

EDMUND BURKE AND THE NATURAL LAW. By Peter J. Stanlis. Preface by Russell Kirk. Ann Arbor: The University of Michigan Press, 1958. Pp. xiii, 311. \$5.75.

BURKE'S interest in political change, its uncertain course and even more uncertain consequences, gives his writings their present relevance and accounts for the continuing appearance of critical studies and republications of his works. This pervasive theme of political change is reflected in his many discussions of the relation between theory and practice, his evaluation of the relative merits of abstract knowledge and experience, and his eulogy of the not easily defined quality of prudence. It is thus not surprising to find that interest in Burke is at its peak when the risk of change is greatest, as during the Reform Bill crisis of 1831-1832, or, indeed, as during recent decades, which have faced the threat of a new Jacobinism. Yet Burke's reflections and warnings about overconfident and careless tampering with social arrangements have immediacy at all times for those who are especially sensitive to latent crises and the vulnerability of the complex institutional fabric, and for those who fear that small changes carry implications of potentially dire consequences. It is for this reason that Burke stands as the dominant figure in the conservative tradition.

The matter cannot rest at that, however, for Burke in his own time and since has appeared somewhat enigmatic. He was a conservative, but opposed the King's party; he defended the underdog—the abused colonists, the Catholics in Ireland, the victims of misrule in India—and shared what at the time were the heterodox economic views of Adam Smith. He was a traditionalist but also a reformer. He attacked one revolution but defended another. While such variations in a political position are unusual, they need not, and in Burke's case do not, indicate inconsistency. The questions they raise nevertheless create an uncertainty regarding Burke's fundamental intellectual and political position—an uncertainty which Peter Stanlis in his scholarly yet tendentious book attempts to remove by setting out what in his opinion constitutes the ultimate theoretical foundation of Burke's political thinking.

In so doing, Stanlis focuses on an aspect of Burke's thought that has been often neglected because of Burke's emphasis on the practical. Burke attacked theory and extolled practice as if they were incompatible. He insisted, moreover, that theory had no part to play in politics and attacked theorists as metaphysicians, speculatists, theological politicians. A number of his memorable maxims counseled that political conduct be guided by moderation and prudence, that political judgments be founded more upon the circumstances of a particular case than upon general principles, and that political wisdom be sought, not in individual speculation, but in established practice and tradition. So emphatic were Burke's pronouncements that some writers concluded that because he opposed theorizing, he was without any theory of his own. Still, Burke must have looked to ultimate principles; so at least it would seem if one considers how little guidance is offered by such concepts as

prudence, utility, and precedent, when examined in isolation. Without reference to an underlying doctrine, these concepts would leave the ship of state quite rudderless, and Burke was hardly one to allow this. He himself said that he did "not vilify theory and speculation—no, because that would be to vilify reason itself. . . . [W]henever I speak against theory, I mean always a weak, erroneous, fallacious, unfounded or imperfect theory . . . ."<sup>1</sup>

Stanlis argues not only that Burke had fundamental principles but that they can be traced to the traditional natural law doctrine, both classical and scholastic, as found in Aristotle, Cicero, Thomas, and Hooker. According to the author, the natural law philosophy was the ultimate source of Burke's beliefs—his political convictions reflected its ethical norms and he "consistently appealed" to it and "sought to establish" its principles through practical political action.<sup>2</sup> This "higher law" was, in essence, an eternal and universal ethical norm emanating from God, apprehended through man's reason, and valid at all times and in all circumstances, independently of man's will. While positive law could vary with the particular needs and circumstances of a political community, its validity depended on its consistency with the law of nature.

This general philosophy, though its formulations and emphasis varied, has been a pillar of much of the ethical inquiry throughout Western history—until the modern era. With Hobbes it faced direct attack, and since the seventeenth century, though it has by no means been abandoned, its foundations have been increasingly undermined. While appeals to nature and its laws were very common during the eighteenth century, the natural law concept had become confused and vague, a situation that allowed for its eventual distortion in the theories of abstract natural rights. It was this distorted version of the traditional meaning that Burke attacked and that led Bentham, writing while Burke was still alive, to deny the existence of natural law and to brand it as a fiction producing only confusion. Stanlis interprets Burke as having resisted the agnostic and scientific currents of the enlightenment that contributed to the undermining of belief in the traditional law of nature; and he sees Burke as upholding the essential features of the original position. This basis of Burke's thought has been ignored, he says, because the utilitarian and positivist critics who have dominated discussion of these matters have assumed that, because Burke opposed the doctrine of abstract natural rights along with all speculative theories, he rejected the entire natural law doctrine as a theoretical position. But, Stanlis shows, they thereby failed to distinguish the doctrine of man's abstract natural right, derived from a hypothetical state of

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1. 3 BURKE, SPEECHES 48 (1816). [The date of the speech is misprinted in Stanlis, p. 129, as June 16, 1789; it should be 1784.]

2. Pp. xi, 40. Stanlis' descriptions vary in emphasis; occasionally they are moderate, as when he simply says that Burke was "in" the natural law tradition, p. xi, or that he "belonged to" it. At other times, however, his language reveals more ambitious claims, as in the passages quoted in text, or where he asserts that Burke "*always* appealed to the Natural Law." P. 83.

nature, from the ethical norms of the law of nature which included the "real rights" underlying Burke's beliefs.<sup>3</sup>

To demonstrate his thesis, Stanlis points out that Burke was intimately acquainted with the literature of the natural law tradition. Burke had, of course, read many of the classics of ancient political philosophy and, in addition, was familiar with the writings of Coke and Grotius, among other jurists and constitutional historians. His interest in these latter writers stemmed in part from his having studied law (he was registered at the Middle Temple) and also from his extensive reviewing of legal works for the *Annual Register*, of which he had been editor.<sup>4</sup> Although he had not completed his legal training, it had served to give him a respect for the English common law (if not always for lawyers), which, even if it was not formulated in the language of the natural law, was nourished by the ideas and values of that tradition.

The author's case rests, however, not on Burke's familiarity with natural law doctrine, but on an attempt to show that the principles of natural law played an important part in the formation of Burke's judgments and in the arguments he used in support of them. He approaches this task in two ways.

Stanlis first examines Burke's position on particular events and issues that provided an occasion for appeal to basic principles—most notably the question of English rule in Ireland, dealings with the American colonies, Indian affairs, the French Revolution, and various domestic controversies. Secondly, he considers topics of critical importance in the theory of natural law, such as the law of nations, the problem of rights and the relation of church and state, and by drawing on Burke to provide illustrations of the natural law position, seeks to establish its major influence on him. Thus, he is able to show that Burke often appealed to a "higher law," divine in its origin and hence eternal, moral in character and binding on all men regardless of nationality or status—on kings and governors-general as well as on peoples and parliaments. Human laws were to be merely declaratory of the original justice of higher moral law. It was this law of nature that provided a distinction between power and moral right—and Burke does indeed appeal to it on certain occasions.

Unlike those commentaries which assume that Burke simply accepted the

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3. Pp. 29-31, 83. For Burke on "real rights," see his *Reflections on the Revolution in France*, in 3 THE WORKS OF EDMUND BURKE 308 (Nimmo ed. 1887). Although Stanlis is on the whole correct in his analysis of the failure of utilitarian critics to recognize the natural law ingredient in Burke's thinking, there are exceptions, the most notable among them being James Fitzjames Stephen. By both his own account and his brother's, Stephen was a utilitarian, though not an orthodox one; yet he wrote that a "notion of a justice antecedent to, and by right formative of, all law, and made binding on all men by an immutable divine decree, lies at the root of every part of Burke's political theories." J. F. STEPHEN, *Burke on the French Revolution*, in 3 HORÆ SABBATICÆ 142, 140-44 (1892); L. STEPHEN, *LIFE OF SIR JAMES FITZJAMES STEPHEN* 116, 123, 230, 299, 317, 321, 328, 334-37 (2d ed. 1895).

4. Among the books he had reviewed were Blackstone's *Discourses and Commentaries* and Beccaria's *Essay*. See pp. 35-40.

historically established values of his society and his party, Stanlis' book has the merit of recognizing that to call Burke a traditionalist or a conservative utilitarian is not sufficient—that the origin of Burke's principles is more varied. In looking to natural law, Stanlis focuses on one important source of Burke's beliefs. The author's view that this concept provides the key to an understanding of all of Burke's writings requires serious qualification, however, for the evidence is ambiguous at best. Although Burke's thinking reflects the traditional natural law, that its principles were the exclusive source of his judgments and arguments is far from clear, for he sometimes appealed to history, tradition, experience, and precedent as if they were the final source of his principles. Such appeals are typical of his discussion of domestic issues like the royal prerogative, the powers of Parliament, or parliamentary reform; whereas direct and explicit references to a higher, eternal natural law are more characteristic of his treatments of Ireland, of Hastings in India,<sup>5</sup> and of Jacobinism.<sup>6</sup> In discussing the British Constitution, for example, he seems to discern the relevant principles in the historical experience of a settled political community. In this context, at least, "theories ought to be found on experience, and instead of adapting the constitution to a theory, the theory [ought to] . . . grow out of the constitution."<sup>7</sup> This theory was to be found "in our histories, in our records, in our acts of Parliament and journals of Parliament"; he further pointed out that Coke and Blackstone were "industrious to prove the pedigree of our liberties."<sup>8</sup> Although Stanlis is most sensitive to

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5. In passing, it should be noted that while the impeachment of Hastings was the occasion for some of Burke's most pronounced statements about the authority of natural law, Stanlis is much too uncritical in his assumption of the accuracy and justice of Burke's charges and the propriety of Burke's conduct. Sir James Fitzjames Stephen said of the indictment, for which Burke had been responsible, that it was equivocal and vague, full of invective and insinuations, and that it covered by its "profusion of irrelevant matter, the total and no doubt designed absence of averments essential to the conclusion which they are meant to support." Concerning Burke's accusation that Hastings, in order to protect his own reputation, had conspired with a judge, Sir Elijah Impey, to bring about the judicial murder of one Nuncomar, "a jury would be properly directed to acquit." Burke was censured by the House of Commons for making this particular accusation. 1 J. F. STEPHEN, *THE STORY OF NUNCOMAR AND THE IMPEACHMENT OF SIR ELIJAH IMPEY* 68-69, 74 (1885); 2 *id.* at 8-9, 113; L. STEPHEN, *op. cit. supra* note 3, at 433; see 3 CHURCHILL, *HISTORY OF THE ENGLISH SPEAKING PEOPLES* 187 (1957) ("posterity has redeemed his [Hastings'] name from the slurs of the Whigs"); FEILING, *WARREN HASTINGS* 354-57, 367 (1954).

6. Stanlis, himself, at p. 83, distinguishes between these two types of situations, indicating that where "the state itself was corrupted from its true function, and became the instrument of arbitrary tyranny and injustice" Burke's appeals became explicit, while in other cases he "was content to fulfill the Natural Law indirectly." Yet on the same page the author states that "in every important political problem he ever faced, in Irish, American, constitutional, economic, Indian, and French affairs, Burke *always* appealed to the Natural Law."

7. 4 BURKE, *SPEECHES* 49 (1816).

8. BURKE, *Reflections on the Revolution in France*, in 3 *THE WORKS OF EDMUND BURKE* 271-72 (Nimmo ed. 1887).

this aspect of Burke's thinking, he does not accept as significant the distinction between natural law and history or tradition. The British Constitution, he argues, is not only in harmony with natural law but is "derived"<sup>9</sup> from it; thus, to seek political norms in constitutional experience and practice is really to derive them from natural law. The civil rights of Englishmen, while established in custom and discovered by examining precedents, are in fact "derivative rights,"<sup>10</sup> taken from that eternal higher law which defines the true rights of all men.

That the natural law tradition played an important part in the thinking of the great commentators on the common law is undoubtedly true; and it is equally true that the supremacy of law and the idea that power is a trust, like other fundamental constitutional principles, find a sanction in natural law doctrine. But, while the constitution Burke extolled did not violate the natural law, his words do not always suggest that he believed constitutional principles and civil rights to be derived from it or to depend upon it for their validity. In the unnatural circumstances of an India suffering from anarchy and arbitrary rule, or an Ireland under the Popery Laws, or France under the Jacobins—where a nation was broken up into "*moleculae* of a disbanded people,"<sup>11</sup> with tradition abandoned or destroyed—Burke did judge by the simple, general standards of the natural law position. But in "ancient organized states"<sup>12</sup> like England, enjoying a constitution that had developed slowly under conditions of stability and historical continuity, tradition was not merely a reflection of philosophy but a substitute for it. Thus he observed that English liberties, from Magna Carta to the Declaration of Rights, were "an *entailed inheritance* derived to us from our forefathers . . . an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior rights."<sup>13</sup>

When Stanlis argues that Burke's extraction of normative political standards from constitutional history and tradition really means that Burke is deriving his principles from natural law, he claims too much not only for Burke, but also for the natural law. According to that position, knowledge of the moral law is accessible to man through his reason; and, while natural law may be reflected in custom and tradition, its validity is independent of historical experience. To the extent that Burke derived his principles from tradition and history, his reliance on natural law loses the critical importance that Stanlis attaches to it. Much of Burke's traditionalism with respect to the British Constitution is an expression of the same attitude or quality of temperament that made him a Whig constitutionalist, and by the eighteenth century that was largely a nonphilosophic position. This constitutionalism, it is

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9. P. 54.

10. Pp. 74, 77.

11. BURKE, *Reflections on the Revolution in France*, in 3 THE WORKS OF EDMUND BURKE 259 (Nimmo ed. 1837).

12. *Ibid.*

13. *Id.* at 274.

true, had been influenced by natural law ideas, and it provided Burke with some of his fundamental principles, but it had also come to incorporate a distrust of claims to theoretical knowledge.

In essence, then, Burke's position is mixed. He certainly reflects more strongly than most of his contemporaries the substance of the old religious and philosophical tradition—as Stanlis abundantly demonstrates. But he was also a politician, and many of his beliefs, while they may be traceable to fundamental principles, seem to have been related in Burke's thinking to unarticulated principles that lived, so to speak, in his fingertips, with the logical connecting lines to ultimate theory neither conscious nor clearly drawn. Stanlis draws in those lines, and in doing so makes Burke a more orthodox representative of natural law than the ambiguous evidence justifies.

What seems to be an exaggerated statement of the case is perhaps a result of the author's dual purpose in this book; for in addition to his analysis of Burke, he has written an exposition of natural law and made a plea, which becomes explicit at the end of the volume, in its behalf. His zeal for the natural law position causes oversimplification in his observations on post-Burkian political thought, which the author roughly labels "utilitarian-positivist." Stanlis is led to consider utilitarianism generally in order to explain why "utilitarian-positivist scholarship," as represented by such men as John Morley and Henry Buckle, failed to appreciate the contribution of natural law ideas to Burke's thinking. Because of the great emphasis he places on the theoretical importance of natural law, however, he establishes too narrow a conception of "utilitarianism" and tends to assume that all who stand outside the natural law fold share much the same views—that is, the same errors. Thus Burke's contemporary critics, like Paine, Price, and Priestly, are lumped together with Bentham, Mill, Morley, and Leslie Stephen. Such imprecise grouping produces small but significant errors. Stanlis says, for example, that Mackintosh, as a utilitarian, wished to reform Parliament so that representation would be based on numbers—a position Mackintosh clearly opposed.<sup>14</sup>

Stanlis also sees too sharp a cleavage between utilitarians and Burke, and this has a more serious consequence. Sharp division is in fact to be found, but only in the restricted realm of theory. If instead of looking exclusively to the philosophical and religious realm, which emphasizes only the differences between utilitarians and Burke, the author had considered the practical judgments and general political thought of nineteenth-century liberal Whiggism, which had a close intellectual affinity and practical political al-

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14. Contrast Stanlis, p. 303, to *Universal Suffrage*, 31 EDINBURGH REV. 165, 186 (1818) (anonymously published), wherein Mackintosh asserts that "if representation be proportioned to numbers alone, every other interest in society is placed at the disposal of the multitude. . . . [N]o other class can have a political security for justice; no other can have any weight in the deliberations of the Legislature. No talents, no attainments, but such as recommend men to the favour of the multitude, can have any admission into it." See also *id.* at 175-77, 182, 184-85, 192.

liance with utilitarianism, a less distorted picture of the political thought of the period could have been presented. For example, Brougham and Macaulay, while both Whigs, expressed great esteem for Bentham's legal philosophy, which was based on the most extreme form of utilitarianism; yet, during the Reform Bill crisis, the spirit of Burke breathed in them; and it was certainly from Burke above all others that they and their colleagues learned the importance of proceeding empirically, of distrusting abstract theorists (whether Tory or Radical), and of allowing for changes within the context of traditional principles. Burke's maxim that "a state without the means of some change is without the means of its conservation" is a perfect statement of the rationale for the Reform Bill defended by the Whig-utilitarians of 1832. It was this spirit of Burkian prudence that led them to make small changes in order to avoid a revolution, and which allowed the British Constitution to survive. For this reason Burke was widely admired among utilitarians and Whigs—as Stanlis acknowledges at the end of his book—so much so, in fact, that Lord Acton could say of these men that they lived "on fragments that fell from his table. . . . Brougham and Lowe lived by the vitality of his ideas. Mackintosh and Macaulay are only Burke trimmed and stripped of all that touched the skies."<sup>15</sup>

The question therefore arises whether much of nineteenth-century utilitarian thinking did not in one sense reflect a Burkian tradition. There is, it would appear, some continuity with Burke, along with the disjunction that Stanlis emphasizes, indeed exaggerates, by condemning the "utilitarian-positivists," not because they failed to admire Burke, but because they admired him for inadequate reasons. Stanlis looks to philosophy and religion when in fact Burkian ideas lived in the realm of practical politics as part of a rich tradition that nourished the mode of thinking of politicians and publicists functioning in a viable political system. Hence, Brougham or Macaulay, like Morley, could think of himself as a "Burkian and a Benthamite."<sup>16</sup>

The conclusion the author draws from his study requires one final comment. In looking for a revival of the natural law, he speaks of our "contemporary need" for Burke. In one important sense that need does and always will exist, so long as it is necessary to protect the institutional framework of

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15. DREW, ACTON, GLADSTONE AND OTHERS 8 (1924). Acton also wrote: "For half a century after Burke's death our political writers lived on his ideas, Canning on one side, Brougham on the other, Mackintosh, successively, on both sides, Macaulay wavering between them." FASNACHT, LORD ACTON ON NATIONALITY AND SOCIALISM 31 (1949).

16. 2 HIRST, EARLY LIFE & LETTERS OF JOHN MORLEY 211 (1927); see Stanlis, p. 30. Macaulay called Burke "the greatest man since Milton," Stanlis, p. 246; yet—notwithstanding his attack on the utilitarian theory of government—he also thought of himself as a disciple of Bentham's legal philosophy. DHARKER, LORD MACAULAY'S LEGISLATIVE MINUTES 140, 214 (1946). Admittedly, Brougham was not sparing in his criticisms of both men; still, some importance attends the fact that he could state, "enlightened men in all ages will hang over the words of Burke," Stanlis, p. 247, and also collaborate with Bentham in designing legal reforms and publish a eulogy of him acknowledging his "first place among Legal Philosophers," 2 BROUGHAM, SPEECHES 290 *et passim* (1838).

society from the doctrinaire advocates of a theory or design, according to which government is to be recast. This consideration makes "conservatives" of all responsible men. At the same time, notice may be taken of the truism that a people is fortunate when its political system can operate within a community in which there is a sufficient measure of agreement on fundamentals to allow for free discussion and democratic choice without the risk of a revolution. While the continuity and the attachment to fundamental constitutional practices that such a condition evidences have been appreciated by many besides Burke, few have made this consideration so central to their thinking. All but extreme parties and dissident minorities have learned this much from Burke, and to this extent it is our good fortune that no "contemporary need" for him exists. To insist that we ought also to proclaim the religious and philosophical underpinning that provided the background to, and in part supported, Burke's convictions is to reveal an exaggerated sense of the danger from contemporary Jacobinism. The plea, moreover, ignores the considerable moral commitment to the political order (many aspects of which would evoke Burke's approval), despite the diminution of religious belief and the weakening of the classical philosophical tradition.

Believing that there is a present need to reaffirm natural law principles, the author seeks to portray Burke as a "true conservative" and to deny the "claims of utilitarian critics that Burke belongs to their camp";<sup>17</sup> this, in view of the general and tacit acceptance of many Burkian ideas, is an immoderate aim of which Burke would surely have disapproved.

JOSEPH HAMBURGER†

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17. Pp. 120-21, 167.

†Assistant Professor of Political Science, Yale University.