they have been advanced in defense of opposite opinions, and that those who write in contradiction to each other can make a specious use of the same authority" (Kings 81, p.11); It may not be improper in this place to caution young inquirers into the origin of our government against too great confidence in systematical writers or modern historians, of whom it may justly be suspected that they often deceive themselves and their readers when they attempt to explain by reason that which happened by chance, when they search for profound policy and subtle refinement in temporary expedients, capricious propositions, and stipulations offered with violence and admitted by compulsion and therefore broken and disregarded when that violence ceased by which they were enforced. (Kings 81,pp.22-23).

tures 1st., 2d., 3d., and 4th." is the next series of lectures. The topics covered in this series are: Lecture I: "Of the Origin and Different Forms of Parliament" (Kings 81, pp. 1-32); Lecture II: "Of the Present Constitution of Parliaments" (Kings 81, pp. 33-69); Lecture III: "Of the King and First of his Coronation Oath" (Kings 81, pp. 70-93); Lecture IV: "Of the Kings Prerogative and First of his Prerogative of Power and Exemption" (Kings 81, pp. 94-127). In this series Johnson's most distinguished contributions concern economics and kingship. Concepts of economics and kingship exerted great influence on the development and operation of the law. In his comments on economics and his examination of kingship, Johnson reveals important keys to the understanding of his legal thinking.

In his discussion of the coronation oath Johnson works from an earlier appreciation of the Saxon oath (cf. Selden: tit. Hon[illegible] part 1st C.8. Sect 2) to the present, more elaborate formulary. His approach is anthropological as he understands the compensations derived especially by primitive people from ceremony:

> It will be found by observation that when countries emerge from barbarity, the first approaches to elegance and civility are made (by)
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> 84
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> by public celebrities and formal magnificence. While men are gross and ignorant, unskilled in the arts of reasoning, and enjoying few opportunities of information and instruction, they are much influenced by unusual and splendid ceremonies which strongly affect the imagination and leave deep impressions on the memory. Nations as well as individuals have their childhood, and the mind, unformed by reflection and unoccupied

> by knowledge, must receive its whole intelligence immediately from the senses. When coronations therefore were first contrived they were probably of great use. As they procured veneration to the person of the king, they at least confirmed his authority though they did not give it.
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> 167

By suggesting the difference between confirming authority and giving it, Johnson raises an important legal and political distinction. The question left somewhat unanswered is what determines legitimacy. Johnson implies that while people may recognize power or authority, it will be an ecclesiastical source that anoints.

The psychological and political significance of this effective consecration is not lost on Johnson. He is aware that in rude society the closeness of the church-state relationship is a powerful one:

> In that Age of prejudice and ignorance, when the civil institutions were yet few, and the securities of legal obligation were very weak, both offences against the law were often unpunished and because the (law)
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> 86
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> law itself could be but little known, it was necessary to invest the king with something of a sacred character that might secure obedience by reverence and more effectually preserve his person from danger of violation. For this reason it was necessary to interpose the clerical authority, that the crown being imposed by a holy hand might communicate some sanctity to him that wore it. And, accordingly, the inauguration of a King is by our antient historians termed consecration; and the writings, both fabulous and historical, of the middle Ages connect with royalty

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167. Kings 81, pp. 84-85.

> some supernatural privileges and powers.
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> 168

Johnson also realizes that this sacerdotal intervention in the political process has grave constitutional ramifications. For Johnson realizes that:

> Such an oath could be required by no civil power because all civil power was subordinate to the king. But, in the opinion of our superstitious ancestors, the ecclesiastics (might)
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> 89
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> might impose it by the rights of the priesthood which Kings do not give and cannot take away.
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> 169

In his understanding of this history, Johnson pointed out not only the potential development of church influenced constitutional law[170] but also lessons that may be applied to the Jacobean controversy.[171] However, the main issues that arise from this situation are how contemporary legal maxims or principles are to be evaluated.

Although these lectures concern the historical origins of Kingship, there is much discussion of certain le-

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168. Kings 81, pp. 86-87.

169. Kings 81, pp. 89-90.

170. Kern, p. 40; Writing of the political significance of royal consecration, Kern corroborates the point Johnson is making: "Because of the sacerdotal character which consecration conferred upon the king, its mystical effects were reflected in the law of the Church, and in consequence of the close bonds between Church and State, church law could hardly have failed in any circumstances to influence constitutional law".

171. cf. Johnson's comments on the Stuarts, Life II, p. 27-29.

gal principles that for Johnson are still viable or ap-
plicable.[172] Of particular interest is the treatment given the maxim: 'the king can do no wrong' (Co Litt: 198 B.). Of this maxim Johnson says:

> That this maxim may be morally and physically false, it is not difficult to discover. But in the legal sense it is generally true, for the king cannot be supposed to do much but by previous advice and subsequent
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> [117] ministration, and the peace of the world is sufficiently secured by the power which the law always retains of vindicating itself from violation by thepunishment of evil counsellors and evil ministers. Of this maxim, so magnificent in sound, the true sense is only this: that when wrong is done it is not to be charged to the King, who being the original of all criminal jurisdiction cannot be supposed accountable to himself. The blame must therefore be thrown where punishment can be inflicted, and falls, not only legally but justly, upon those who if not the original authors must, almost in all cases where wrong is done, be the immediate agents.
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> [173]

In this position Johnson reflects a philosophical atti-
tude similar to Locke,[174] but carefully suggests the ques-

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172. Life I, pp. 423-424; where Johnson and Goldsmith discuss this legal maxim.

173. Kings 81, pp. 117-118.

174. John Locke, The Second Treatise of Government, ed. Thomas P. Peardon, (Indianapolis: The Bobbs Merril Co., Inc., 1952), Chap. VII, 94, p. 54: "No man in civil society can be exempted from the laws of it; for it any man may do what he thinks fit, and there be no appeal on earth for redress or security against any harm he shall do, I ask whether he be not perfectly still in the state of nature, and so can be no part or member of that civil society; unless any one will say the state of nature and civil society are one and the same thing, which I have never yet found any one so great a patron of anarchy as to affirm."

tion of state immunity and the concurrent obligations under which a king must operate. By distinguishing the role of a king, Johnson, on the one hand, is able to maintain a recognition of the king's legal status, and, on the other hand, the perception that some element of responsibility still exists. The issue of agency is raised in such a way as to limit the potential political damage to the monarchy. However, since the source itself is not liable to sanction, the law must be seen to be inadequate and undone.

Much of Johnson's thinking is colored by his experience of poverty and the desire for security.[175] From these concerns spring Johnson's deep interest in economic thought and commercial history. In this fourth lecture on the King's prerogative, he takes the opportunity to write of the history of trade:

> In the present age when every village is stored with shops, and every road encumbered with carriages, and all the necessaries and luxuries of life solicit us to purchase them at our own doors, we do not readily comprehend the great importance of fairs and markets. To know, therefore, how much they contributed to plenty and convenience, we must place ourselves in an age when there was no post by which one man could make his wants known at a distance, to another; when by the want of intercourse the state of few men's fortune was known, and therefore very little credit could be given; when there was not money sufficient to fill up by its circulation all the wants of life, and a great part of the nation lived upon the immediate produce of the earth, fixed, either by physi-[110]

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175. Bate, The Achievement of Samuel Johnson, pp.74-128.

> cal or legal necessity, to the turf on which they labored .....[111]
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> The modes of common life when they are once changed are easily forgotten, for no man records that which when records it is already known to all mankind. We have, therefore, no distinct view of the methods by which the internal commerce of the country was transacted, and a distribution made of manufactures and commodities. It is believed that when a fair was held at any seaport or large town, the petty traders from smaller places gathered up the horses of the country and purchased commodities at the fair for their respective shops, in such quantities as they expected to be sufficient till the same opportunities of purchase should return. They [112] were probably accommodated on their journey at religious houses, for as men in those days travelled but little, few inns could be maintained. [176]

Johnson's placement of these remarks in the context of this lecture is not surprising. Throughout the lectures economic and commercial concerns are woven into the patterns of his legal thinking. Johnson understands the relationships among economics, power, and politics that develop laws.[177] Adding these concerns with his interest in

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176. Kings 81, pp. 110-113.

177. cf. Kings 82, pp. 117-118; In lecture VII "of the House of Commons", Johnson writes on the changing nature of money and the difficulty in ascertaining the true value of quit-rents which determine political representation: "It is one of the defects of civil knowledge that property is yet only estimated by denominations of money, which have not the same ultimate meaning in two places or in two years. Money is in some sense only the shadow of property and is, like the shadow, always varying its proportion to the substance. By this mode of computation quit-rents are almost annihilated, and ecclesiastical revenues are very much impaired. The time will perhaps come when the law that qualifies candidates shall depart as far from the original intention as that which now qualifies electors. But to compute by pecuniary notation is most easy and most intelligible at the present time; every age provides for itself, and is content to leave the same obligation on posterity."

Here, Johnson points out the inherent weakness in determining the qualification for electors who are subject to 'malignant operations' and are constituents by some financial standard. Essentially, Johnson is writing about the intricate relation between money and politics in a very practical manner.

law and moral philosophy, Johnson is working within the main stream of enlightenment thinking. His interest in mixing sociology, economics, and legal history is characteristic of the way Johnson defines his jurisprudential thinking in these lectures.

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In the remaining twelve lectures of "Part I Containing the Publick Law of England", Johnson's most important contributions are found in: Lecture V: "Of the King's Preogative of Possession or his antient and established Revenue" (Kings 82, pp. 2-37); Lecture IX: "Of Courts of Justice, and First of General Courts of Common Law and Equity" (Kings 83, pp. 45-76); Lecture XII: "Of Civil Rank, Order and Precedence" (Kings 84, pp. 86-118); Lecture XV: "Of the Government of Ireland and the American Provinces" (Kings 86, pp. 2-42). In these lectures Johnson explores themes of estate forfeiture, aspects of equity, status and precedence, and the position of the American colonies. On all these topics Johnson writes in a general manner but betrays a hard conservatism.

This attitude is best seen in Johnson's discussion of estates forfeited to the crown because of treason. He seems to feel that the sins of the father may be visited on the son:

> It has appeared to many hard, and to some unreasonable, that the son should be impoverished by the father's crimes, which he perhaps
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> neither abetted nor approved. But no man

> ought rashly to censure this regulation, till he has considered the multifarious relations of civil life, the different modes by which artificial property is acquired, and the different principles upon which it is possessed. It must be remembered that, though a man may have some natural claim to possession, yet he has no natural right to be protected in the exercise of those claims, or vindicated from their violation, that the obligation of one man to defend another arises merely from mutual compact, that a compact implies conditions, and that of the conditions on which any society shall unite, that society must be judge. Different societies, indeed, judge differently, and we may therefore suppose some of them to judge amiss. But if we consider how many ages and nations, ages in which knowledge has been most diffused [33] and nations in which legislation has been most cultivated, have concurred in appointing this punishment of treason, we shall be inclined to believe these securities of public peace salutary to mankind; and as rebellions and civil wars are the greatest evils that can happen to a people, will think that people most happy in which as they are most severely punished they are most effectually prevented. [178]

In this harsh view of the way in which the social compact operates,[179] Johnson reflects the hardness of Hobbes. Moreover, the idea of punishment expressed in this excerpt runs counter to the general enlightened view of

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178. Kings 82, pp. 32-34.

179. Goldsmith, pp. 176-177; "The science of politics indicates what powers are necessary to a state, and perhaps even what sorts of actions will make it strongest; it indicates the necessary limits of those powers and the duties of the sovereign. Hobbes regarded the function of government as the preservation of order or peace, the conditions necessary for the existence of human beings. He does not incline to Locke's view that men are naturally peaceable, and therefore that government is necessary only because of the activities of a few bestial aggressors."

proportion in determining punishment.[180] Johnson does not address the question of social utility or propriety in the exercise of such authority. He does, however, indicate his abhorrence of social and political unrest. Since this forfeiture is the product of treason, Johnson is consistent when he permits such severity because treason undermines the established state.

In the ninth lecture Johnson makes his first substantial comments on equity. Writing on the general quality of equity, he says:

> It has appeared to some a question difficult of decision what is the use of a court of equity if our laws are right, and what is the use of laws if they are wrong. This question supposes in human institutions a degree of excellence which they have never attained. No human law was ever perfect; it has always equity for its object, but it sometimes misses of its end. The imperfections of our criminal law are therefore remedied by the mercy of the king, and those of our civil institutions by the equity of the chancery. Yet law is not unnecessary; by laws against crimes wickedness is restrained, by laws relating to property commerce is regulated and possession is secured. The subject has, in the law, a rule of action always safe, and commonly right; and where it happens to be wrong
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> a remedy is provided.[181]

This fallibility in human institutions which requires some compensating force provides the reason behind concepts of

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180. Maestro, Voltaire and Beccaria as Reformers of Criminal Law, pp. 38, 62, 118.

181. Kings 83, pp. 59-60.

equity. Equity which departs from the formal law because it helps decide cases on their individual merit reflects a strong moral component. There is a problem inherent in equity between justice and law which Aristotle addresses[182] and Johnson attempts to reconcile. The fundamental question rests with the distinction between 'what the law is' and 'what the law should be'. Johnson points out the position of equity in terms of natural justice and its appropriateness as a remedy.

In this effort, Johnson assimilates the basic ideas of his friend Henry Ballow.[183] In his treatise on equity Ballow writes:

> Equity therefore, as it stands for the whole of natural Justice, is more excellent than any human institution; Neither are positive Laws, even in matters seemingly indifferent, any further binding, than they are agreeable with the Law of God and Nature, But the Precepts of the Natural Law, when enforced by the Laws of Man, are so far from losing any thing of their former excellence, that they receive an additional strength and sanction. Yet as the rules of the Municipal law are finite, and the Subject is infinite, there will often fall out cases, which cannot be determined by them; for there can be no finite Rule of an infinite matter, perfect, so that there will be a necessity of having

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182. Aristotle, Nicomachean Ethics, Bk 5, c. 10 "For equity, while superior to one sort of justice, is itself just: it is not superior to justice as being generically different from it. Justice and equity are therefore the same thing, and both are good, though equity is the better. The source of the difficulty is that equity, though just, is not legal justice, but a rectification of legal justice. The reason for this is that law is always a general statement, yet there are cases which it is not possible to cover in a general statement."

183. Life III, 22; 472-473.

recourse to the Natural principles; that what was wanting to the finite, may be supplied out of that which is infinite. And this is what is properly called Equity in opposition to Strict Law; and seems to bear something of the same proportion to it in the Moral, as Art does to Nature in the material world. For as the universal law of matter would in my instances prove harmful to Particulars, if Art were not to interpose and direct them aright; so the general precepts of the Municipal Law would often not be able to attain their end, if Equity did not come in aid of them.

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Working within this framework of natural law theory, Ballow advances a philosophical justification for equity. In Johnson's remarks, he reflects the same philosophical understanding, but focuses on its application.

Johnson does this by examining the practical need for equity when civil laws have been legislated. It is the imperfectibility of man and his institutions that interests Johnson. In Sermon 24 Johnson writes: "all institu-

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tions are defective by their nature; and all rulers have their imperfections". In order to rectify this insuf-

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184. Henry Ballow, A Treatise of Equity, (London: E. and R. Nutt, and R. Gosling, assigns of Edward Sayer, esq., for D. Browne, at the Black Swan without Temple-Bar; and J. Shuckburgh, at the Sun next the Inner Temple Gate in Fleetstreet, 1737), pp. 2-3.

185. Sermon 24, p. 259 (Yale ed.), cf. p. 256: "Human laws, however honestly instituted, or however vigorously enforced, must be limited in their effect, partly by our ignorance, and partly by our weakness. Daily experience may convince us, that all the avenues by which injury and oppression may break in upon life, cannot be guarded by positive prohibitions. Every man sees, and may feel, evils, which no law can punish. And not only will there always remain possibilities of guilt, which legislative foresight cannot discover, but the laws will be often violated by wicked men, whose subtlety eludes detection, and whom therefore vindictive justice cannot bring within the reach of punishment. These deficiencies in civil life can be supplied only by religion." It is from this religious base that Ballow and Johnson derive the moral precepts that help to form the natural law and the principles of equity of which it is a part.

ficiency in the law, Johnson relies on equity to provide balance and justice. Certainly, as Johnson points out equity itself is not sufficient and there is need for positive laws. But equity which has its origin in the moral principles that are part of the natural law can be the best arbitrator. On the one hand, Johnson seems to respect the maxim: Bonus judex secundum aequum et bonum judicat, et aequitatem stricto juri praefert (Co. Litt.24), and on the other, stresses the legitimacy of action and remedy provided by the positive law.

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It is certainly correct that as Greene points out "Johnson believed in rank, to be sure; but there is no evidence that he believed in class, which in later senses of the word, is an entirely different matter."[186] In the twelfth lecture of this series, Johnson gives some reasons for his respect and acceptance of the propriety of rank. Writing of both his understanding of political society and the place rank holds in it for orderly growth, Johnson says:

> Political society is that state of man in which some govern and others are governed; it therefore necessarily implies subordination, and ranks those of which it is composed in different degrees. In a speculative system of government the mind may satisfy 86

186. Greene, Politics of Samuel Johnson, p. 234; cf. Life I, pp. 443,447-448; Life III, pp. 55, 353.

itself with temporary subordination and suppose that part to be governed at one time which governs at another. But as experience immediately shows that but a very small number of any society are qualified to regulate manners or superintend the interest of the rest, and that these qualifications must be the effect of study and enquiry not easily made consistent with manual labor or the constant solicitudes of husbandry or trade, almost every civilized nation has distributed its inhabitants into different orders and, by conferring established precedence and hereditary honours, has in some sense designated from the birth a certain number to public cares and

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liberal employments.

Riches long continued in a family constitute a kind of nobility without any positive designation, and where the rank of nobles is established by an edict of the sovereign authority riches have always been considered as a motive to preference.

Of all kinds of superiority that of riches is most notorious and least disputable. It has been alleged by modern politicians, and alleged with reason, that rich men ought to be more trusted than others by the public because they have more to lose by bad administration. We are not, however, too readily to imagine that the institutions of our savage ancestors were founded in deep research or refined ratiocination. Riches always obtained

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honour; because riches always comprized the power of benefaction. Those who had less than they wanted adhered naturally to those who had more. But there is likewise another reason; wealth is the only superiority that can be successively transmitted. The son of a rich man will be rich, but the son of a wise man will not always be wise. Wealth is therefore perhaps the only ground of hereditary greatness.

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187. Kings 84, pp. 86-89.

Within this historical context Johnson makes observations on order and precedence that reflect his usual inconsistency. He does not want to see political society as exclusive, but neither does he want to lose sight of the need for continuity.

This attitude becomes clearer when Johnson remarks on the effect of precedence for his own generation:

> The doctrine of precedence is in our time very little studied. In a country of commerce and an age of action, every man is more diligent to press on those that go before him, than to turn back and stop the encroachments of those that follow him. And precedence, or, what is of more importance, that respect which precedence is intended to imply, will be proportioned to every man's riches or usefulness, to his acknowledged power of benefitting others or his supposed abilities
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> to acquire it.
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Although these remarks reflect primarily sociological concerns, they have legal implications for both property and politics.[189] In his apprehension of this relationship, Johnson agrees with Adam Smith's thesis that property is a determinant for law and civil society.[190] The distri-

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188. Kings 84, pp. 115-116.

189. cf. Bl. Comm. I. C. 2. p. 157-159.

190. Adam Smith, Wealth of Nations, Cannan ed. Bk. V, pt 2, p. 670: "Civil government supposed a certain subordination. But as the necessity of civil government gradually grows up with the acquisition of valuable property, so the principal causes which naturally introduce subordination gradually grow up with the growth of that valuable property."

bution of property controls the political process and the framing and execution of its laws. Johnson appreciates the importance of rank and social order[191] on political society. His intellectual indecisiveness is the result of conflicting moral hopes and social reality, but it is common sense and observation that leads Johnson to respect rank and the power it wields.

The antecedents to his pamphlet Taxation No Tyranny[192] are found in Johnson's contribution to "Lecture XV" on the American provinces. Writing on the moral and legal status of political representation by colonists, Johnson points out:

> ..... But a question has been lately raised and agitated, for some reason or other, with uncommon warmth, whether our colonies are bound by the statutes of taxation, or whether any part of the public expense shall be required from them. The moral part of this question is in my opinion

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191. cf. John Millar, Observations Concerning the Distinction of Ranks in Society (1771); William C. Lehmann, John Millar of Glasgow 1735-1801: His Life and Thought and his Contributions to Sociological Analysis (Cambridge: At the Univ. Press, 1960).

Despite a Whiggish complexion, Millar's thinking and method parallel that of Johnson's. Both function as 'philosophical historians', show deep concern for the poor, have a strong, underlying moral texture, abhor slavery yet respect the traditions of rank in civilized society. However, this does not mean that Millar accepted subordination, but that he sought the enlightened use of any vestigial prerogatives. Moreover, Millar's analysis of property and his appreciation of power relationships in society, though somewhat different from Johnson's, reflect a sociological understanding of the way society operates.

192. cf. Political Writing (Yale ed.) ed. Greene, pp.401-455; all quotations from this pamphlet taken from Yale ed.

easily decided; no man has a right to any good without partaking of the evil by which that good is necessarily produced; no man has a right to security by another's danger, nor to plenty by another's labour, but as he gives something of his own which he who meets the danger undergoes the labour considers as equivalent; No man has a right to the
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security of government without bearing his share of its inconveniences. Those who encrease the expenses of the public ought to supply their proportion of the expenses
encreased.

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Johnson explores a legal argument against the colonists' abnegation of their political responsibility to the Crown. Government works in a compact of rights and duties, and it is the perception of how these function that frames the issue involved in this dispute. Moreover,
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Johnson, who sees a moral component in government, examines the relationship between crown and colony in an effort to set out the applicability of authority and the limits of sovereignty. Here, it is the question of taxation and what determines its legitimate imposition that is the focus of the dispute.

In his examination of these issues, Johnson attacks the supposition that the colonies cannot be legally taxed because it is not done by the consent of their represent-
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atives. Johnson points out the inaccuracy of this

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193. Kings 86, pp. 36-37.

194. cf. Sermon 23 and Sermon 24, for the way Johnson develops a moral and religious texture for his understanding of government.

195. cf.: Taxation No Tyranny pp. 433-434; Johnson sets out the current manner of choosing representatives in Britain.

assertions:

> The whole difficulty, therefore, of this question must arise from positive institutions; and it has been objected that our colonies cannot legally be taxed, because every subject of this kingdom is taxed by the consent of his representative. That the British Empire in general is represented by the British Parliament, the law uniformly supposes, but if we attempt to subdivide this representation and consider what proportion the representing powers bear to the numbers represented, we shall
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> find nothing but deficiency, vacuity, and confusion -- small villages with two representatives, the greatest city in the world, with only four, and many large and opulent towns to which, having risen since the original regulation, no representatives have ever been granted. Our House of Commons, therefore, with whatever observance of proportion it was instituted at first, can now be considered only as a body of men summoned to consult the general interest of the community with very little or no reference of particular men to particular places.
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> 196

Johnson advances the line of reasoning that Parliament has not had actual proportional representation for centuries. It does have representation by interests, and should have representation by both virtue and wisdom acting for the common good. In this way he suggests that colonists enjoy the same degree of representation as the majority of British citizens.[197] However, the cogency of his argument is undermined by the specious claim that "it cannot be charged as injustice that we do not for our colonies what we do not for ourselves, that we content

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196. Kings 86, pp. 38-39.

197. Taxation No Tyranny, p. 431: Johnson discusses the so-called inheritable right as elector.

ourselves with the ancient mode of election, notwithstanding the changes that have been made amongst us by commerce and by time."[198] The changing nature of property and its assessment for voting purposes is mentioned by Johnson, but is seemingly dismissed as insignificant in terms of quality of parliamentary representation.

Nevertheless, since this point is raised by the colonists, Johnson must argue against it. He says that:

> If it be argued that on these principles the colonists may be taxed without due attention or full knowledge of their abilities, the same argument[40] might be used by the trading companies. If it shall be said that they may be taxed wantonly, because the legislators pay no part of the taxes imposed upon them, it must be considered that if they are useful and beneficial to their mother country it can never be our interest to diminish their usefulness or obstruct the benefits that we receive ourselves.[199]

By contrasting the argument of the colonists with the position of trading companies,[200] Johnson chooses an example that deals with the property qualification as well as the direct issue of representation. While this is a clever precedent to cite, there is a fundamental weakness in its applicability. The equation made between company and colony implies that both enjoy the same legal status

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198. Kings 86, pp. 39-40.

199. Kings 86, pp. 40-41.

200. cf. Taxation No Tyranny, pp. 423-425, 432; where Johnson explores respective charters of colonies and corporations.

and relation in usefulness to the crown. Since both have their origin in charter, the suggestion in Johnson's argument is that colonies have the same type of sovereignty as the East India Company.[201] However, this ignores the rights of citizenship the British colonists have not renounced. And it is the definition of citizenship and concomitant rights that distinguishes their respective legal status.

Johnson endows the government with both discretion and sapience in prescribing laws and determining levels of taxation:

> We shall be restrained from oppression by that great principle which holds all empires together, 'that the happiness of the whole is the happiness of its parts'. It appears, therefore, reasonable to conclude that all colonies may be taxed by that state on which they depend for support, and to which they fly for protection, and that
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> English colonies may (whenever it shall be found necessary or expedient) be taxed by the English legislature, on principles equally reasonable and just with those on which the publick expenses are levied on the greater part of their fellow subjects.
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In essence, Johnson maintains that by claiming the rights

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201. Letters, 187.2, 197.3 (Chapman Edition,pp.193-194).

202. Kings 86, pp. 41-42.

of Englishmen[203] and the protection of England, the colonists must accept the responsibility of those rights and the burden of their cost. And it is the authority inherent in sovereignty that apportions the benefits of these rights and the definition of these duties. Both benevolence and understanding are required on the part of government in its effort to perpetuate the happiness of the governed. When Johnson adopts this government knows best attitude, he reflects an extreme utilitarian standard for the rule of law[204] fashioned according to the government's interpretation.

These lectures are an appropriate forum for Johnson to discuss the legal arguments raging over the American colonies. Not only are the political issues pertinent to the development of the law, but a legal context may offer

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203. cf. Julius S. Waterman, 'Thomas Jefferson and Blackstone's Commentaries', in Essays in the History of Early American Law, ed. Flaherty, pp. 451-457, for a survey of the work of those scholars who accept the thesis that Blackstone's Commentaries provided the cornerstone of 18th C. American legal theory. An understanding of these rights is gained from Blackstone. Gary Wills, Inventing America: Jefferson's Declaration of Independence (NY: Doubleday and Co. Inc., 1978), for a detailed examination of the legal and political theory behind Jefferson's concept of the 'rights of Englishmen '. Wills' textual analysis provides contemporary information on the colonial perception of these rights and the English understanding of the corresponding duties.

204. cf. Cicero, De Legibus, Bk I, XV:42; XVI -45, pp. 344-347;

Grotius, De Jure Belli et Pacis, Prolegomena 16-18, pp. xlix-li, where Johnson's use of such extreme utility is repudiated and where the place of utility is distinguished in relations between communities.

the most effective mode for persuasion.[205] In his remarks Johnson writes from his concern for the potential disintegration of society and the breakdown of the rule of law. His enquiry into the nature of a colony and its relation to the mother country rests not on principles derived from Locke on the power of taxation, but on the precedent of English political institutions. Moreover it is self-evident to Johnson that consent has its reciprocal component. Since the colonists claim the rights of Englishmen, they must accept the responsibilities of British citizenship. Within the structure of British government, the power to tax rests with Parliament. It is Parliament that sets the level and type of taxation, or can delegate aspects of its taxing authority. Johnson, therefore, asserts that Parliament enjoys jurisdiction over the colonists and by the nature of colonial charters has the legal status to decide their management. Johnson's discussion is neither flamboyant nor inflammatory as in Taxation No Tyranny. Instead, he offers a dignified rea-

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205. cf. Edmund Burke, 'Speech on Conciliation with the Colonies', ed. Bate, pp. 126-129; Writing of the agitation in the colonies which he calls 'this untractable spirit', Burke says: "I mean their education. In no country, perhaps, in the world is the law so general a study. ... I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England.... This study (law) renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple, and of a less mercurial cast, judge of an ill principle in government only by an acute grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze."

soned legal presentation that displays his skills of legal writing and advocacy.

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Johnson's contributions to Part II: "Concerning the
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Criminal Law of England" reveal his understanding of the social and political history that helps to formulate the criminal law. In these lectures Johnson explores an early principle of penal laws, mentions the clergy as guardians of learning, explains the contravention of currency regulations, and analyzes the crime of forgery. All of these themes are treated in a way which helps to define the pattern of Johnson's legal thinking. Johnson reviews these subjects in relation to their history and reflects the impact of contemporary legal theory. From his treatment of these elements of the criminal law, Johnson derives his political position and shows how this affects his jurisprudential thinking.

In the first lecture on the nature of punishment, Johnson sets forth a view of man as a fallen creature with
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a deeply ingrained tendency to evil. There is a Hobbesian

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206. Lecture I: "Of Criminal Law and First of the General Nature of Punishments" (Kings 87, pp. 5,6,18,19); Lecture IV: "Of the Benefits of Clergy" (Kings 88, pp. 11,12); Lecture VII: "Of Felonies and Inferiour Offences immediately against the Government" (Kings 88, pp.132-133); Lecture X: "Of Offences against Property and first of Arson, Burglary, Malicious Mischief and Forgery" (Kings 89, pp. 79-80).

207. Hobbes, Leviathan,Chap.14, p.103; Chap.15, pp.113-114; Hobbes describes the fundamental law of nature and mutual trust as a constituent of justice and propriety in the formation of the common wealth. Hobbes' famous aphorism:"The fear of punishment maketh men just"

quality about Johnson's observations:

> Every man desires to retain his own in proportion as he desires to seize what is another's, and no man can be allowed to rob, where none are willing to be robbed; We, therefore, mutually agree to protect and be protected, and every invader of property is opposed by the whole community,at least that part of it which has anything to lose.
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> The same account may be given of the means by which the irascible passions are restrained. Every man would at sometime be willing to hurt another but that he is afraid of being hurt himself.
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> Thus we permit anger and revenge to be restrained by law, because if they were once let loose upon mankind one mischief would forever beget another, and he that had been oftenest conqueror would at least be conquered.
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In this view criminal laws develop because of the need for security and out of fear. The distinctive feature of this opinion is that for the nature of man to be governed, an idea of authority must be established. Legal authority has its origin in the desire to direct these passions and in doing this elucidates those coercive orders which to be effective must have an element of sanction with them. Characteristically, Johnson focuses on the place of coercion and morality in his description of early punishment.

Johnson combines his thinking on coercion and morality with principles of pleasure and pain. He introduces a religious sense in the conflict between good and evil

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208. Kings 87, pp. 9-10.

when he writes:

> The great strength of human laws arises from the constitution of things ordained by Providence, by which man is so formed and disposed that he can suffer more than he can enjoy. If the evil of penalty could not exceed the advantage of wickedness, the mind, so far as it is influenced merely by the laws of man, could never pass beyond an equipose of passion, and the nearer good would generally outweigh the remoter evil. But such is the frame of man that the dread of evil may be always made more powerful than the appetite of good ..... Even the Lex Talionis has upon this principle a very powerful operation, for no man can have as much pleasure in pulling out the eyes of another as he will suffer pain from the pulling out of his own ..... To this principle, which is easily discovered, society owes all its power over individuals. It was soon found that pain would be too powerful for pleasure, and the question then remaining was, on what occasions and in what proportions pain should be applied.
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In this excerpt Johnson reflects the thinking of Grotius more than that of Beccaria.[211] While he is not actually calling for harsh retaliation, Johnson does not emphasize reformation in this view of punishment as deterrent. He does, however, consider the object of the first principle of penal laws to be a deliberate attempt to secure happiness for the greatest number. And to Johnson it is self-

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209. Kings 87, pp. 18-19: cf. footnote 141 on Lex Talionis in Saxon times.

210. Grotius, De Jure Belli et Pacis, Bk. II, chap.20.XI, p.240: "Est autem poena generali significatu Malum passionis, quod infligitur ob malum actionis."

211. Beccaria, On Crimes and Punishments, @1 "of the Right to Punish" where it is argued that punishment should be more corrective and deterrent than vindictive.

evident that man in his first search for happiness requires the perception, at least, of a safe environment. A major consideration of such protection is the rule of law. But for the law to be effective it must have sanctions, and as society develops, the nature of these sanctions must change. Johnson recognizes that for punishment to be just, it must be applied in proportion to the enormity of the evil committed.[212] In this lecture Johnson discusses the evolution of society's attitude for punishment and the laws initially framed from this realization.

In the fourth lecture on the benefit of clergy, Johnson's contribution is the section on preservation. His comments here may be seen as addenda or expansion of his earlier remarks on the palliative forces of Christianity.[213] Writing of the clergy as guardians of learning, Johnson points out:

> The clergy were chiefly employed in all cases where a cultivated understanding was required, because all learning was confined to the clerical order. The learning here intended is not restrained to difficult speculations, for the clergy were necessarily called if there was a record to be read or a contract to be written, because the clergy were almost the only men that in those days could read and write.
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> The accounts occasionally transmitted to us of the grossness and ignorance of the feudal ages make it evident that, without some order of men devoted to literature, the business of life could scarce have

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212. cf., my discussion of Rambler 114, chapter I, pp.40-51.
213. cf. pp. 246-249.

> been transacted; and perhaps in the long continuance of that state of violence, this literary order could scarcely have subsisted without the security of religious reverence. 214

As an historian Johnson wants to stress the vital role the clergy filled in feudal society. Without these men there would be no records of legal decisions or few written texts of legal thinkers. The clergy were worthy enough to be scribes or to be privy to private affairs. In underscoring this function of the clergy, Johnson wants to indicate how some of the benefits the clergy enjoyed were deserved.

The clergy "whose character restrained them at least from open violence and avowed contempt of reason and of justice" 215 were seen as impartial and were perceived by the community as arbitrators. Because of the respect they had, Johnson makes this historical judgment:

> The priest was naturally a lover of peace because he suffered many of the calamities of war and had no hope of plunder or of honor. He was by his celibacy much disengaged from the prejudices of alliance, which are known to be in feudal countries the great sources of corruption and injustice. As he held his estate only for life, his power and riches, whatever they were, regarded with less jealousy; and his person being considered as inviolable, he was in less danger of revenge from those whom his decision might disappoint and offend. 216

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214. Kings 88, pp. 11-12.
215. Kings 88, p. 11.
216. Kings 88, p. 11.

On account of their ecclesiastical status and position in the community, certain legal benefits accrued to the clergy. But it is Chambers who writes on the technical aspects of ecclesiastical courts, the types of cases it tried, and the limits of its jurisdiction. Johnson does not deal with the questions of dual sovereignty which the existence of a separate church structure implies, but he is content to comment in this general fashion on the priest as arbitrator and guardian.

Since Middendorf remarks that "illustrations of Johnson's considering economic questions theoretically are not frequent",[217] it is instructive to review his comments on currency[218] in "Lecture VII." Here, Johnson points out how human nature subverts currency regulations:

> Laws to retain the precious metals where they once come into possession, are made in almost every country and are in all countries ineffectual. An offence which being only political does not much alarm the conscience, and which requiring little participation or confidence is not capable of detection, will be always committed when it is excited by the hope of profit. That which the merchant is sure of selling to large profit, if he cannot buy it with commodities he will buy with money, and with money of his own country if no other can easily be had. To this practice it must be imputed that crown pieces have almost vanished from among us, and that half crowns seem to follow them. The oath required at the exportation of silver is a restraint intended indeed to operate in secret, but long experience has too well informed us that the contest is unequal between oaths

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217. Middendorf, p. 57.

218. Life IV, pp.104-105; Johnson and Wilkes discuss the circulation of coin; Johnson cites Locke.

> and interest, and that they vitiate morals without regulating trade.[219]

Merchants have in specie a method of payment that offers them the freedom to trade with whomever they can make arrangements. In this age of economic acitivity the circulation of money and the attractions of commerce encourage the contravention of mere political restraints. By his experience and observation Johnson appreciates that the desire for money will frustrate any artificial restraints imposed by the state.

In the tenth lecture of this section on the criminal law, Johnson expounds on forgery and its deleterious effect on commercial relations.[220] The crime of forgery with its intent to defraud permeates much of Johnson's thinking on morals[221] and the law. In this lecture Johnson writes on the way in which forgery subverts the structure of society and impedes its orderly progress. In his description of the effects of this crime, Johnson emphasizes the violence done to the social contract on which communities are based and how the distribution of property is disrupted. Johnson maintains that the very fabric of society is stretched by the enormity of evil in fraud. He points out:

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219. Kings 88, pp. 132-133.

220. cf. Bl. Comm. IV 245-247; calls forgery one of the principal infringements on the rights of property.

221. cf. remarks on Dodd in chap. 1; Sermon 17; Sermon 18 where Johnson closely analyzes the moral implications of fraud and applies this discussion to its legal context.

> Forgery is one of the most dangerous and extensive evils to which men are subjected by the combinations of society and the regulations of civil life.
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> 222

Johnson implies that the more complex the society, the greater the opportunity for fraud to exist. While he does not criticize this complication which is an outgrowth of progress, Johnson does suggest an exponential rise in the corresponding evil forgery accomplishes.

To Johnson there exists a natural right to honest records, and the presumption to or reliance on accurate reporting that lies behind commercial and legal relations. Johnson argues that:

> One of the great advantages of a common weal is that every man lives under the protection of all the rest, that every claim is publickly decided, and every considerable transaction publickly attested. But if records and testimonies be forged or falsified the whole power of society is turned against the right. If there were no written testimonies, truth would stand at least upon equal ground with falsehood, but if there be any art by which falsehood can arm itself with the securities of truth, the invention of those securities would be an evil.
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> 223

Because of the changing nature of commercial relations, those obtaining property under false pretences developed ingenious stratagems and therefore society demanded that

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222. Kings 89, p. 79: Life II, pp. 50-51: where Johnson argues that positive proof is not a necessary element of the crime.

223. Kings 89, p. 79.

the rule of caveat emptor be diminished.[224] The requirethat this rule becomes obsolete suggests to Johnson the fundamental need for verifiable records. It is the ability to have reasonably accurate accounts for commercial transactions that leads to Johnson's major concern about the freedom to control the disposition of one's property.

Johnson sees the damage forgery can do to the will-making process.[225] To him the greatest freedom lies in the unfettered control of property,[226] and notions of fraud undermine the exercise of this basic right. In this lecture Johnson articulates this feeling most strongly:

> ..... it is one of the greatest advantages of a regular government that a man can leave his acquisitions by his will, to those whom he best loves

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224. Hall, Theft, Law and Society, p. 70: "Yet the combination of large-scale marketing and the purchase of goods at a distance in reliance on representations of the seller, produced conditions which in due course could be seen to make safeguards against fraud necessary. Again, the transition from a system of cash on delivery transactions to a credit economy made the sale of goods on time a vital factor. Accordingly it became necessary to safeguard merchants against an extension of credit upon misrepresentations. Finally, the breakdown of primary groups by a succession of enclosure movements concomitant with greatly increased mobility in population and the rise of cities produced new alignments of persons unknown to one another--a condition of affairs which lent itself to fraud quite apart from commercial transactions."

225. cf. Life II, pp. 260-262; where Johnson and Chambers discuss will-making in Chambers' rooms in the Temple; Life IV, 402-405, for a revealing personal look at Johnson's own will.

226. cf. Life II, pp. 251-252; property as a great principle in society and a hands-off view of magisterial authority.

> or to whom he is most nearly related, but if wills were easily forged it were more happy that all property should descend by some settled rule or perhaps that it should be picked up, as derelict, by chance, for into what hands can it fall so bad as into those that are practiced in forgery?
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> 227

It is in this way that Johnson feels forgery attacks the heart of civilized society. For Johnson the control of property is an essential freedom and any illegitimate intervention subtends his values of civil society.

The economic base of society relies on confidence in the monetary system and the just execution of the law. Both values are susceptible to the machinations of the forger. Johnson stresses that forgery:

> ... is a crime which the present state of the commercial world makes particularly dangerous. The greater part of all movable property is now wandering in bills, round land and sea, and stands wholly upon the faith of paper. If this faith should by frequent and successful forgery become suspicious and uncertain the traffic of mankind must stop, and the wealth of thousands be annihilated.
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> 228

In this aroused and somewhat virulent analysis of the effects of forgery, Johnson writes an extremely pessimistic scenario. Certainly, if forgery became so widespread as to completely subvert the world's economic system, the result would be chaos. Although Johnson was familiar with

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227. Kings 89, pp. 79-80.

228. Kings 89, p. 80.

the economic collapse caused by the South Sea Bubble,[229] his hyperbolic remarks of an economic crash caused by widespread forgery are ridiculous. Naturally, there would be extreme dislocation, but Johnson neglects both the resiliency in economic systems and the ability of man to cope with the unexpected. This reductio ad absurdum can be seen, however, as the product of Johnson's experiences with poverty[230] and his inordinate desire for stability.[231]

In his contributions to these lectures on the criminal law, Johnson provides no detailed description of the elements of crimes. Instead, he gives general historical appraisals that are replete with moral lessons. While it appears that many of Johnson's observations are obvious, the audience to whom Johnson addressed these lectures must be kept in mind. Also, it must be recalled that these lectures are a partnership between Johnson and Chambers. Nevertheless, Johnson chooses to fulfill his obligations

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229. cf. Life IV, p. 121; V. p. 60 n.4; where Johnson is shown to have absorbed some of the lore associated with the South sea bubble; cf. Carswell, The South Sea Bubble for a treatment of the cause and effects of this episode.

230. cf. Bate, The Achievement of Samuel Johnson. pp. 74-78; for a discussion of psychological effects of poverty of Johnson; Life IV, p. 152: "Do not accuse yourself to consider debt only as an inconvenience; you will find it a calamity. Poverty takes away so many means of doing good, and produces so much inability to resist evil, both natural and moral, that it is by all virtuous means to be avoided.

231. Bate, Samuel Johnson, p. 198:"Moreover, his intellectual conviction of the need for protective order and settlement is constantly being prodded-sometimes given passionate, even explosive, urgency-by his lifelong struggle to control his own rebellious nature, and to pull himself into clarity and balance."

by writing on the historical and moral aspects of the law. And it is from these portions that much of Johnson's jurisprudential thinking emerges. As we have seen Johnson feels that the criminal law is necessary because of the nature of man[232] and the changing nature of society demands protection in order that it may function. He suggests that laws come into being to fulfill the general expectations of society and that the criminal law as an aspect of the civil law theory has an underlying philosophical basis in the natural law. Johnson does not analyze specific principles that make up the criminal law; he does examine the human conduct that results in the formation of positivist criminal laws. It is his view of the particular characteristics of the criminal law as distinguished by its ethical foundation that illuminates Johnson's thinking.

Johnson makes few substantial contributions to the final section of these lectures in Part III: "Containing the Private Law of England".[233] In his remarks Johnson

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232. Life V, p. 211: "Lady M'Leod asked, if no man was naturally good?- Johnson. 'No Madam, no more than a wolf.'-Boswell. 'Nor no woman, sir?' Johnson. 'No, Sir.'-Lady M'Leod started at this, saying in a low voice, 'This is worse than Swift.'"

233. Johnson's most important contributions are found in K91 Lect I: "Of Personal Rights, and the Injuries affecting them, considering Man merely as an Individual" (pp. 58-61); Kings 94 Lect. XII: "Of Alienation by Common Assurance the Remaining Method of Transfering Real Property" (pp. 86-88); K95 Lect.XIV: "Of the Remaining Injuries to Real Property" (pp.50-52); Kings 97: Lect. XIX: "Of Private Rights as Protected by Courts of Equity, and first of cases of Securities for Money Lent" (pp. 9-12).

focuses on family law, alienation of real property, recovery of property, and equity. His discussion is less historical than in the previous sections, but reveals a general appreciation of the relative civil duties involved in each topic. His understanding of legal distinctions is rather unsophisticated as he more clearly reflects the prejudices and limitations of his age. Johnson develops a censorial jurisprudence where comparative rights and duties are left mostly untreated. However, in these lectures Johnson's thinking is formidable and his reasoning impressive.

This contrast between his lack of understanding of legal distinctions and impressive reasoning is evident in his comments on divorce. Johnson, who thought marriage had little enjoyment and needed much endurance, writes an exceptional memorandum on divorce. Because the civil government has a legitimate interest in upholding the institution of marriage,[234] Johnson considers this lecture on family law an appropriate forum to argue against simple divorce. The attitude amplified is surprising since Johnson claims marriage to be an unnatural state for man.[235] However, this may explain the negative tone of these remarks which point out that a harmonious marriage works best from an avoidance of unhappiness:

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234. Life II, p. 25; Bl Comm I, (15, p. 423 "Our law considers marriage in no other light than as a civil contract."

235. Life II, p. 165.

> All concord in the married state arises from the reflection that discord must produce unhappiness. In connubial contests the motive to compliance and reconciliation is that those who must live together will live best in peace.
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> 236.

In this contorted view of marriage, matrimony is seen as a 'contest' which once engaged, must be finished. Apparently, Johnson feels that happiness can only be pursued successfully in marriage by following the path of least resistance.

While a bill of particulars may contain valid items, Johnson contends that an action for the dissolution of marriage should be difficult to lodge. To make this point, Johnson avers:

> In the present state of matrimonial life the parties are forced to agree because they know that they must live together, and duty is supported by interest; but if irreconcilable discord were allowed to be a sufficient cause of separation, whoever desired to be parted would very easily find a cause of discord; every slight provocation would be returned with unextinguishable resentment, every casual disgust would be indulged, sometimes injuries would be committed only to excite anger, and sometimes anger would be excited when very small injuries afforded opportunity.
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Moreover, as in any effective legal presentation, Johnson anticipates the objection which is the issue of mutual assent. He responds:

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236. Kings 91, p. 58: cf. Rasselas Chap XXVIII-XXIV, For the debate on marriage.

237. Kings 91, p. 58-59.

> The nature and merits of the question are not altered by saying that 'to justify separation the desire of separation must be mutual;' for if either desires to part and knows that by petulance and malignity, this desire may be gratified, the power of giving offence is always at hand, and they that are weary of their partners may soon make their partners weary of them.
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> 238

In a style reminiscent of the Boswell cases, Johnson adopts a manner of presentation that attempts to foreclose disagreement. By his treatment of the question of mutuality, Johnson reaffirms his sour view of fraud in domestic relations.[239] His impugnment of motive does not allow for honest emotion or good faith. This attitude continues when Johnson discusses child rearing and family obligations. From "gusts of petulance or schemes of malice" Johnson sees the main threats to marriage. But it is from his own need for stability that these perceptions come.

In his summation Johnson says:

> For these reasons and probably for a thousand more which human wisdom will never fully discover, marriage is by our religion made indissoluble; and, therefore, Christian nations have universally appointed it to be solemnized with such rites as shall make it a contract, sacred as well as civil, and super- add to the legal obliga-

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238. Kings 91, p. 59.

239. cf. Rambler 18, the result of choosing the wrong woman; Rambler 35, 39, 45, 113, 115, 119 and 167 all discuss the proposition 'marriage is generally unhappy', but while reviewing both men and women, are not entirely pessimistic.

tion the sanction of a vow.[240]

Johnson's view of divorce in this lecture relies on principles taken from canon law.[241] His uncompromising stand on divorce has a deep ethical and religious foundation.[242] Johnson sees the sanctity of marriage as inviolate and his entire discussion affirms that view. Certainly, Johnson is inconsistent in much of his more general writing on marriage; however, in the finality of divorce Johnson

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240. Kings 91, p. 61.

241. Bl. Comm I,C. 15, pp. 440-441: "Divorce a menso et thoro is when the marriage is just and lawful ab initio, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And thus is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another. The civil law, which is partly of pagan origin, allows many causes of absolute divorce; and some of them pretty severe ones: (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband) but among them adultery is the principal, and with reason named the first. But with us in England adultery is only a cause of separation from bed and board: for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, which is now prohibited by the canons. However, divorces a vinculo matrimonii, for adultery, have of late years been frequently granted by act of parliament."

242. Sermon I, where Johnson makes a strong case for marriage and suggests that 'religion and marriage have the same enemies.'

sees not only a threat to marriage but to the fabric of society. Both of these perceptions and his moral structure demand that Johnson oppose the concept of divorce.

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It is instructive to review Johnson's remarks on the general reasoning behind the early evasion of entails. Writing on the alienation of common assurances[243] in the twelfth lecture, Johnson invokes the dangers in 'perpetuity' which both hinder commercial growth and frustrate the management of property.[244] Recognizing this situation, Johnson points out that for medieval lawyers a method to regain control over property was necessary:

> In this age, and in the reign of Edward the Fourth, the judges, supposing that entails obstructed the public prosperity, found out or admitted that method of stopping them which is called recovery.

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243. cf. Bl Comm. II, C 19, p. 294 writing on common assurance, Blackstone says: "A translation, or transfer of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed."

244. cf. Smith, Wealth of Nations, Bk. II, C. II, pp. 362-363; where Smith argues that entails discourage agricultural and commercial growth.

> What were the evils of entails which required and justified a remedy at once so laborious and so fraudulent, we perhaps, do not at this distance sufficiently discern.
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Ignoring the tangled web of land law, Johnson does remark on the ability of these legal practitioners to formulate legal fictions and adapt the law to new contingencies. The demands of society require the development of 'recoveries' which complicate entails and succession. The complex issue of entails interested Johnson not only as legal history, but also in terms of its effect on the structure of English society.[246]

Johnson appreciates the problems in freezing the ownership of land. He reasons that:

> It is however, apparent that if all land be devolved by entails through a settled and necessary succession, no land can be sold, and none therefore can be bought; no new families therefore can be raised, the future proprietors of the country can only be the heirs of the present. The great motive to adventure and industry would be taken away, few would have the hopes of growing rich, and those whom skill in trade or any other ability had enabled to accumulate money would be tempted to remove their wealth to some other country where they might obtain possessions permanent and secure.
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245. Kings 94, pp. 86; Johnson is thinking here of Taltarum Case (1472).

246. cf. chapter II, pp. 167-180 my discussion of entails in the dispute between Boswell and his father where Johnson is called upon for advice.

247. Kings 94, p. 86-87.

To Johnson this free movement of property which is part of man's natural right[248] promotes the economic system. Since the ownership of property is seen to be a primary freedom, the control over its distribution is the first corollary. One of society's chief advantages is the opportunity to acquire property, and the breaking up of entails encourages this process.

After having argued why a commercial nation would abhor perpetuities and thus, develop the 'artifice of recoveries', Johnson offers a political analysis that is probably more accurate. He points out that:

> This nation had then little trade, and those who were not born to lands were seldom able to purchase them with money. It appears more probable that as the feudal combinations of interest began to be relaxed, and tranquillity, and safety gave the mind leisure to extend its views and multiply its desires, men grew weary of having estates which they (in effect) held only for life and which, being determined to a certain course of succession, gave them no power to raise hope or fear, nor enable them to reward kindness or to punish neglect. Every man naturally loves dominion and favors that scheme by which his power is advanced; those who at first were desirous to secure estates to their families

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248. Boorstin, p. 180: "whatever confusion there may at first seem to have been in saying at once that property had been commanded by Nature and had been created by the state, Blackstone actually made the two ideas complementary. The law of nature had made property possible and necessary, but the laws of England had fulfilled the possibility, and had shown new aspects of ownership which Nature herself had not dreamed of ..... Every right of property which was protected by the law of England in Blackstone's day thus had ultimately the protection of Nature and of Nature's God." The unfettered movement of property reflected in Johnson's thinking subsumes both sanctions.

> grew in time willing to have them wholly to themselves.[249]

Johnson, who had a favorable view of power,[250] argues that disentangling entails gives landlords more power and control. However, he neglects to consider that this process may eventually vest greater dominion in the monarchy.[251] While Johnson's idea of the impact entails have on commercial relations is valid, his political thinking is muddled by his perception of motive. The vacuum created by increased leisure time highlights feelings of frustration and impotence. With external threats diminished, landlords can naturally focus on domestic concerns and petty interests. Since entails are seen to be a major contributor to these feelings, their break up is thought beneficial. The result of this process is that while some estates may consolidate, more will be split up. The total influence of landlords will lessen and ultimate power will devolve to the monarchy and a small power elite. In his analysis Johnson correctly sees power as the important concept, but misunderstands the way in which it functions because he neglects to consider the dangers in monopolistic powers that accrue to the king and the owners of

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249. Kings 94, p. 87-88,

250. Life II, p. 357.

251. Harding, p. 92: "The judges may have encouraged the breaking of entails because they and the king were beginning to see the political danger of huge blocks of property which could be built up and kept intact through the centuries."

large estates.

In the fourteenth lecture on injuries to real property, Johnson makes a short comment on limitations of entries and actions. Writing on writs of recovery, Johnson chooses to discuss general reasons why:

> It is necessary that these writs for the recovery of possession be brought within a certain and limited time, for the peace of society requires that there should be a period for which succession should be certain and property secure. In times of tumult and civil contentions, (and in such times were most of our antient statutes enacted and all our common or customary law had its original), the memory of transactions between particular persons was quickly lost, conveyances were often oral and ceremonial (as by verbal feoffment with livery of seizin), of which the natural mortality of man in a short time destroyed the remembrance; and writings, when writings had intervened, were easily lost when houses were plundered, or their proprietors fled for their lives. At all times it must inevitably happen that evidence of things not influencing the general state of the world will grow weaker by time, and therefore there is in most countries a period fixed when presumption and prescription may supply its place.
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> 252

Again, Johnson's historical speculation relies on his own need for stability which colors his perception of civil society. This affects his legal thinking on what constitutes an effective remedy. For an action to be just, it must be understandable and definite. Therefore, in his advocacy of a statute of limitations, Johnson is able to indulge his psychological needs and, at the same time,

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252. Kings 95, pp. 50-52.

offer an impressive argument on the origin of a legal procedure. This is characteristic of the way Johnson operates throughout these lectures. In these remarks on writs of recovery Johnson continues an historical approach to jurisprudence that helps to define not only the habits of his mind but also his view of past society.

In the nineteenth lecture where his last major contribution may be discerned, Johnson uses this lecture on equity to focus his juridical thinking. He asserts that:

> The end of all law is suum cuique tribuere, to give to every man that which he may justly claim, and the design of all juridical maxims and institutions is to adjust and satisfy the various degrees of right which may arise in the devolutions of succession, the reciprocations of contracts, the terms or conditions of credit and of partnerships, and the various combinations of accident or commerce.
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> 253

This succinct appraisal which relies on one of Justinian's fundamental maxims[254] indicates that Johnson's thinking on equity provides a key to his general legal thinking. Equity, which tries to achieve just ends, helps to define social norms and the law's relation to them. It is in this effort to reconcile social order with legal system where the flaws in the law are most apparent. There is a difference between legal propositions determined by law and those derived from equity:

> The decisions of equity as contradis-

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253. Kings 97, p. 9-10,

254. Justinian, Institutes Bk. I, tit. I @ 4.

> tinguished from those of law are not contra legem but preter legem, they do nothing which the law forbids, they do only what the law desires but cannot perform. Equity supplies the deficiencies of law, but cannot correct the errors of the legislator.
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> 255

The merits of equity rest with its moral force and its treatment of precedent. Johnson suggests a concept of equity that allows for general reasoning and societal interest in determining its decisions. It is this general character in equity law that attracts Johnson because of its wide scope and moral content.

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In his contributions to these lectures, Johnson establishes no systematic approach to the characteristics of the law. He does, however, discuss the law's historical development which provides a framework for his remarks. Johnson makes rational and coherent statements on the effects certain legal principles had on society. From his analysis of these principles, Johnson demonstrates the way the law grows and determines contemporary institutions. In this process he defines the human values and moral imperatives that are at the law's foundation. Many of Johnson's historical perceptions reflect his own pre-

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255. Kings 97, p. 10-11.

judices[256] and indicate the ultimate moral values he wishes to teach. And it is these insights into moral thinking that most clearly emerge from Johnson's historical jurisprudence.

These lectures encourage Johnson to indulge his wide-ranging intellectual interests and moral concerns. His treatment of legal rights and duties is both descriptive and censorial. As a student of society, Johnson tries to discover how legal institutions respond to the claims made on them by man. Throughout these lectures Johnson distinguishes those passions in man that require them to be governed. Johnson makes his most trenchant comments on those ambiguous qualities in man that call for the application of law. Johnson uses comparisons with other legal systems, cites assorted authorities, and draws freely on

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256. cf. Gay, I: The Rise of Modern Paganism, p. 32, for the way Enlightenment thinkers manipulated history to advance their own views of society. Gay writes: "The historical writings of the Enlightenment are more than special pleading; they are comprehensive, critical, often brilliant- they are true history. Reversing Tacitus' famous precept, the philosophes wrote history with rage and partisanship, and their very passion often allowed them to penetrate into regions hitherto inaccessible to historical explorers. Yet it also made them condescending and oddly parochial: their sense of the past merged all too readily with their sense of the present. ...they looked into the past as into a mirror and extracted from their history the past they could use. This limits the range of philosophic history but enchances its value as a clue: it permits us to look over the philosophes' shoulders to discover in their historical portraits a portrait of themselves, and to read in their accounts of Seneca's heroism or the iniquities of the Inquisition, the mind of the Enlightenment." In his writing of legal history, Johnson functions in the same way because he constantly construes history by the limits of his own perceptions. cf. Chapter I, footnote 102, p. 51, for consideration of the word 'prejudice'.

natural law thinkers to help formulate his opinions. He displays familiarity with contemporary intellectual movements, and, despite reservations and inconsistency, has some claim to be considered a man of the Enlightenment.

Appendix I

Johnson has a distinct style in his writing as well as in his conversation. And in these lectures we have the unique opportunity to examine a written text designed for oral presentation. Although poems and prayers share a strong verbal component, the lectures as a genre require the blend of expository writing with the attractions needed for auditory comprehension. The demands of this form, however, neither dilute nor exaggerate Johnson's peculiar stylistic manners. Indeed, as his usual prose style and epigrammatic conversational form are readily apprehended, his lecture manner is also distinctive. While Johnson has been known to vary the general character of his prose, his vigorous style remains and is apparent in his contributions to the text.

The style of Chambers can usually be recognized in these lectures. Prime characteristics of Chambers' style are; its general contorted nature, its jargon-filled diction, and a proclivity for technical expression at the expense of simple elegance. An examination of Chambers' language indicates scant literary achievement. At best, his style reflects that of a learned but dull legal writer. Moreover, Chambers' writing is replete with unintelligible and unnecessary legal obscura. Chambers' language lacks the flair and penetration of Johnson's as he seemingly plods along with neither wit nor decision. An unfortunate tendency towards periphrasis predominates in his discussion of and concentration on the minutiae

of legal processes. Chambers' style is appropriate for the writing of a legal treatise but it is not properly attuned to the requirements of the lecture hall.

A comparison between the following extracts will illustrate the recognizable characteristics in the styles of Johnson and Chambers. In these lectures Johnson's writing is accomplished with ease and sophistication. There is an elegance in his handling of legal topics in a simple and general manner. Chambers, however, lacks the ability to express his admittedly more complex terms with the same assuredness and comprehension. Both writers deal with a specialized topic that must conform to the requirements of historical usage. Johnson's writing seems to absorb these considerations while Chambers' writing conforms in a dull, mechanical way. In the main, Chambers' expression is judicial and prudent while Johnson's seems to be accomplished unfettered by obsessive legality.

Of the examples I have selected, two are obvious in their stylistic variations. The third, however, demonstrates the problem when accurate differentiation is not entirely possible. The fourth is extracted from a legal treatise put together from lectures and notes by his ancestor written by Chambers and serves as a control. This authorial problem could indicate: Johnson rewriting Chambers, Chambers absorbing aspects of Johnson, or Johnson employing the talents he developed years earlier as a Grub-street writer. It is Johnson's ability to 'ghost-

write' that, on the one hand, evidences his understanding of language, and on the other hand, contributes to the confusion in determining what passages were actually written by him.

An examination of the passages that are Johnson's reveals the prominence of certain stylistic devices which are typical of his writing. Among these literary devices are: his attention to diction where a latinate flavour is set off by harsh, straight forward Anglo-Saxon words to emphasize and strengthen points. This language placement also contributes to the alignment of his reasoning which permits Johnson's idiosyncrasies to emerge. Elements of his neo-classical thought process set out by a Ciceronian balance and parallelism are highlights of this style. His stress on generality with specific ideas expressed by the excessive useof the relative clause consistently works to develop a contrapuntal quality in the text. Johnson creates a tone by his eccentric syntax and platitudinous choice of words and placement of ideas within the context of his jurisprudential thinking. Johnson's various styles of expression are evident in his recognition of the philosophical demands inherent in juridical writings. For Johnson understands the need for accurate, precise use of certain legal terms which have been established by precedent. Nevertheless, while some jargon-filled contortions exist, Johnson's legal writing is lucid when compared with the writing of Chambers.

One of Johnson's most telling sentences is indica-

tive[257] of the quality of thought and style of language that marks his contributions to the lectures:

> When we consider in abstracted speculation the unequal distribution of the pleasures of life, when we observe that pride, the most general of human passions, is gratified in one order of men only because it is ungratified in another and that the great pleasure of many possessions arises from the reflection that the possessor enjoys what multitudes desire, when it is apparent that many want the necessaries of nature, and many more the comforts and conveniences of life, that the idle live at ease by the fatigues of the diligent and the luxurious are pampered with delicacies untasted by those who supply them, when to him that glitters with jewels and slumbers in a palace multitudes may say what was said to Pompey, Nostra miseriâ tu es magnus, when the greater number must always want what the smaller are enjoying and squandering, enjoying without merit and squandering without use, it seems impossible to conceive that the peace of society can long subsist; it were natural to expect that no man would be left long in possession of superfluous enjoyments while such numbers are destitute of real necessaries, but that the wardrobe of Lucullus should be rifled by the naked and the dainties of Apicius dispersed among the hungry, that almost every man should attempt to regulate that distribution which he thinks injurious to himself and supply his wants from the common stock.
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> 258

This well reasoned sentence persuades by a logical process that communicates its message with real grandeur. The way Johnson compares and contrasts in order to develop his ideas illustrates his approach to juridical argument. The structure of this sentence shows how Johnson uses

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257. McAdam, p. 107; Greene, Politics, pp. 195-196.

258. Kings 87, pp. 5-6.

rhetorical devices to make his points effectively. Moreover it is surprising that Chambers' not Johnson's language suggests a studied, learned expression.[259] While in these lectures Johnson's language is emphatic and dignified, it is neither ponderous nor erudite.

In the following excerpt from A Treatise on Estates and Tenures, Chambers' language is neither vivacious nor virile. As a legal writer he insists on authority to satisfy the rigors of legal thinking. He defines the concept of fee in preparation for a technical discussion:

> A feud or Fee is a free grant of something immoveable, generally of lands, made to any person in such a manner, that the Sovereign right over the thing granted still remains in the hands of the Donor; but the profits arising from it are so consigned to the grantee as to pass to him and from him for ever to his heirs, where heirs are mentioned: in consequence of which he and his heirs are bound to mention true fealty to the land, either by some service expressly particularised, as by the general duties of fidelity and allegiance.[260]

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259. Brader Matthews, Essays on English, (New York: Scribner's Sons, 1924), p. 145: "... Macaulay was not overstating the case when he declared that all Dr. Johnson's books 'are written in a learned language, in a language in which nobody hears from his mother or his nurse, in a language in which nobody ever quarrels, or drives bargains, or makes love, in a language in which nobody even thinks.

260. Sir Robert Chambers, knt., A Treatise on Estates and Tenures, ed. Sir Charles Harcourt Chambers, knt., (London: Joseph Butterworth and Son, and Dublin: J. Cooke, 1824), p. 14.

This definition sets out the basic principles of fee in a crafted legal language. Each significant term implies its position in relation to an assumed background. Moreover, Chambers' usage is characterized by its attention to its own weight and self-importance.

This becomes clear when Chambers' letter to Bishop Percy is examined. In a letter concerning the authenticity of some poems attributed to Rowley, the supposed Bristol poet, Chambers functions as Johnson did in the Ossian controversy:

> Of the authenticity of the few parchments that are in Mr. Barret's possession, those must judge who have seen them, and who are, at the same time able to judge. If your Lordships had examined them and had determined any of them to be genuine, it would afford a ground for supposing that, among the old title deeds found in the church at Bristol, (of which you may remember that poor Goldsmith showed one or two to his friends) Chatterton might have found other poetical writings also, from which he might have taken the substance of some of the poems that he gave out as ancient; but then, as he has not produced the originals, I should think myself obliged to believe that in copying he had altered and added to them, whatever his fancy suggested, or his ear accustomed to modern versification required.
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> 261

Chambers structures a legal argument where his diction reveals a reasoned legal presentation. He is neither vehement nor assertive but shows the assimilation of a John-

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261. Letter to Bishop Percy, Calcutta, 9 November 1789; BM 32329 f. 124.

sonian approach. While Chambers writes with authority, he does not reflect the finality of Johnson. Instead, he operates in a workman-like manner that is characteristic of one having formal legal training.

While neither writes with brevity, they do suggest decision. Certainly, there is a divergence in tone, but sometimes this actually hinders the search for authorship:

> The first purpose of every political society is internal peace, for as no man would submit to any Polity if he were able by his own power to gratify his appetites and appease his Fears, so he has submitted in vain to the Diminution of his Natural liberty unless he has obtained in return some additional stability of good and security from evil.
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> 262

This excerpt indicates the presence of Johnson's thought process, but the expression is Chambers'. And it is this type of combination that makes complete differentiation impossible. Clearly, the collaborative effort is present here. In instances like these where Johnson's thinking dominates Chambers writing, and where the language also reveals a strong Johnsonian influence, one must be cautious because imitation declares Chambers to be the author. It is in these uncertain passages where Johnson determines, but Chambers writes.

Although it is true that subject matter affects style, Chambers' writing, regardless of the subject, maintains its own distinctive qualities. In these examples from the

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262. Kings 87, p. 5.

lecture on high treason, Chambers' treatment is characteristicly laborious:

> Treason in the general and civil sense may be committed under any form of government. He that endeavours the Destruction of legal Authority, whatever be the mode of it's constitution, is what the Romans termed Perduellis and what we may call a Traitor. But in all Nations where Monarchial Government prevails, Treason is an appellation given to those crimes which
> 37
> immediately affect the Person or Rights of the Prince and in it's highest Degree in the Act of attempting, conspiring or imagining the Death of the King.
> 263

> The superstition of barbarous Times prevails now no longer, but the Law has very diligently supplied by positive securities the deficiency of blind and irrational Veneration, by considering all attempts against the Life or Safety of the King as in the highest Degree criminal and calling all those Principals by whom such attempts are however remotely incited or abetted.
> 264

Both in expression and treatment Chambers over-works language and relies too much on background knowledge. He writes a judicially, honed prose that trips up on its own careful attention to detail and phrasing. Moreover, this style creates its own monotony and complication. The effort needed to read his contributions to the lectures creates an undertone that hinders communication. Unlike the flair of Johnson's writing, Chambers' writing lacks general appeal and easy comprehension.

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263. Kings 88, pp.37-38.

264. Kings 88, p. 40.

Appendix II

Kings 80 Lecture I: "Of the Law of Nature, The Revealed Law and The Law of Nations, The Primary Sources of the Law of England", pp. 2-41.

Lecture II: "Of the Origin of Feudal Government, and the Anglo-Saxon Government and Laws", pp. 42-76.

Lecture III: "Of the Feudal Law Strictly So Called, and of the Effects of That Law on our Constitution and Government", pp. 77-118.

Lecture IV: "On The General Division of the Law of England", pp. 119-155.

Kings 81 "Part I. Containing the Publick Law of England Lectures 1st, 2d, 3d, and 4th"

Part I, Lecture I "Of the Origin and Different Forms of Parliament", pp. 1-32.

Part I, Lecture II: "Of The Present Constitution of Parliaments", pp. 33-69.

Part I, Lecture III: "Of The King and First of his Coronation Oath", pp. 70-93.

Part I, Lecture IV: "Of the King's Prerogatives and first of his Prerogative of Power and Exemption", pp. 94-127.

Kings 82 "Part I. Containing the Publick Law of England, Lectures 5th, 6th, and 7th.", vol. III.

Part I, Lecture V: "Of The King's Prerogatives of Possession or his antient and established Revenue", pp. 2-37.

Part I, Lecture VI: "Of The Royal Family, and of The House of Lords", pp. 38-91.

Part I, Lecture VII: "Of The House of Commons", pp. 92-130.

*In the first transcripts of these lectures, the 6th lecture of the first part is entitled Of The Royal Family and House of Lords. This Discourse consists of the former part of That corrected and enlarged. The Disquisition on The House of Lords continues nearly as before and forms a distinct lecture.

Part I, Lecture VI: "Of The Royal Family (a)", pp. 132-159.

Kings 83 Lecture VIII: "Of The Privy Council and Offices of State", pp. 2-44.

Lecture IX: "Of Courts of Justice, and first of General Courts of Common Law and Equity", pp. 45-76.

Kings 84 Publick Law of England, Lectures 10th, 11th, and 12th.

Lecture X: "Of Courts whose Judgments are directed by the Civil, Canon and Maritime Law; and of Courts private Jurisdiction", pp. 31-85.

Lecture XI: "Of The Civil Divisions of England and of Territorial Magistrates", pp. 31-85.

Lecture XII: "Of Civil Rank, Order, and Precedence", pp. 86-118.

Kings 85 "Part I Containing the Publick Law of England, Lectures 13th and 14th".

Lecture XIII:"Of the Rights of Embassadors", pp. 2-39.

Lecture XIV: "Of Aliens, and of the incorporation of England with Wales and its union with Scotland", pp. 40-79.

Kings 86 Part I:"Containing The Publick Law of England". vol. VII Lectures 15th and 16th.

Lecture XV: "Of the Government of Ireland and the American Provinces", pp. 2-42.

Lecture XVI: "Of Corporations", pp. 42-72.

Kings 87 Part II "Containing the Criminal Law of England".

Lecture I: "Of Criminal Law and first of the general nature of Punishments", pp. 2-35.

Lecture II: "Of the History of Punishments", pp. 36-87.

Lecture III: "Of Exemption from Punishment" and first of incapacity to commit crimes",pp.88-123.

Kings 88 Lecture IV: "Of the Benefit of Clergy", pp. 1-35.

Lecture B: "Of offences against The Government and First of High Treason; particularly such as are committed against the Stat: of Edward the 3rd called The Statute of Treason", pp. 36-84.

Lecture VI: "Of Crimes made Treason since the statute of Edward the Third", pp. 85-116.

Lecture VII: "Of Felonies and Interiour Offences immediately against the Government", pp. 117-149.

Kings 89 Lecture VIII: "Offences against The Subjects of Other States: and of Homicide, The first offence against a Fellow Subject", pp. 1-31.

Lecture IX: "Of Violence To The Person not destructive of Life", pp. 32-54.

Lecture X: "Of Offences against Property and first of Arson, Burglary, Malicious Mischief and Forgery", pp. 55-82.

Lecture XI: "Of Larceny or Theft", pp. 83-122.

Kings 90 Lecture XII: "Of Offences against The Commonwealth and first of such as are committed against established Religion", pp. 1-19.

Lecture XIII: "Of The Remaining Offences against the Commonwealth", pp. 20-42.

Lecture XIV: "Of The Different Imputation of Crimes to Agents and Accomplices", pp. 43-46.

Kings 91 Part III Containing The Private Law of England

Lecture I: "Of Personal Rights, and the Injuries affecting them, considering Man merely as an individual", pp. 2-49.

Lecture II: "Of Economical Relations, and Private Civil Relations", pp. 50-110.

Lecture III: "Of The Several Species of Real Estates and first of Estates in Fee Simple.", pp. 111-148.

Kings 92 Lecture IV: "Of Estates in Fee Tail", pp. 1-37.

Lecture V: "Of Mere Freeholds", pp. 38-87.

Lecture VI: "Of Chattels Real", pp. 88-133.

Kings 93 Lecture VII: "Of Customary Estates", pp. 1-43.

Lecture VIII: "Of The Conditions annexed to Real Estates, and first of the Tenures by which They are holden and the Conditions Therein Implied", pp. 44-88.

Lecture IX: "Of Estates Upon Condition", pp. 89-131.

Kings 94 Part III

Lecture X: "Of The Joint Possession of Estates", pp. 1-22.

Lecture XI" "Of The means of Acquiring and losing Real Property", pp. 25-51.

Lecture XII: "Of Alienation by Common Assurance The Remaining Method of Transferring Real Property", pp. 52-90.

Kings 95 Lecture XIII: "Of Injuries Affecting Real Property and Their respective remedies, and first of such as do no amount to Dispossession", pp. 1-31.

Lecture XV: "Of The Remaining injuries to Real Property", pp. 32-74.

Lecture XV: "Of The Several Species of Personal Property and of the Original Means of Acquiring it". pp. 72-100.

Kings 96 Lecture XVI: "Of The Several Methods of Acquiring and losing Personal Property without the consent of The former Owners", pp. 1-35.

Lecture XVII: "Of The Several Methods of Transferring Personal Property with the Consent of the former Owners", pp. 36-66.

Lecture XVIII: "Of The Injuries Affecting Personal Property and Their Respective Remedies", pp. 67-90.

Kings 97 Lecture XIX: "Of Private Rights as Protected by Courts of Equity, and first of cases of Securities for Money Lent", pp. 1-20.

Lecture XX" "Of The distribution of Justice in Courts of Equity with Respect to Contracts", pp. 29-52.

Lecture XXI: "Of The Distribution of Justice in Courts of Equity with respect to Fiduciary Property", pp. 23-83.

Lecture XXII: "Of Cases where legal Evidence or legal Trial would be insufficient, and of those cases in which there is no legal Remedy, or where legal Remedy would be dilatory or inadequate", pp. 84-114.

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