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The Diverse Doctor Johnson: Among Other Things, A Lawyer's Lawyer

Jeffrey O'Connell*
Thomas E. O'Connell**

I. Introduction

Why a law review article about Doctor Johnson?

Perhaps more than any other professional, the lawyer is a generalist who draws upon learning from any and all sources, humanistic and scientific, in plying his or her trade. No one in the Western World embraced more learning of all kinds than did Samuel Johnson. As such, he has much to teach lawyers, who are often woefully ignorant about him in ways, and on subjects, that could be useful to them. Also, too little is usually known, even among those lawyers and non-lawyers who are drawn to Johnson, about his life-long and highly expert interest in the law. Finally, regardless of its utility, knowledge about Johnson can be one of life's great pleasures. That may be especially true for lawyers, who are especially apt to be admirers of superior, ranging minds.

Johnson is at least superficially familiar to most lawyers because of Boswell's great biography.¹ Lawyers are apt to know Johnson as a conversationalist and a stimulating character. But stimulating characters *per se* don't stand the test of time. For one thing, there are too many of them. To hold the fascination of generation after generation, Johnson had to have been more than a presence, a wit and a phrasemaker. He certainly was more. Not only a great person and personage, he was a deep thinker on moral questions, a first-class writer and (of crucial importance to lawyers) the man who brought order to the English language through his dictionary. He was also not only a student of the law but (as we now know) an unofficial practitioner as well.

After a childhood in rural Lichfield, England, Johnson went up to Oxford. He subsequently lived most of his long life in London. His

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1 J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, (G.B. Hill ed., rev. & enlarged by L.F. Powell, 1934-50) (6 vols.). For the best and most scholarly modern life of Johnson, see W. J. BATE, *SAMUEL JOHNSON* (1975, 1977). For a very readable popular life of Johnson concentrating mostly on his early years, see J. WAIN, *SAMUEL JOHNSON* (1975). There are other recent biographers. For a thoughtful discussion of their merits, see Folkenflik, *Johnson's Modern Lives* in *JOHNSON AFTER 200 YEARS* 3 (P. Korshin ed. 1987).

youth had been deeply troubled. All his life he suffered from a series of maladies and misfortunes. In maturity he was huge and physically unattractive. He had more trouble than most of us in finding his place both socially and professionally. Leaving Oxford for financial reasons after only thirteen months caused him to relapse into deep and prolonged depression. As a young man (he later remarked) he never tried to please because he thought the task impossible. An important turning point in his life came when he met and married an older widow; using his wife's money, he started a school for boys; it failed. He then set out for London to become a writer. Like most young authors, his early years there were full of difficulty. But there were opportunities in the bustling London of mid-eighteenth century, and he gradually began to have enough success to support himself and his wife.

To his great sorrow, his wife died just as he was starting to make a mark. With fortitude and faith he plunged on, made new friends and continued to build his reputation. He was fortunate to receive a small pension from the Crown as a reward for his varied and increasingly influential writings. The pension freed him of the stultifying obligation of supporting himself by whatever writing opportunities came his way. Gradually, he assumed a position of importance in the life of London. He was a sought-after guest whose reputation for eloquence and intellectual pugnacity soon made him famous. His poetry, his essays, his literary criticisms and his dictionary were read and acclaimed by all educated English men and women. The Johnson of the Age of Johnson had emerged.

Johnson is a timeless figure. In the English-speaking world, only Shakespeare wears as well over the centuries. A thinker of great stature who examined all aspects of human experience, he is of particular interest to us because he turned an especially perceptive eye on the law. But before focusing on that, let us turn to other aspects.

II. God & Morals

Johnson was a deeply religious man. For him, punishment for sin was such an awful threat that it sometimes crippled him psychologically. His fear of God's wrath amounted to terror.² He never lost his fear of actually burning eternally for his presumed sins: sloth, gluttony, rage,

² W. J. BATE, *supra* note 1, at 451. Bate believes, however, that Johnson feared not so much "falling into Hell, but falling . . . into nothing." *Id.* at 451-52. To Anna Seward's remark that death is a form of "annihilation[] which is only a pleasing dream," Johnson replied, "It is neither pleasing, nor sleep; it is nothing. Now mere existence is so much better than nothing, that one would rather exist even in pain." *Id.* at 452. As Bate put it,

beneath those uneasy outbursts . . . is a far deeper anxiety: a need, through conviction of a future after death (at whatever risk), to find an explicit purpose or meaning for human suffering in this world; a strongly suspicious and starkly existential dread, which he needed constantly to repress, that this purpose might not be found; and a "displacement" of that larger anxiety by a more simplified, partly self-imposed dread in which, though he might himself be weighed in the balance and found wanting, the universe would at least make sense.

Id. at 452.

intemperance, lust, pride, and perhaps most specific and unforgivable of all, his neglect of his mother.³

Johnson arrived at committed Christianity while a student at Oxford, based on his reading of William Law's *A Serious Call to a Devout and Holy Life*, published in the year Johnson entered Oxford. Prior to that, he told Boswell, he had been "a sort of lax *talker* about religion, for I did not much *think* against it."⁴ But upon finding Law's *Serious Call* he began to read it,

expecting to find it a dull book (as such books generally are) and perhaps to laugh at it. But I found Law quite an overmatch for me; and this was the first occasion of my thinking in earnest of religion, after I became capable of rational inquiry.⁵

Johnson was especially struck by Law's point that "desires, ambitions and possessions" ultimately prove empty. In the words of W. Jackson Bate, they leave "the heart nowhere else to turn for stability and purpose except to religion."⁶ For Johnson, religion was the only means of durable human comfort.⁷ Johnson's religion was also based on his profound skepticism of man and man's instincts. He repulsed any thought that man's instincts are fundamentally good and that virtue will prevail.⁸ Earlier in his life, Johnson had been influenced by Bernard Mandeville, who taught that human virtue is the effect of religion *or* reason over the "natural man."⁹

From the time of Johnson's birth to our day, there has been a sharp decline in the importance of religious belief and a concomitant rise of rationalism, along with the secularization of thought and life. Professor A. R. Hall has written that the spread of rationalism occurred during the years 1500-1800, a period he describes as "The Formation of the Mod-

3 It is hard for many people today to empathize with such torment over religion. One of the most successful books ever written was Lytton Strachey's *Eminent Victorians*, in which this quintessential early-20th-century author gained huge popularity by ridiculing what was deemed to be the hypocritical and fatuous pieties of leading, late-19th-century figures such as Cardinal Manning, General Gordon, and Florence Nightingale. Note, though, that much of what looks to modern people as excessive, 19th-century agonizing over matters of religion—for example, intensive prayer to be free from sins of pride or anger or covetousness or worldly ambitions—are the same concerns that wrack us today, except that we are not so inclined to filter these anxieties through religious beliefs. People today are equally concerned to be calm and good, helpful to neighbors, free from anger and self-doubt, in short, "adjusted." But we are more inclined to resort to psychotherapy, or meditation, or yoga, or simply to self discipline, to focus our efforts toward being more controlled, more worthy (one could almost say "saintly") people. The agony we modern people go through on matters of ethics and choice was just more likely in earlier times to be subsumed under religion. People prayed to be worthy of God's love, etc., whereas now people struggle to be moral without as much reliance on prayer. The struggle is the same; only the terminology is different. Once one sees religion as the filter through which, until a century and a half ago, people routinely passed anxieties and hopes not dissimilar from our own, one finds it easier to comprehend, and even appreciate, the past primacy of religion. One might also then see Strachey's picture of Victorian piety as inappropriately condescending.

4 *Id.* (citing 1 J. BOSWELL, *supra* note 1, at 68).

5 *Id.* at 102.

6 *Id.* at 103.

7 *Id.* at 279.

8 *Id.* at 101.

9 *Id.*

ern Scientific Attitude."¹⁰ It culminated in Johnson's lifetime, the mid to late eighteenth century. This was the period during which science came of age. The touchstone of thought became not religion but thought itself in the form of conceptualism—the scientific ordering of knowledge.¹¹

10 A. HALL, *THE SCIENTIFIC REVOLUTION 1500-1800* xii (2d ed. 1962), quoted in Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 695 n.15 (1968). It was, according to Professor Hall, "only a period of 'preparation, [while] that since 1800 [has been] one of accomplishment.'" While some of the greatest names in science lived between 1500 and 1800, as Professor Calvin Woodard tells us, some of the difficulty of the struggle to adopt scientific reasoning is suggested by the facts that Newton had a black box full of material on magic, Robert Boyle believed in witches, and Joseph Priestly was reputed to have invented an electrical machine to exorcise a demon. *Id.*

11 With respect to the not necessarily inconsistent interaction of religion and scientific rationality, note that in the eyes of some thinkers, including Alfred North Whitebread, religious thought actually prepared the way for scientific thought. It was the many centuries of faith in the order and rationality of the world that paved the way for scientific thought. A. GREELEY, *A FUTURE TO HOPE IN: SOCIO-RELIGIOUS SPECULATIONS* 160 (1970).

Once scientific thought began to compete for man's intellectual energy, though, the rise of secularism and the comparative fall of religion proceeded rapidly.

And yet not all thinkers would agree that the influence of religion in most modernized societies is on the wane. Andrew Greeley, a Catholic priest and an eminent sociologist, argues that estimates on the decline of religion are fallacious, being confined, he says, to "the intellectual community—and only a segment of that." "I . . . assert," he writes, "that the religious crisis of the intellectual community by no means reflects the religious situation of the mass of the people." The deep desire of most people for religious values, Greeley argues, remains. If other interests—often material—have grown, that is not to say, argues Greeley, that religion is fundamentally less influential now than at earlier times. Greeley contends:

[T]here is in the human condition a built-in strain toward evolving an ultimate meaning system and making it sacred. There is no reason to think that agnosticism, atheism, skepticism, and irreverence are any more common today than they were in other societies, and equally no reason to think that faith, devotion, religious commitment, and sanctity were any more common in the past than they are today.

A. GREELEY, *UNSECLAR MAN* 241 (1972).

In this connection it is of considerable interest that probably the most influential of modern writers on religious matters, at least for the general reader, is C. S. Lewis, who is often compared to Dr. Johnson. So great is the interest in Lewis that the Modern Language Association cites him as one of the most rapidly increasing objects of literary study in the world. J. COMO, *C.S. LEWIS AT THE BREAKFAST TABLE: AND OTHER REMINISCENCES*, at xxii (1979). Particularly, Lewis's religious writings continue to sell on prodigious scale. Modern people can get something of the flavor of Johnson transported to modern times by focusing on Lewis, especially as to religious and moral matters. A Lewis editor and admirer, James Como has said, "it is not too much to say (as has been said of Dr. Johnson) [Lewis] convinces his reader that however far they go he has been there before them and they are meeting him, on his way back, back from having addressed the subjects that matter most and having thought them through to the end, to the 'absolute end.'" *Id.* at 130.

Como writes that reading Lewis leads to the simple reassurance that his readers obtain from knowing that a distinguished career in secular learning was comfortably combined with steadfast belief in orthodox Christianity. "Lewis is a noteworthy example of the fact that an intelligent modern man can find Christian Doctrine thoroughly credible, and such knowledge is useful when we are dealing with certain intellectual bullies."

Como writes other words about Lewis that might very well have been written about Johnson:

Once in a tutorial, though I fully shared Lewis's love of Milton, I commented adversely in a young man's way on Milton's concept of God as expressed in the line 'as ever in my great Taskmaster's,' as an unduly school masterly and demanding notion of God, I thought. Not at all, said Lewis; how marvelous to think of everything you do is being watched and weighed.

This reveals in [Lewis] a higher level of conscious and unconscious virtue that I can reach, but chiefly it is fine perception of the need for, and the availability of, real objective significance in our lives based on religious obligation, duty, and achievements. A strenuous Protestant ethic!

Id. at 66-67.

Finally, like Johnson, C. S. Lewis was a great conversationalist—and even more like Johnson, a great controversialist. Both Johnson and Lewis loved disputation and engaged in it superbly. One

Johnson lived and wrote at precisely this key turning point in the way humans viewed their universe. But his religious beliefs had all the intensity of pre-scientific times; his God often seems an Old Testament God.

III. His Learning

Since Johnson lived during most of those last 100 years of the period between 1500 and 1800, we see in him the combined forces of piety and rationalism, of worship and skepticism. Above all was his passionate concern with *morality*; with a pragmatic, sophisticated concern, transcending his own age, as to how humans should live together. The "incredible range" of Johnson's moral concerns is striking, "from the hopes and fears of the inner life [in Bate's words] to the most practical concerns of worldly existence, from anxieties shared by everyone to the more specialized ideals and generousities, stratagems and envies, of the learned, professional, and political milieus."¹² Bate tells us that it is Johnson's capacity to create a bond of trust between himself and his readers that makes Johnson the most powerful of all moralists.¹³

This brings us to Johnson's great capacity as a rationalist in a rationalist age—the Age of Reason itself. Johnson encapsulated the rise of rationalism to the point that the Age of Reason in England is called the Age of Johnson.

With respect to the range of his learning, William Adams, Johnson's tutor during Johnson's Oxford days, opined that Johnson "was the best scholar he ever knew come to Oxford."¹⁴ Adam Smith, though not very fond of Johnson (the feeling was mutual), grudgingly conceded that "Johnson knew more books than any man alive."¹⁵

In light of these comments it is interesting to note that Johnson rarely read a book through. Rather, he learned early in his father's book shop to skim rather than read thoroughly (a habit also typical of many busy practicing lawyers in their research). It was a habit which Johnson became perversely proud of. "Alas," he said to his close friend Mrs. Thrale, "how few books are there of which one ever could possibly arrive at the *last* page!" Even more pointedly, he said to the bookish William

reason for Johnson's avoiding drink in the taverns, where so many of his conversations took place, was his fear that wine obstructed his capacity to converse at the top of his form. In this respect he was in private like an actor or lecturer in public, scrupulously avoiding drink before or during a performance. Like Johnson, Lewis often met in a pub to converse with a set of friends but was quite abstemious there. *Id.* at xv.

¹² W. J. BATE, *supra* note 1, at 297.

¹³ *Id.*

¹⁴ *Id.* at 107 (quoting J. BOSWELL, *NOTE BOOK 1776-1777*, at 8, 21-22 (R. W. Chapman ed. 1925)).

¹⁵ *Id.* at 35. Boswell writes:

[Johnson] enlarged very convincingly upon the excellence of rhyme over blank verse in English poetry. I mentioned to him that Dr. Adam Smith, in his lectures upon composition when I studied under him in the College of Glasgow, had maintained the same opinion strenuously and I repeated some of his arguments. JOHNSON. 'Sir, I was once in company with Smith, and we did not take to each other; but had I known that he loved rhyme as much as you tell me he does, I should have HUGGED him.'

J. BOSWELL, *LIFE OF JOHNSON* 111 (Osgood ed. 1917). See *infra* note 122 and accompanying text.

Bowles: "I have read few books through; they are generally so repulsive that I cannot."¹⁶

Johnson's comments to Bowles intimate that his notable achievements as a scholar were, somewhat perversely, aided by his not being a traditional scholar—indeed he scorned such. Johnson spoke feelingly of professional "cant." Knowledge gained from experience, not at second or third hand, was of most importance to him. Along with many of his non-academic friends on Grub Street, he scorned refinements that descend into quibble so typical of much academic work in his day and ours¹⁷ (a prejudice shared by many practicing lawyers). As Fanny Burney pointed out, he always preferred to converse with intelligent men of the world rather than with professional scholars.¹⁸ Commenting on an old Oxford friend he wrote, "About the same time of life Meeke was left behind at Oxford to feed on a Fellowship and I went to London to get my living: now Sir, see the difference in our literary characters."¹⁹ In his preface to his dictionary Johnson noted that it "was written with little assistance of the learned, and without any patronage of the great; not in the soft obscurities of retirement, or *under the shelter of academic bowers*, but amidst inconvenience and distraction, in sickness and in sorrow."²⁰

Despite—or perhaps because of—the conditions under which he wrote it, Johnson's dictionary stands as the ultimate tribute to the exhaustive range of his knowledge. It was an awesome compendium of knowledge of all kinds, literary and scientific, greater than any that had ever before been assembled by one person. Bate tells us that for over a century after its publication it was without a rival.²¹ In addition, it set the pattern for all subsequent dictionaries, with its striking examples of the use of a word in literature, a technique never tried previously nor abandoned since.²²

No one except a person with an enormous range of knowledge could have completed such a task. Johnson's qualities in this regard are reflected in his great reputation as a talker. No greater expositor of dialectical skills ever lived. Bate speaks of the "strength, quickness and range"

16 W.J. Bate, *supra* note 1, at 35.

17 *Id.* at 212-13.

18 W. J. BATE, *THE ACHIEVEMENT OF SAMUEL JOHNSON* 228 (1955).

19 J. BOSWELL, *supra* note 16, at 70.

20 B. BRONSON, *SAMUEL JOHNSON* 238 (1958).

21 W. J. BATE, *supra* note 1, at 212.

22 The dictionary that replaced Johnson's, the great *New English Dictionary* in ten volumes (1888-1928), the basis of all subsequent English dictionaries, used the word *New* in its title because it was in substance the only new dictionary since Johnson's. The *New* dictionary (retitled in a later edition of 13 volumes, the *Oxford English Dictionary*) drew on over 2,300 scholars before it was finished 70 years after it had been undertaken. Johnson's two volumes, which he worked on in one cluttered room with little backing and only modest clerical help, were finished in nine years. W. J. BATE, *supra* note 1, at 251-52. See R. DEMARIA, *JOHNSON'S DICTIONARY AND THE LANGUAGE OF LEARNING* (1986).

As to the very latest edition, (1989), of the *Oxford English Dictionary*, with the aid of the computer it took only five years. Following Johnson's example, it still has quotations to illustrate usage. At this point, almost two and a half million are needed. They were provided by many volunteer human readers (Harold Laski's niece, the late Marghanita Laski, alone provided a quarter of a million of them). But even with such readers, without the aid of computers completing the latest dictionary might well have taken fifty rather than five years. Kermode, *Diary*, *London Review of Books*, April 20, 1989, at 21 (commenting on *OXFORD ENGLISH DICTIONARY*, 2d ed., Vols. I-XX (J. A. Simpson & E.S.C. Weiner eds., 1989)).

of Johnson's talk.²³ John Wain paints "a picture of Johnson as a conversationalist . . . [w]ide-ranging, instantaneously marshalling information, weighing evidence, exploding cant" ²⁴ So substantive and original was his talk, that, unlike all other famous talkers who often base their talk on reminiscences and anecdote, Johnson rarely used either (though, as Wain puts it and his friends attested, "he could tell a good story when he wanted to").²⁵ Again on the range and pragmatism of his learning Bate tells us

Johnson, time and again, walks up to almost every anxiety and fear the human heart can feel. As he puts his hands directly upon it and looks at it closely, the lion's skin falls off, and we often find beneath it only a donkey, maybe only a frame of wood Constantly, as he expresses himself, we have the sense of a living originality—of the genuine personality of an experiencing nature—operating upon all the facts of life.²⁶

Here is the great Boswell on Johnson's prodigious powers of rational thinking:

His superiority over other learned men consisted chiefly in what may be called the art of thinking, the art of using his mind; a certain continual power of seizing the useful substance of all that he knew, and exhibiting it in a clear and forcible manner; so that knowledge, which we often see to be no better than lumber in men of dull understanding, was, in him, true, evident, and actual wisdom.²⁷

IV. Law

This brings us to Johnson and the law. From early on until the end of his life, Johnson was fascinated by it.

The figure who most influenced the young Johnson was Gilbert Walmesley, a well-to-do lawyer and graduate of Trinity College, Oxford, who was described by contemporaries as "the most able scholar and finest gentleman in Lichfield or its environs."²⁸ Fifty years later Johnson commented "such was his amplitude of learning and such his copiousness of communication that it may be doubted whether a day now passes which I have not some advantage from his friendship."²⁹ Walmesley was forty-seven years old when he befriended the eighteen-year-old Johnson.³⁰ He was a man of the world, in intimate touch with life and manners in both a social and literary sense. He lived in the Lichfield cathedral close at the imposing Bishop's palace which he leased (the

23 W. J. BATE, *supra* note 18, at 46-47.

24 J. WAIN, *supra* note 1, at 247.

25 *Id.* at 247.

26 W. J. BATE, *supra* note 1, at 41.

27 J. WAIN, *supra* note 1, at 242 (quoting Boswell).

28 W. J. BATE, *supra* note 1, at 79.

29 *Id.* at 80.

30 *Id.* at 83. As a mature man, Johnson also befriended much younger men, including Robert Chambers, *see infra* notes 35-69 and accompanying text, and James Boswell. It is interesting to speculate on the degree to which this pattern, so important to Johnson in his later years, resulted from this important early friendship with Walmesley.

Bishop himself lived in Eccleshall Castle).³¹ Cultivated, well-read, urbane, he carried his "learning lightly," as Bate tells us. Walmesley was both lonely and generous; thus, he took pleasure in seeking out Johnson, giving him "the kind nutriment of attention and praise."³²

It was important to Johnson's development that Walmesley was a practical lawyer. He excited in Johnson a deep interest in the law. All his days, Johnson regretted that he had not been able to carry out his strong ambition—begun by his exposure to Walmesley—to study law.³³ Even in his sixties, long after he had achieved fame as a writer, Johnson manifested his regret about the study of law. On the street one day, Johnson and Boswell met Johnson's old college friend Oliver Edwards. Later Boswell said to Johnson, "Mr. Edwards had said to me aside that Dr. Johnson should have been of a profession." Johnson responded that "it *would* have been better that I had been of a profession. I ought to have been a lawyer." Boswell then adds:

Sir William Scott informs me, that, upon the death of Lord Lichfield [1772] . . . he said to Johnson, "what a pity it is, Sir that you did not follow the profession of the law. You might have been Lord Chancellor . . . and now with the title of Lichfield, your native city, is extinct, you might have had it." Johnson upon this seemed much agitated, and in any angry tone, explained "Why will you vex me by suggesting this, when it is too late?"³⁴

The late E. L. McAdam and Sir Arnold McNair have revealed the fascinating story of Johnson's collaboration in, and (as McAdam saw it) surreptitious authorship of much of the language in the Vinerian Lectures in Law at Oxford by Blackstone's successor, Robert Chambers.³⁵ The youthful Chambers, panicked at having his lectures compared to Blackstone's, was completely blocked, unable to undertake preparation of the lectures. Johnson, a friend of Chambers, hearing of his dilemma offered to help—anonymously of course, since Chambers' need for such help, and from a non-lawyer as well, would have been an additional humiliation. Chambers gratefully accepted.

In thinking about the law, Johnson perceived the intertwining of law and religion. In a much more imaginative way than other eighteenth-century figures, Johnson (perhaps in a measure instructed by his younger but nonetheless learned collaborator in the preparation of the lectures)

³¹ W. J. BATE, *supra* note 1, at 81.

³² *Id.* at 82.

³³ Johnson did not have the same respect for practitioners of the law as for the law itself. Robert DeMaria comments, for example, "[Johnson's] dictionary honors the law as an institution essential to government and as a study of importance to every citizen, but it treats the practitioners of the law—jurymen, judges, and lawyers—with severity and suspicion." R. DEMARIA, *supra* note 22, at 225.

³⁴ *Id.* at 84-85.

³⁵ As to the history of Johnson's role in the composition of parts of Chambers's Vinerian lectures, see E. MCADAM, *DR. JOHNSON AND THE ENGLISH LAW 65-122* (1951). For three other views, see A. MCNAIR, *DR. JOHNSON AND THE LAW 76-80* (1948); and two works by Thomas M. Curley: Curley, *Johnson, Chambers, and the Law*, in *JOHNSON AFTER 200 YEARS*, *supra* note 1, at 187-209 [hereinafter *Johnson, Chambers, and the Law*]; and Curley, *Statement of Editorial Principles and Editor's Introduction to R. CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW: AND COMPOSED IN ASSOCIATION WITH SAMUEL JOHNSON* (T. Curley ed. 1986).

saw clearly how the law, like other aspects of civilization, had gradually undergone secularization.³⁶

In the Vinerian Lectures, Johnson and Chambers traced the rise of law directly from religion. In primitive societies, fierce, savage war lords emerged as leaders where one's own brute strength and that of one's followers were all important—except in one class of men: priests. The clergy, with no strength of arms, was able to wrest respect for themselves from the most powerful of warriors. (Was it through fear of the only force at the clergy's disposal which was, in turn, more forbidding than warrior lords: fear of God and the after-life? Johnson does not say so directly but one can surmise it.) Thus, as Johnson saw, the one civilizing force able to rise without the use of brutal force was the clergy. In turn, as the clergy's civilizing force gradually, tortuously spread, the liberating amenities of art and music commenced to flow from religious purposes and themes. As men took the first step toward civilization—with the concomitant needs for writing and reading and record-keeping and, ultimately, more advanced administration, the tools to accomplish these subtle unsoldierly tasks were held by the clergy. With further advances in civilization came the need for ordering and regulating society by other than direct application of force and fear, namely law. This tool evolved under the clergy since they were the only bookish people, that is to say the only ones capable of writing and administering the law.³⁷

In those times of ferocious barbarity [wrote Johnson and Chambers] which succeeded the first establishment of feudal power, when there was yet no regular distribution of civil justice, when the laws, *yet few in number*, were unequal to the exigencies of life, when those laws (imperfect as they were) were unknown to the greatest part of the people and, for want of gradual subordination of power, were violated by every chieftain who was stronger than his opponent, it was natural for the oppressed and the timorous to fly for shelter to the ministers of

³⁶ Initially, law was shrouded in religion, taking much of its cast therefrom. In the words of Professor Calvin Woodard:

... In earlier times the law was almost as mystical, and certainly as ritualistic, as the Church itself. Not only was there pomp . . . there was also ceremonial garb (besides gorgeous gowns and tippets, serjeants[at-law] wore a coif that was never doffed, not even in the presence of the king), and above all, the practice of law was itself a sacrament carried out in a form closely resembling the quodlibetical disputations of the Schoolmen. "The right word," Maitland noted, "must be said without slip or trip, the due ceremonial acts must be punctiliously performed, or the whole transaction will be nought."

Woodard, *supra* note 10 at 691-92.

³⁷

When Christianity was received by the Saxons it necessarily introduced some degree of literature, and literature would soon be employed in settling some system of written law. 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 authors 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 themselves, and the *punishment of crimes* which would claim the *second* attention of those who were to reform and superintend the manners of the people. . . . That the first preachers of our religion were likewise the first authors of our laws is yet further evident because our laws and religion are drawn alike from the volume of Revelations; the first forty-nine laws in the Code of Alfred are transcribed from the Mosaic institutions.

As quoted in E. McADAM, *supra* note 35, at 88.

religion, whose character restrained them at least from *open* violence and *avowed* contempt of reason and of justice.

In those days almost every man who was not a clergyman was a soldier, habituated to tumult and outrage and accustomed to think nothing wrong which he had strength to defend. They in whose hands the power of government was placed were feudal lords, ignorant and savage, insolent with habitual superiority, and too little acquainted with argument and distinction to control by reason their passion and their interest. The priest was naturally a lover of peace, but 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, were regarded with less jealousy; and his person being considered as inviolable, he was in less danger of revenge than those whom his decision might disappoint and offend.

To these arguments of propriety was added what may be almost termed a reason of necessity for the weight and authority of ecclesiastics. The clergy was 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 who could read and write.

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 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.³⁸

Johnson and Chambers described³⁹ how religious-jurists imaginatively used religion to buttress the status of the sovereign.

In that age of prejudice and ignorance, when the civil institutions were yet few and the securities of legal obligations were very weak both because offences against the law were often unpunished and because the 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 it to him that wore it. And accordingly the inauguration of a king is by our ancient historians termed consecration; and the writings, both fabulous and historical, of the Middle Ages connected with royalty some supernatural privileges and powers.

...

It may not be unreasonably conjectured that to this necessity of the clerical benediction, we are now indebted for the Coronation Oath. 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

³⁸ *Id.* at 110-11.

³⁹ As to why it is reasonable to assume that this was Johnson's (not Chambers's) description, see *infra* note 69 and accompanying text.

superstitious ancestors, ecclesiastics might impose it by the right of the priesthood which kings did not give and cannot take away It had been vain for the civil power to impose an oath of which it could not exact the performance, nor punish the violation.⁴⁰

In light of the foregoing, perhaps it is not surprising that lawyers, like ecclesiastics, came to see the subject of their learning as "transcendental" and indeed above the sovereign.⁴¹

Johnson and Chambers' view of religion's ameliorating role in raising the legal status of men is set forth as follows:

If it be objected that land is no use to the owner but as it is tilled and that, therefore, he would willingly feed all who would labor, it must be remembered that while men are satisfied with the products of the earth, very little improved by art or manufacture, many will be sustained by the labor of a few, a single shepherd can tend a numerous flock, a few plows will till a spacious farm, and there is then no commerce by which superfluity might be turned to profit, the lord could desire to raise no more than he consumed. Thus land was more necessary to the laborer than the laborer to the land. Many petitioned to be fed whose work was not wanted by him that fed them. There were, therefore, reduced to the hard choice of servitude or hunger and accepted small portions of land on the cruel terms of being becoming in some sense the cattle of their lord, a property attendant to the soil by which they were sustained. This is the *natural* and, therefore, probably the *true* original of villenage. And such, with accidental differences of mode, will inevitably be the state of every nation whose lands are appropriated and arts are few. One part must live wholly at the mercy of the other, and where there is no reciprocation of benefits the conditions of life will always be equal.

...

As peace softened manners and religion rectified opinions, the inequalities of life⁴² were gradually leveled and the rigors of inferiority imperceptibly mollified. That one Christian should be held in bondage by another was considered by the clergy as contrary to that mercy which religion dictates, and by lawyers as inconsistent with that justice which is the end of legal institutions. It is, therefore, probable that

40 E. McADAM, *supra* note 35, at 93-94.

41 Speaking of the cult of the "legal mind," Calvin Woodard writes:

The transcendental nature of law, like that of theology, made it something more than pure reason and distinguished it from other academic and scholarly ventures. Every school boy is familiar with the celebrated confrontation between King James I and Lord Coke—in which the noble Lord, though he ended by trembling abjectly upon all fours, vindicated the uniqueness of the law and the legal mind. In Coke's words: "[T]hen the King said he thought the law was founded upon reason, and that he and others had reason, as well as judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of the realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reasons but by the artificial reasons and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was in the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said: which I have said, that Bracton saith, 'quod Rex non debet esse sub homine, sed sub Deo at lege.

Woodard, *supra* note 10, at 719-20.

42 The reference is to the inequities represented by villenage.

many were emancipated by the piety of their lords, and some enfranchised by the subtleties of law. The villain might become a free tenant in villenage and the tenant in villenage rise to a copyholder. That this was the gradation by which [land] base tenures were brought to their present state is very probable.⁴³

Johnson was early to see law not so much as divinely inspired or mystically revealed but as reflecting the society it tried to regulate. He saw how law grew naturally—and even chaotically—out of the world and conditions surrounding it. In his dictionary he included this entry: “Common Law contains those customs and usages which have, by long prescription, obtained in this nation the force of laws.”⁴⁴

Professor E. L. McAdam, in his work *Dr. Johnson and the English Law*, noted that Johnson was “insistent on the changing character of law”—which McAdams finds “sufficiently surprising in this crusty old Tory.” He quotes Johnson’s remark that, “‘Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes.’”⁴⁵ In the Vinerian lectures, Johnson and Chambers wrote: “The methods of government and processes of jurisdiction have not been devised at once, or described and established by any positive law, but have grown up by slow and imperceptible degrees, as experience improved and necessity enforced them.”⁴⁶ A corollary to such natural growth were the law’s anachronisms. According to Johnson and his young collaborator: “[l]aws often continue when their reasons have ceased.”⁴⁷

It is perhaps impossible [wrote Johnson and his young collaborator] to review the laws of any country without discovering many defects and many superfluities. Laws often continue where their reasons have ceased. Laws made for the first state of the society continue unabandoned, when the general form of life is changed. Parts of the judicial procedure, which were at first only accidental, become in time essential; and formalities are accumulated on each other, till the art of litigation requires more study than the discovery of right.⁴⁸

Few other than Johnson perceived the disorderly, tatterdemalion quality of the law in the eighteenth century. To the contrary, Blackstone, the

43 E. McADAM, *supra* note 35, at 116.

44 *Id.* at 49.

45 *Id.* at 148.

46 *Id.* at 118.

47 *Id.* at 200.

48 *Id.* at 50. Perhaps the most vivid description of this state of the law in Johnson’s time is from J. S. Mill’s essay on Blackstone, Johnson’s contemporary, and Jeremy Bentham. As Mill put it, the law had come

to be like the costume of a full-grown man who had never put off the clothes made for him when he first went to school. Band after band had burst, and, as the rent widened, then, without removing anything except that might drop off of itself, the hole was darned, or patches of fresh law were brought from the nearest shop and stuck on.

Woodard, *supra* note 10, at 654. But Mill, writing in the 19th century, had the benefit of writing 100 years after Johnson.

great legal thinker of Johnson's time, saw law as similar to Adam Smith's orderly world of economics.⁴⁹

This is not to say that Johnson, deeply religious as he was, did not believe that a great part of the law was bottomed on the wisdom of Providence. In a striking passage in the Vinerian Lectures, he and Chambers wrote:

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 equipoise of passion, and the nearer good would generally outweigh the remoter evil [of subsequent punishment]. But such is the frame of man that the dread of evil may be always made more powerful than the appetite of good. He that possessing a hundred sheep shall steal a hundred more, will by no means gain such a degree of happiness as he will lose if his own hundred be taken away. Even the *Lex Talionis* has upon this principle a very powerful operation, for no man can have as much pleasure in pulling out of 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.⁵⁰

As the foregoing suggests, if Johnson and Chambers had little sentimentality over man's state of natural grace, they also had no illusions about the brutal basis of the law. "Law," they said, "is nothing without power."

By this power, wherever it subsists, all legislation and jurisdiction is animated and maintained. From this all legal rights are emanations which, whether equitably or not, may be legally recalled. It is not infallible, for it may do wrong; but it is irresistible, for it can be resisted only by rebellion, by an act which makes it questionable what shall be thenceforward the supreme power.⁵¹

In Boswell's account of his tour of the Hebrides with Johnson, he records the following exchange:

Boswell. But consider, Sir, what is the House of Commons? Is not a great part of it chosen by peers? Do you think, Sir, they ought to

49 As Professor Paul Carrington of the Duke Law School has perceptively pointed out, the lawyers' Reasonable Man turns out to be from the same mold as the economists' Economic Man. According to Carrington, an economic analysis of law can be viewed as reuniting

two divergent strands of rational intellectual tradition, the classical economic rationalism sired by Adam Smith and the common law rationalism which can be said to date from William Blackstone. . . . Blackstone and Smith each wrote with an extraordinarily lucid, if somewhat oracular, style. . . . While Smith analyzed markets and Blackstone analyzed court decisions, both proceeded from the assumption that human behavior is essentially, if not completely, rational. . . . Both Blackstone and Smith were prone to attribute to human rationality a commanding force over social institutions and relationships. . . .

Carrington, Book Review, 1974 U. ILL. L.F. 187 (reviewing R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972)).

50 E. MCADAM, *supra* note 35, at 110.

51 *Id.* at 190. As Emily Dickinson wrote:

Revolution is the pod
Systems rattle from.

COMPLETE POEMS OF EMILY DICKINSON, Poem 1082 at 490 (T. Johnson, ed., 1960).

have such an influence? Johnson. Yes Sir, Influence must ever be in proportion to property, and it is right it should. Boswell. But is there not reason to fear the common people may be oppressed? Johnson. No Sir. Our great fear is from want of power in government. Such a storm of vulgar force has broken in. Boswell. It has only roared. Johnson, Sir, it has roared till the judges in Westminster Hall have been afraid to pronounce sentence in opposition to the popular cry. You are frightened by what is no longer dangerous, like Presbyterians by Popery. Johnson then repeated a passage, I think in Butler's *Remains*, which ends, "and would cry 'Fire' in Noah's Flood."⁵²

As might be expected from someone who could make such remarks and who viewed the law as the command of an all-powerful sovereign, for Johnson, a deep desideratum in the law was *certainly*, such that the law's commands could be known and obeyed. The famous preface to Johnson's Dictionary contains only one comment on the law: "It has been asserted, that for the law to be known, is of more importance than to be *right*."⁵³ On another occasion Johnson wrote, "to promote trust . . . is the apparent tendency of all laws."⁵⁴

Such views on the law represented at the time a remarkably distinct attitude. Certainly the great majority of men of Johnson's time—even thinkers—viewed the world through more limited prisms; they saw a world far more mysterious than the one Johnson saw, a world much more subject to God's whim than Johnson believed, deeply religious though he was.

But though his ideas were advanced in some respects, Johnson was, as much of the above suggests, deeply conservative. The powerful respect for tradition which he felt was manifested in his attitude toward both law and religion. Indeed, McAdam speculates that this respect for institutions had its origins in his attitude toward the law; he cites "the insistence which Johnson placed on the credibility of the evidence for historical Christianity, where [Johnson] thinks and talks very much like a lawyer."⁵⁵

Johnson's interest in the law was not only philosophical but pragmatic, especially for a non-lawyer. Before turning to the pragmatic side (where, in effect, Johnson at least flirted with practicing law, albeit without a license), consider in more detail his authorship, according to McAdam, of much of the language in Robert Chambers's lectures as Blackstone's successor as Vinerian Professor of Law at Oxford.

Blackstone had been appointed the first Vinerian Professor of Law in Oxford in 1758, following the funding of the professorship by a bequest from Charles Viner. Blackstone's Vinerian lectures were the basis of the first volume of his momentous *Commentaries on the Laws of England* (1765), a precedent which could readily overwhelm any scholar succeeding him. Blackstone resigned the professorship in 1766 to return to practice and was succeeded by Chambers who had been Blackstone's understudy as a

⁵² J. BOSWELL, *JOURNAL OF A TOUR OF THE HEBRIDES* 37 (R.W. Chapman ed. 1924).

⁵³ E. McAdam, *supra* note 35, at 46.

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 200.

Vinerian Fellow since 1762. Chambers was only twenty-seven years old, extremely young for such an appointment. Great things were expected of him.

By the time of his accession to the chair, Chambers had known Johnson for some time, through an acquaintance stretching back to the time Chambers was seventeen and studying as an undergraduate at Lincoln College, Oxford. From the start, Johnson took a keen interest in Chambers. The older man had often vicariously enjoyed following the progress of young law students and lawyers of his acquaintance, reflecting his own long suppressed desires for a legal career.⁵⁶ Johnson and Chambers had corresponded on legal and literary matters, with Johnson on occasion writing letters of recommendation for Chambers.⁵⁷

The duties of the Vinerian Professor of Law mandated a long series of lectures, with severe fines for each failure to give a required lecture, such that in the course of a year the fines could equal the stipend. (This was in contrast to some other Oxford Professorships where professors scandalously neglected to deliver any lectures, despite at least moral obligations to do so).⁵⁸

As indicated earlier, Chambers, a notoriously timid man all his life, was paralyzed at the prospect of being compared to Blackstone. In desperation he turned to Johnson, who was then in his mid-sixties.

It so happened that the Johnson to whom Chambers turned was at that time himself in very fragile shape emotionally. He was immersed in one of the many long bouts with severe depression that he suffered throughout his life. At the time Chambers approached him, Johnson was beginning a slow recovery, helped enormously by the warm and supportive friendship of the Thrale family, whose household he had in effect joined the summer before being approached by Chambers. The opportunity to pursue the study of law, his oldest ambition, through helping Chambers also substantially served to aid Johnson's recovery. As no other work could have done, the congenial and stimulating subject of law brought Johnson out of himself; it revived his self-confidence and restored his mental faculties after a long period of depression.⁵⁹

In response to the importuning of Chambers, Johnson took a coach to Oxford in the fall of 1776. He stayed with Chambers for several

56 See W. J. BATE, *supra* note 1, at 417-18; E. MCADAM, *supra* note 35, at 65.

57 Thomas Curley argues that Johnson's association with Chambers was more intimate and prolonged than that with Boswell: "In fact, in depth and duration Boswell's more celebrated connection with Johnson pales by comparison." Curley, *Johnson, Chambers, and the Law*, *supra* note 35, at 188. Curley makes an impressive case. He points out, for example, that as manager of *The Literary Magazine* Johnson published the only item of Chambers' writing to appear in print with his authorization in his lifetime. It was a biographical article on Ben Johnson, and Chambers was still an Oxford undergraduate when it appeared. *Id.* at 189. In turn, Chambers was solicitous and helpful to Johnson during some of the latter's times of depression, and his bringing Johnson to Oxford for collaborative work on the lectures was thus helpful to both men. *Id.* at 191. Finally, the friendship continued through Chambers's long distinguished career as a judge in India and culminated in Johnson's last of a long series of letters to his younger colleague shortly before the older man's death, "a moving letter of fond farewell that ranks among the longest and most heartfelt performances in his collected correspondence." *Id.* at 205.

58 E. MCADAM, *supra* note 35, at 67.

59 W. J. BATE, *supra* note 1, at 417-18.

months at New Inn Hall (later to be merged into Balliol) of which Chambers was principal. After Johnson left, however, Chambers panicked again, now haunted by the added fear that his need for help—especially from a non-lawyer—would be discovered.⁶⁰ Upon Chambers writing to him, Johnson replied with warm reassurance:

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 the lectures will be produced. You must not miss another term. . . . Come up and work, and I will try to help you. You asked me what amends you could make me. You shall always be my friend.⁶¹

Chambers complied; six weeks later Johnson wrote, "I hope you are soon to come again, and go to the old business, for which I shall expect an abundance of materials, and to sit very close, and then there will be no danger, and needs to be no fear."⁶²

Chambers went through more false starts (he was somewhat lazy) after gaining momentum from Johnson, and Johnson undertook even more responsibility, such that the lectures were announced to begin on March 17, 1767. As Bate tells us, Johnson showed amazing talents whipping the materials into shape.⁶³

Johnson was back in Oxford twice in the spring of 1767 for short stints to help Chambers further. The pattern kept repeating itself, with Chambers making little headway in the summer of 1767, with more trips to Oxford by Johnson or by Chambers to London to work on the second series of lectures to begin on February 20, 1768. Johnson was in Oxford from late February until the end of April. In December of 1768, Johnson was back in Oxford to begin on the third and last series of the lectures, with still another trip in February 1769 and a final one that May.

Throughout this period of selfless, anonymous effort, Johnson remained the soul of discretion. While working on the lectures, Johnson had his famous interview with King George III. Johnson frequently walked to Buckingham House to use its splendid library, which included law books. The librarian, knowing the King wanted to meet Johnson, brought the King from his apartments to the library where Johnson and the King chatted easily. According to Bate, "throughout the interview, Johnson stood with dignity and talked in a courteous but firm and sonorous voice rather than in the subdued, deferential tone customary among those presented to the sovereign."⁶⁴ At one point the King asked Johnson if he was in the process of writing anything; Johnson avoided any mention of his work on the law lectures or even that he was consulting law books. Instead he turned the query aside with a gentle comment that he was not writing since, as Boswell recounted his words, he had pretty well told the "world what he knew, and must now read to acquire more knowledge."⁶⁵

60 E. MCADAM, *supra* note 35, at 69.

61 *Id.* at 68.

62 *Id.*

63 W. J. BATE, *supra* note 1, at 420.

64 *Id.* at 421.

65 E. MCADAM, *supra* note 35, at 69.

Even the voraciously curious Boswell (himself, of course, a lawyer, and one who in his professional work was often aided by Johnson's legal advice, as we shall see) knew nothing of Johnson's efforts on the legal lectures. On his last trip to Oxford, Johnson took with him Mrs. Williams, a destitute elderly lady who had long been part of Johnson's household. Subsequently, Boswell tried to find out from Mrs. Williams the reason for the "mysterious trip" but she told him only that Johnson, while there, "seldom or never dined out. He appeared to be deeply engaged in some literary work." Johnson's other close friend, Mrs. Thrale, knew of, or at least strongly suspected, Johnson's involvement. In the unpublished Mainwaring Piozziana, Mrs. Thrale indicated her suspicion that Johnson had written the lectures, adding that Johnson "used to visit the University at *Critical Times* . . . or I thought so." In *Thraliana*, not published until 1942, she listed the lectures among Johnson's works.⁶⁶

But there the secret rested. Twenty-one years after Chambers's death, his nephew Sir Charles Chambers, also a lawyer, selected twelve of the lectures to be published in *A Treatise on Estates and Tenures* (1824), but the lectures selected were not ones in which Johnson had a hand, at least not to any significant extent.⁶⁷

Even the authoritative history of the Vinerian Professorship published in 1958 makes no mention of Johnson in its discussion of Chambers.⁶⁸ It was E. L. McAdam, an American working on a Guggenheim Fellowship, who had uncovered the tale. He did so by careful examination of the sixteen-hundred pages which Chambers's Vinerian Lectures covered, having in mind Johnson's distinctive pungent writing style which was in sharp contrast to Chambers's frequently verbose and rambling sentences. McAdam found Chambers's platitudinous style "wholly foreign to Johnson's." Consequently, while unable to divide the sixteen-hundred pages "exactly into those pages which are of Johnson's composition and those which are Chambers's," McAdam found it possible "to identify passages which are unmistakably Johnson's."⁶⁹

⁶⁶ *Id.* at 69.

⁶⁷ W. J. BATE, *supra* note 1, at 426.

⁶⁸ *Id.* at 418.

⁶⁹ E. MCADAM, *supra* note 35, at 73. Curley, however, is a good bit more cautious: "Readers should be warned that at least a few passages [in the lectures] formerly ascribed to Johnson have been discovered almost verbatim in Chambers's private papers written before and after the composition of the lectures." He underscores the difficulty of being certain as to which language was Johnson's, though he grants that, "as some scholars have argued, [the creation of the lectures] may even have involved Chambers's incorporation of groups of paragraphs or entire lectures dictated or drafted by Johnson." Curley, *Johnson, Chambers, and the Law*, *supra* note 35, at 195. Curley's caution is reinforced in a general way by similar reservations on the part of John L. Abbott, who in an essay on the Johnson canon discusses the difficulty of being precise about what Johnson wrote, especially in light of Johnson's many skillful imitators. Abbott, *The Making of the Johnsonian Canon* in JOHNSON AFTER 200 YEARS, *supra* note 1, at 127-139. However, there is no indication that Chambers ever tried to imitate Johnson, though it is conceivable he many unconsciously have done so.

Curley makes a particularly telling point in emphasizing how much Johnson himself learned from collaborating on the lectures irrespective of the question of how much of the language they contain is exclusively Johnson's. He writes, "Furthermore, there remain rich possibilities of thematic ties between the law lectures and Johnson's literary criticism and philological essays. For Johnson, literature like statecraft embodied a common law of fortuitous adaptation and progressive correctness which the second Vinerian course summarily traced in the political history of England." Further as to the precise credit for language he says, "At least this much can be stated with safety:

Mention has already been made of Johnson's intense interest in the *practice* of law. Boswell, as well as others, often consulted him for help in practical details or dealing with legal problems.⁷⁰ Especially for help in writing briefs, Boswell often turned to Johnson. One instance will serve as an example, although others could be cited. While in London on another case (on which Boswell also sought advice from Johnson), Boswell consulted Johnson on "a question purely of Scotch law." Formerly the law had been that "whoever intermeddled with the effects of a person deceased, without the interposition of legal authority to guard against embezzlement, should be subjected to pay all the debts of the deceased, as having been guilty of what was technically called *vicious intromission*."⁷¹ Of late, the courts had been relaxing this rule when intermeddling was deemed minor. In the case of *Wilson v. Smith and Armour*,⁷² Boswell had petitioned the court for a strict application of the doctrine but had been unsuccessful. Applying for a "revision and alteration of the judgment," Boswell asked Johnson for help, and Johnson dictated a long memoran-

Johnson was sufficiently familiar with the course to have remembered certain lectures for use in his own writings and to have been influenced in his political and literary themes by a comprehensive, cohesive, and congenial survey of the British constitution." Finally, the "partnership in performing the duties of the second Vinerian Professorship helps to correct the Boswellian portrait of Johnson as a marmoreally changeless and self-sufficient intellect. The author who promoted Chambers's work as an academic lawyer displayed an unusual capacity in old age to learn from another mind and to refine conceptions of country and culture for an unprecedented outburst of political writing at the end of a remarkably diverse literary career." Curley, *Johnson, Chambers, and the Law*, *supra* note 35, at 195 and 206.

For further and more detailed expressions of Curley's reservations about McAdam's distinctions between Johnson's language and that of Chambers, see Curley, *Editor's Introduction* to R. CHAMBERS, *supra* note 35. Through he cautions that care must be taken in ascribing specific language to Johnson, Curley throughout his *Editor's Introduction* draws numerous interesting parallels between views expressed in the Lectures with similar passages found elsewhere in Johnson's writing. However, at a few points he does the same with respect to Chambers's own subsequent writings, thus pointing up the difficulty of distinguishing between the two collaborators with respect to precise language in the Lectures, as McAdams had attempted to do. *Id. passim*.

70 But see A. McNAIR, *supra* note 35, at 79.

71 E. MCADAM, *supra* note 35, at 131.

72 *Wilson v. Smith & Armour*, 23-24 W.M. Morison, *The Decisions of the Court of Session Digested in the Form of a Dictionary*, 9833 (Scot. Sess. Cas. 1772) (W.M. Morison ed. 1811) [hereinafter *Wilson I*], *reh'g granted*, *Wilson v. Smith & Armour*, 1-2 M.P. Brown, *Decisions of the Courts of Council and Session From 1766-1791* (collected by Lord Hailes), 482 (Scot. Sess. Cas. 1772) (M.P. Brown ed. 1826) [hereinafter *Wilson II*].

Lord Hailes was one of fifteen Justices (all Lords, including Boswell's father, Lord Auchinleck) to sit on Scotland's Court of Session, which had general original and appellate jurisdiction over civil cases in Scotland. Boswell lost his first petition to Division IV of the Court of Session before Lord Justice Hailes. He then appealed to the Court of Session's appellate jurisdiction and, three weeks later (1st case—June 19, 1772, Appeal—July 7, 1772), once more failed to persuade the court (Auchinleck not sitting, although he apparently rendered a preliminary ruling in the case—*against* Boswell. *Wilson II* at 483; *Wilson I* at 9834).

It appears that Boswell may have lost despite the weight of precedent being on his side. See, *Wilson I* at 9844-9845, "The former practice of the Court is also consonant with the pursuer's plea." Accord, *Wilson II* at 483 (Gardeston, L. J. dissenting) ("We ought not think ourselves wiser than our predecessors: we ought not to change the law. I wish to know what is vicious intromission if this is not.")

The facts presented in the case were such that the subject of the asserted intromission, "excepting one trifling articles of chairs," had come into the hands of Armour with the consent of the widow of decedent and consisted merely of "some mean body clothes, and some blankets." *Wilson I* at 9834, 9836.

Hence Lord Justice Hailes held that lacking fraud and *malis animus*, the *intromission* was *passive* and not an *intromission universitatem*. *Wilson I* at 9834-9836. Thus the defendant could not be subject to

dum. Boswell "prefaced and concluded [Johnson's words] with some sentences of [his] own" and presented it as a Petition before the court.

One of the judges in the case, Lord Hailes, anticipating by many years Professor McAdams's skillful detective work on the Vinerian Lectures, perceived in the Petition "a more than ordinary hand," pointing out exactly where Johnson's work began and ended.⁷³

To illustrate the flow of Johnson's legal thinking—to demonstrate his mastery of legal argument and counterargument—a lengthy extract of Johnson's memorandum to Boswell on *vicious intromission* is hereafter reprinted:

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.

Concerning the power of the Court to make or suspend law, we have no intention to inquire. It is sufficient for our purpose that every just law is dictated by reason, and that the practice of every legal Court is regulated by equity. It is the quality of reason to be invariable and constant; and of equity, to give to one man what, in the same case, is given to another. 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 of civil right; but if the measure is changeable, the extent of the thing measured never can be settled.

To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public 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. 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. He lives by a law, if a law it be, which he can never know before he has offended it. To this case may be justly applied that important principle, *misera est servitus ubi just est aut incognitum aut vagum*. If Intromission be not criminal till it exceed a certain point, and that point be unsettled, and consequently different in different minds, the right of Intromission, and the right of the creditor arising from it, are all *jura vaga*, and by consequence, are *jura incognita*; and the result can be no other

the "penal passive title" to decedent's debts but rather only subjected "in *valorem* of his intromissions." *Wilson I* at 9834.

The Court of Session upheld Lord Justice Hailes's decision that intromission to a trifling extent, and without fraud, will not infer passive title of decedent to defendant. *Wilson II* at 482.

The Court explicitly rejected one of Johnson's (or Boswells') main arguments which was that the doctrine of *vicious intromission* be rigidly adhered to in civilized times due to the increased opportunity for fraudulent action. See *Wilson II* at 482 (Kames J.): "In disorderly times men were apt to lay on hands; there was a necessity of strictness. Now in more civilized times, there is no occasion for such strictness, unless when there is evidence of fraud or of intentional concealment."

A final point of interest: in *Wilson II* at 483 the Court noted:

"[N.B.—From page 17 of Mr. Boswell's second petition Dr. Samuel Johnson dictates.]"

73 A. McNAIR, *supra* note 35, at 51. See *supra* note 72.

than a *misera servitus*, an uncertainty concerning the even of action, a servile dependence on private opinion.

It may be urged, and with great plausibility, that there may be Intromission without fraud; which, however true, will by no means justify an occasional and arbitrary relaxation of the law. The end of law is protection as well as vengeance. Indeed, vengeance is never used but to strengthen protection. The 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. Such a prohibition was this, while it operated with its original force. The creditor of the deceased was not only without loss, but without fear. He was not to seek a remedy for an injury suffered, for injury was warded off.

As the law has been sometimes administered it lays us open to wounds, because it is imagined to have the power of healing. 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. To permit Intromission, and to punish fraud, is to make law no better than a pitfall. To tread upon the brink is safe, but to come a step further is destruction. But, surely, it is better to enclose the gulf, and hinder all access, than by encouraging us to advance a little, to entice us afterwards a little further, and let us perceive our folly only by our destruction.

As law supplies the weak with adventitious strength, it likewise enlightens the ignorant with extrinsic understanding. Law teaches us to know when we commit injury, and when we suffer it. It fixes certain marks upon actions, by which we are admonished to do or to forbear them. *Qui sibi bene temperat in lictis*, says one of the fathers, *nunquam cadet in illicita*. He who never intromits at all, will never intromit with fraudulent intentions.

The relaxation of the law against vicious intromission has been very favorably represented by a great master of jurisprudence, whose words have been exhibited with unnecessary pomp and seem to be considered as irresistibly decisive. The great moment of his authority makes it necessary to examine his position. "Some ages ago, (says he,) before the ferocity of the inhabitants of this part of the island was subdued, the utmost severity of the civil law was necessary to restrain individuals from plundering each other. Thus the man who intermeddled irregularly with the moveables of a person deceased was subjected to all the debts of the deceased without limitation. This makes a branch of the law of Scotland, known by the name of *vicious intromission*; and so rigidly was this regulation applied in our Courts of Law that the most trifling moveable abstracted *mala fide* subjected the intermeddler to the foregoing consequences, which proved in many instances a most rigorous punishment. But this severity was necessary in order to subdue the undisciplined nature of our people. It is extremely remarkable that in proportion to our improvement in manners, this regulation has been gradually softened, and applied by our sovereign Court with a sparing hand."

I find myself under a necessity of observing that this learned and judicious writer has 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 beniginity in which laws shall be no longer necessary. Men are first wild and

unsocial, living each man to himself, taking from the weak and losing to the strong. In their first coalitions of society, much of this original savageness is retained. Of general happiness, the product of general confidence, there is yet no thought. 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. The restraints then necessary, are restraints from plunder, from acts of public violence and undisguised oppression. The ferocity of our ancestors, as of all other nations, produced not fraud but rapine. They had not yet learned to cheat, and attempted only to rob. As manners grow more polished, with the knowledge of good, men attain likewise dexterity in evil. Open rapine becomes less frequent, and violence gives way to cunning. 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 was framed; and I am afraid the increase of commerce, and the necessary struggle for riches which commerce excites, gives us no prospect of an end speedily to be expected of artifice and fraud. It therefore seems to be no very conclusive reasoning which connects those two propositions—"the nation is become less ferocious and therefore the laws against fraud and *covin* shall be relaxed."

Whatever reason may have influenced the Judges to a relaxation of the law, it was not that the nation was grown less fierce; and, I am afraid, it cannot be affirmed that it is grown less fraudulent.

Since this law has been represented as rigorously and unreasonably penal, it seems not improper to consider what are the conditions and qualities that make the justice or propriety of a penal law.

To make a penal law reasonable and just, two conditions are necessary, and two proper. It is necessary that the law should be adequate to its end; that, if it be observed, it shall prevent the evil against which it is directed. It is, secondly, necessary that the end of the law be of such importance as to deserve the security of a penal sanction. The other conditions of a penal law, which though not absolutely necessary are to a very high degree fit, are that to the moral violation of the law there are many temptations and that of the physical observance there is great facility.

All these conditions apparently concur to justify the law which we are now considering. Its end is the security of property, and property very often of great value. The method by which it effects the security is efficacious because it admits, in its original rigor, no gradations of injury, but keeps guilt and innocence apart by a distinct and definite limitation. He that intromits, is criminal; he that intromits not, is innocent.⁷⁴

McAdam in discussing Johnson's memorandum, comments that Johnson seemed to be aware, as Boswell was not, that the principle underlying the doctrine of vicious intromission was also found in civil law countries, and not limited to Scotland.⁷⁵ McAdam also notes how convinced Johnson was that as civilization advances, protection against fraud becomes much more important than protection against violence.⁷⁶

⁷⁴ E. MCADAM, *supra* note 35, at 132-34.

⁷⁵ *Id.* at 135-36.

⁷⁶ *Id.* at 136.

Boswell deeply appreciated Johnson's effort in this case. He commented that Johnson treated "a subject altogether new to him, without any other preparation than my having stated to him the arguments which had been used on either side."⁷⁷ Boswell later wrote to Johnson that his memorandum was "a noble proof of what you can do even in Scotch law."⁷⁸ McAdam notes, however, Johnson's wide and longtime reading of books on the civil law. He speculates that Johnson may well have had knowledge of a passage in Blackstone's *Commentaries* (a copy of which Johnson owned):

If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions) he is called in law an executor of his own wrong . . . and is liable to all the trouble of an executorship, without any of the profits or advantages⁷⁹

That Johnson had immersed himself in the case is indicated by a remark he made to Boswell a few weeks after submitting his memorandum:

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.⁸⁰

Johnson's critical appraisal of the English authorities clearly indicates his familiarity with them.

After all this, it is sad to report that the court once again ruled against Boswell. Johnson, however, took the result with professional aplomb—as well as with certain pride—writing to Boswell, "I am sorry you lost your cause of Intromission, because I yet think the arguments on your side are unanswerable."⁸¹

All in all Boswell sought Johnson's advice in some dozen formal cases.⁸² In addition, the Thrales, his old friend the litigious John Taylor, and others afforded Johnson many other occasions to offer legal advice, even to the extent of writing or contributing to pleadings and briefs. At one point Boswell wrote to the Reverend William Temple, "Luckily Dr. Taylor has begged of Dr. Johnson to come to London, to assist in some interesting [legal] business, and Johnson loves much to be so consulted and so comes up."⁸³

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 136-37.

⁸¹ A. McNAIR, *supra* note 35, at 51.

⁸² Curley comments on Boswell's (as well as Chambers's) use of Johnson's advice. "Boswell did not adopt the arguments verbatim but 'interwove' a good deal," probably in the same skillful manner that Chambers adopted any Johnsonian dictation to suit the style and sentiments of his discourses." Curley, *Introduction* to R. CHAMBERS, *supra* note 35, at 10.

⁸³ A. McNAIR, *supra* note 35, at 69 (quoting LETTERS OF SAMUEL JOHNSON No. 423 (G. Hill ed. 1892)). Johnson's apprehension of Taylor is indicated by a letter four years later when Taylor was again on the war path; Johnson wrote to Mrs. Thrale that Taylor "has let out another pound of blood, and is come to town brisk and vigorous, fierce and fell, to drive on his lawsuit. . . . His solicitor

In 1766-1767, Johnson apparently advised the East India Company concerning one of the periodic investigations of the Company that the House of Commons was prone to make into the Company's affairs. In this instance, the Company's right to fix dividends payable to its members was apparently the issue. For whatever part Johnson played (and this is not at all clear), he sought the help of Robert Chambers, whom he was then helping with the Vinerian Lectures.⁸⁴

That Johnson sought to end his amateur standing is shown by his attempt in middle age to circumvent the barriers to entry to the Bar. In late 1745 or early 1746 (when he was thirty-six), Johnson, though lacking not only a law degree but any degree at all, sought to discover "whether a Person might be admitted to practise as an Advocate" without the degree of Doctor of Civil Law (D.C.L.) before the "Doctors' Commons"—a court concerned with canon and civil law. Since the court was self-governing, Johnson thought it might be willing to make an exception on the requirement of the degree. Writing to request the aid of an old friend, Dr. William Adams, as an intermediary in the matter, Johnson told Adams that, although he (Johnson) had never formally studied law, "whatever is a Profession and maintains numbers must be within the reach of common Abilities and some degree of Industry."⁸⁵ Adams did what he could, but the lack of a degree was an insurmountable bar to the Bar, if you will. Adams could see that Johnson felt that this was "a great disappointment."⁸⁶

V. Politics, Altruism & Economics

Johnson's views on the general ordering of society were richly complex. As suggested by his attitude toward the law, Johnson was deeply conservative—but in a very subtle and original way. He saw man as a cruel, anarchic creature desperately in need of order and control—desperately needing the yoke of submission to authority. In John Wain's words,

Man was not, to Johnson, inherently gentle and unselfish. On the contrary. He was a creature full of . . . ravening instincts, which had to be controlled by the exercise of discipline both from within the individual and from without. When he was in the Hebrides [with Boswell] he had a conversation with Lady M'Leod of Dunvega, in which he maintained that unselfishness and regard for others, non-existent in a young child, are implanted by upbringing:

has turned him off; and I think it not unlikely that he will tire his lawyers." *Id.* at 70 n.2 (quoting LETTERS OF SAMUEL JOHNSON No. 672 (G. Hill ed. 1892)).

84 *Id.* at 73-76. In the minutes of the Company's Directors for April 7, 1767, an entry appears authorizing payment to "Samuel Johnson" for ten pounds in connection with the "Proceedings in Parliament and frequent general courts." "[A] startling discovery" writes Sir Arnold McNair in his book *Dr. Johnson and the Law*, that "seemed to show that on this occasion Johnson lost his amateur status as a legal adviser." *Id.* at 76. Further probing reveals that the payee was another of the same name, a clerk in the East India office. But Johnson, though not the payee in question, seems to have been involved to some extent in the legal affairs of the East India Company. *Id.* at 73-75.

85 W. J. BATE, *supra* note 1, at 232.

86 *Id.* at 232-33.

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."⁸⁷

It followed that Johnson embraced not only order and discipline, but rank and even privilege. According to Boswell, Johnson stated that:

if he were a gentlemen of landed property, he would turn out all of his tenants who did not vote for the candidate whom he had supported. Langton. "Would not that, Sir, be checking the freedom of election?" Johnson. "Sir, the law does not mean that the privilege of voting should be independent of old family interest; of the permanent property of the country."⁸⁸

But such reactionary beliefs were held on unemotional, pragmatic grounds. For Johnson, rank was not ordained by God, or otherwise immutable. Wain puts it this way:

[Johnson's] view of government was remarkably cool, even prosaic. To him, it was a matter of convenience. Men banded together in societies because by so doing they could more easily supply their wants, protect their property, and defend themselves against outside enemies [He did not] believe in the divine right of kings nor in the quasi-mystical forms of authoritarianism. He was a Tory in the sense that he believed in obeying the existing power rather than leapfrogging into an undefinable future.⁸⁹

Unlike so many conservatives of his day and ours, his sympathy for hierarchical structure stemmed not from his concern for those at the top of the ladder but for those at the bottom. According to Wain:

If I had to fix upon one word that would convey the heart of Johnson's attitude towards man in society, I would choose compassion. He wanted an ordered, hierarchical society because he loathed the thought of the kind of scramble in which the weak inevitably go down.⁹⁰

He felt that the new orthodoxy of his time, the *laissez-faire* of the Whig merchants, would produce an out-and-out plutocracy such that although all men are supposedly equal, those with money would rise to power and preeminence. This belief had considerable validity as we have all learned.⁹¹ Better, reasoned Johnson, a society that retains feudal rank and distinctions—not because divine authority had ordained them, but to eliminate much of the mean struggling and squabbling over preferment. Johnson believed in "subordination," which means keeping alive at least

⁸⁷ J. WAIN, *supra* note 1, at 279.

⁸⁸ A. McNAIR, *supra* note 35, at 88.

⁸⁹ J. WAIN, *supra* note 1, at 277. Johnson was violently anti-Whig because for him Whiggism, backed by rising commercial interests, meant chaos. If he believed in the need for central control and authority, it was, in Bate's words, more than "a mere stock sanction of the established order." W. J. BATE, *supra* note 18, at 166. Johnson found the new orthodoxy of his time, the *laissez-faire* of the Whig merchants, anathema because it so undermined established order.

⁹⁰ J. WAIN, *supra* note 1, at 279.

⁹¹ *Id.* at 278-79.

some feudal attitudes and observances. He anticipated, Wain tells us, Yeats's question:

How but in custom and in ceremony, Are innocence and beauty born?⁹²

Johnson told Boswell, "there would be a perpetual struggle for precedence, were there no fixed invariable rules for the distinction of rank, which creates no jealousy, as it is allowed to be accidental."⁹³

Johnson was thus sometimes romantically nostalgic about primitive societies. He wrote Boswell in 1776, "the admission of money into the Highlands [of Scotland] will soon put an end to the feudal modes of life by making those men landlords who are not chiefs. I do not know that the people will suffer by the change, but there was in the patriarchal authority something venerable and pleasing."⁹⁴ Economic historian Peter Mathias, now Master of Downing College, Cambridge, terms "remarkable" the quality of Johnson's perceptions on the rapidly changing economy of both the Highlands and Western Isles, citing the following example:

The payment of rent in kind [wrote Johnson] has been so long disused in England that it is totally forgotten. It was practiced very lately in the Hebrides, and probably still continues, not only at St. Kilda where money is not yet known, but in others of the smaller and remoter Islands It were perhaps to be desired that no change in this particular should have been made. When the Laird could only eat the produce of his lands he was under the necessity of residing upon them; and when the tenant could convert his stock into no more portable riches, he could never be tempted away from his farm, from the only place where he could be wealthy. Money confounds subordination, by overpowering the distinctions of rank and birth, and weakens authority by supplying power of resistance and expedients for escape. The feudal system is formed for a nation employed in agriculture and has never long kept its hold where gold and silver has become common.⁹⁵

Indeed, one of Johnson's chief motivations in taking the famous tour of the Hebrides with Boswell was to see if people were still living in ancient ways. As Wain tells us:

All his life he had longed for some means of comparing the present system with that of earlier days. Did money, social flexibility, ease of communication, really produce happiness, or was the old, fixed, earth-rooted pyramid better? What was life *really* like in historical times? He was a passionate student of history; but the professional historians, prosing on about battles and treaties and alliances, had never satisfied him. As he was later to remark to Boswell (29 April 1778), "All that is really *known* of the ancient state of Britain is contained in a few pages I would wish to have one branch well done, and that is the history of manners, of common life." And there, all the time, within his own

⁹² *Id.* at 303 (quoting Yeats).

⁹³ *Id.* at 279.

⁹⁴ Mathias, *Dr. Johnson and the Business World*, in *THE TRANSFORMATION OF ENGLAND: ESSAYS IN THE ECONOMIC AND SOCIAL HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY* 300 (1979) (quoting S. JOHNSON, *A JOURNEY TO THE WESTERN ISLANDS* 103 (R.W. Chapman ed. 1924)).

⁹⁵ *Id.* at 300-01.

nation-state, governed "nominally" by the same king and parliament that governed him, was a feudal society that had lived on into his own day; a society which rarely handled money, where the laird received his rent in goods and services and had jurisdiction over his people. To travel only a few hundred miles north would have been to see this society, to mingle with it, and to gain a more vivid impression of what mediaeval feudalism must have been like than could have been gathered from all the historians who ever wrote.⁹⁶

Still on the subject of poverty, as Mrs. Thrale (by then Mrs. Piozzi) put it, "Severity towards the poor was, in Dr. Johnson's opinion . . . , an undoubted and constant . . . consequence [of] . . . Whiggism."⁹⁷ Conversely, it was Johnson's oft-quoted view that "a decent provision for the poor is the true test of civilization."⁹⁸

Nor was Johnson's compassion for the poor an abstract one. Few human beings have ever manifested a more generous feeling for society's unfortunates than Johnson. Though living very far from luxury himself,⁹⁹ Johnson permitted his quarters to become the haven for many derelicts whom he sheltered, clothed, and fed, often extending compassionate aid to desperate friends for years on end. In Mrs. Thrale's words:

He loved the poor as I never yet saw any one else do, with an earnest desire to make them happy. What signifies, says some one, giving half-pence to common beggars? [T]hey only lay it out in gin or tobacco. "And why should they be denied such sweeteners of their existence (says Johnson)? [I]t is surely very savage to refuse them every possible avenue to pleasure, reckoned too coarse for our own acceptance. Life is a pill which none of us can bear to swallow without gilding; yet for the poor we delight in stripping it still barer, and are not ashamed to shew even visible displeasure, if ever the bitter taste is taken from their mouths."¹⁰⁰

Johnson genuinely liked—even admired—the common folk whom as a Tory he admittedly would exclude from governmental responsibility. John Wain tells us that Johnson found the ordinary Englishman of his day spirited, energetic, and courageous.¹⁰¹ Johnson was also extremely forward-looking in his attitude toward the education and advancement of the underprivileged of his day. Although he believed in "subordination" of the masses, since peace and stability required a central government with absolute power,¹⁰² and although he believed in gradations in soci-

96 J. WAIN, *supra* note 1, at 303. As these remarks suggest, Johnson anticipated the current interest of many historians in common life as opposed leaders, politics and battles.

97 H. L. PIOZZI, *ANECDOTES OF SAMUEL JOHNSON* 56 (S.C. Roberts ed. 1932).

98 J. WAIN, *supra* note 1, at 280.

99 Johnson was certainly never a man of means and really lived well only in those years after his wife's death when the well-to-do Thrale family took him in. But Thomas Kaminski questions the poverty Johnson actually suffered in London. Kaminski feels, for example, that Johnson never went hungry. T. KAMINSKI, *THE EARLY CAREER OF SAMUEL JOHNSON passim* (1987).

100 H. L. PIOZZI, *supra* note 97, at 57.

101 J. WAIN, *supra* note 1, at 282.

102 Johnson deplored the horrendous conditions in English prisons of the day. Robert Hughes discusses this overloaded prison system, which resulted, of course, in the idea of shipping lawbreakers to Australia. He quotes Johnson on the terrible conditions where "some sink amidst their misery, and others survive only to propagate villainy." R. HUGHES, *THE FATAL SHORE* 39 (1988).

ety, he also believed that individuals should be free to move up the scale through their own efforts.¹⁰³ He also rejected the proposition, as James Clifford tells us, that universal education was pernicious in rendering the many in society unhappy with their social lot. As Johnson put it:

The privileges of education may sometimes be improperly bestowed, but I shall always fear to withhold them lest I should be yielding to the suggestions of pride, while I persuade myself that I am following the maxims of policy; and under the appearance of salutary restraints, should be indulging the lust of dominion, and that malevolence which delights in seeing others depressed.¹⁰⁴

In fact, Johnson believed, as few of his contemporaries did, that ultimately sovereignty existed at the sufferance of the people. Extremes of conservatism and radicalism are joined in him. Johnson once said, "no government power can be abused long. Mankind will not bear it. If a sovereign oppresses people to a degree, they will rise and cut off his head."¹⁰⁵

It is true that Johnson was opposed to the only major revolution of his time, the American War of Independence. He nevertheless, as the above statement indicates, believed in man's right to throw off by force of arms an intolerable yoke. As John Wain tells us:

His generous indignation was aroused by any authority which, however legitimate its basis in legality, abused its power at the expense of the people who were helpless in its grasp. His blood boiled when he thought of the slave trade. He once silenced an Oxford dinner-party by holding up his glass and saying, "Here's to the next insurrection of the Negroes in the West Indies!"¹⁰⁶

In Bate's words:

To Johnson, Whiggism was ultimately a direct expression of self-interests, and thus . . . it involved "a negation of all principles," a surrender of general responsibility. Characteristically, Johnson's own stand is always for greater social responsibility and humanitarian reform—reform of laws that permit imprisonment for debt, radical change of the death-penalty that was so freely handed out for minor crime ("to equal murder to robbery is to reduce murder to robbery . . . and incite the commission of a greater crime to prevent the detection of a less") and, above all, abolition of slavery and of slave trade.¹⁰⁷

103 J. CLIFFORD, *DICTIONARY OF JOHNSON, THE MIDDLE YEARS 182* (1979).

104 *Id.*

105 But, indicating Johnson's combination of conservatism and radicalism, the above statement was made as a corollary to Johnson's belief in a strong government. As Arnold McNair puts it, Johnson

had little sympathy with checks upon the action of the Executive. In conversation with Sir Adam Ferguson who was so incautious as to suggest that "in the British Constitution it is surely of importance to keep up the spirit in the people so as to preserve the balance against the Crown," [Johnson replied] ". . . Why all this childish jealousy of the power of the Crown? The Crown has not power enough."

Johnson then goes on to make the statement quoted above. A. MCNAIR, *supra* note 35, at 85.

106 J. WAIN, *supra* note 1, at 278. It was indeed American colonists' trading and using slaves that in part caused Johnson's hostility to the American revolution. "How is it," he wrote, "that we hear the loudest yelps for liberty among the drivers of negroes?" *Id.*

107 W. J. BATE, *supra* note 1, at 194.

It was such an attitude that triggered his hostility to colonial expansion. As Johnson wrote to an American friend, after mentioning the news of an arctic exploration, "I do not much wish well to discoveries, for I am always afraid they will end in conquest and robbery."¹⁰⁸

In his old age, Johnson became more aware of the dangers of governmental abuse of power. Bate tells us that, "[a]t times, one even suspects an element of Thoreau in Johnson, and a feeling that all government is equally unfortunate, though necessary."¹⁰⁹ One of his most famous couplets, written for Goldsmith's *Traveller*, reads:

How small, of all that human hearts endure,
That part which kings or laws can cause or cure.¹¹⁰

If Johnson's ultimate attitude toward government was ambivalent, so was his view of economic change. If he had nostalgia for the rugged simplicity of bygone eras, if he feared the detested rise of the anarchic marketplace as destroying old values and hierarchies, he also deeply appreciated much of what new modes of production and marketing brought in their wake.¹¹¹ If he distrusted the resultant plutocracy and impersonality of market relationships, he also, in John Wain's words,

welcomed the improvement in trade and agriculture and the proliferation of new techniques, which relieved the stagnation of small country-towns and made a wider life possible. He appreciated that the faster flow of money gave more people a chance to raise themselves from poverty, and led to a social mobility without which such men as himself and his friends . . . would not have been able to figure so prominently in society.¹¹²

Unlike most in his circle, Johnson viewed with approval the bustling commercial activities that made London the richest city in the world. He did not, like so many of his peers (and so many intellectuals from his day to ours), hypocritically enjoy the fruits of the new age while condemning the degeneracy that new wealth entailed. "There are few ways" wrote Johnson, "in which a man can be more innocently employed than in get-

¹⁰⁸ J. WAIN, *supra* note 1, at 278.

¹⁰⁹ W. J. BATE, *supra* note 18, at 165.

¹¹⁰ *Id.*

¹¹¹ Doctor Johnson's understanding of the price to be paid for (desirable) progress is arguably at least somewhat reflected in the situation in the American South with the ending of segregation. Consider the following remarks in a review of V.S. Naipaul's recent book based on his tour of several Southern states:

. . . [I]t is . . . surprising to discover an ambivalent nostalgia for the era of segregation among . . . blacks [interviewed by the book's author]. The sense that there was a positive side to racial separation—the black-controlled institutions and enclaves that it encouraged provided a sense of order and community hard to achieve under current conditions—coexists in the minds of some with relief and happiness that the days of lynching and Jim Crow humiliation are over. Naipaul himself is an admirer of Booker Washington and looks with sadness on the relative decline of Tuskegee Institute now that blacks are free to attend predominantly white institutions. His is not an apologia for enforced racial separation; it is rather a recognition that all progress comes at a cost and that in the historical and social circumstances of some black people in the United States there is a distinct risk that change will not mean progress at all but rather the exchange of one kind of tragedy for another.

Fredrikson, *Piety and Paternalism*, *The Times* [London] Literary Supplement, May 5-11, 1989, at 477, cols. 3-4 (reviewing V. S. NAIPAUL, *A TURN IN THE SOUTH* (1989)).

¹¹² J. WAIN, *supra* note 1, at 303.

ting money."¹¹³ In his travels through western Scotland with Boswell, he was sensitive to how much the modern methods of production and trade could mean to that backward, desperately poor area where subsistence farming was the mode. One of the reasons he so scorned Scotland—not always jocularly—was his understanding of life, in Peter Mathias's phrase, "at the margin of subsistence."¹¹⁴ With the clan system broken up, a market economy was developing in areas previously without any cash crops. In spite of a romantic liking for the older, simpler ways, Johnson appreciated, with an economic acuity unusual for his time, what such changes would mean for landowners, tenants and laborers. Typical of his insight was his refusal to condemn "tacksman" who were almost uniformly attacked as parasitic middlemen between Lairds and tenants. As he complained to Mrs. Thrale in 1773, "[T]he improvements of the Scotch are used for immediate profit, they do not yet think it worthwhile to plant what will not produce something to be eaten or sold in a very little time."¹¹⁵ Johnson had no trouble seeing that if "all must obey the call of immediate necessity, nothing that . . . provides for distant consequences will be ever performed."¹¹⁶ Such views coincided, as Peter Mathias tells us, with "Adam Smith's own defence of the division of labour, specialization of function, and an expanding market which implies, too, as a social consequence of the process, a more differentiated society."¹¹⁷

Johnson defended trade and affluence. Mathias points out that this was a view more in keeping with Whiggism, "then commonly identified as the party of commercial wealth opposing a Tory squirearchy of land unsullied by commerce."¹¹⁸ In Mathias's view, Johnson was in some measure an early Keynesian. In keeping with Keynes's views, Johnson believed that consumption was the key to maintaining the benefits of trade. Indeed, even conspicuous consumption—luxury—"as far as it reached the poor . . . would do good to the race of people; it will strengthen and multiply them."¹¹⁹ " 'You cannot spend in luxury,' he wrote, 'without doing good to the poor. Nay, you do more good to them by spending it in luxury than by giving it: so by spending it in luxury you make them exert industry, for as by giving it you keep them idle.' "¹²⁰ Not that Johnson was against saving. Like Keynes, he was against hoarding. He welcomed, as generating increased employment, both increased investment and increased spending. What he wanted was the vitality and abundance of urban London in contrast to the drab poverty of rural Lichfield, as much as he loved Lichfield. Johnson saw, as Mathias puts it, "that unwilling destitution—what we should not call chronic involuntary

113 W. J. BATE, *supra* note 18, at 98.

114 Mathias, *supra* note 94, at 300.

115 *Id.* at 301.

116 *Id.* (quoting S. JOHNSON, A JOURNEY TO THE WESTERN ISLANDS OF SCOTLAND 78-80 (R. Chapman ed. 1924)).

117 *Id.*

118 *Id.*

119 *Id.* at 302.

120 *Id.* at 302-03.

unemployment—was one of the worst social evils of a pre-industrial society.”¹²¹

All this is not to say that Johnson was technically an economist—he surely was not. Apparently he never commented on Smith’s *Wealth of Nations* in any substantial way.¹²² Basically he accepted many of the fundamental tenets of mercantilism, tenets Smith was to destroy.¹²³

But if he was not a trained economist, Johnson was very unusual for his time because he was an intellectual fascinated by society’s practical and technical underpinnings. He was an active member of the Society for the Encouragement of Art, Commerce, and Manufactures. He often confounded his friends by his thorough knowledge about such matters as “coining, the trade of a butcher, granulating gunpowder, brewing spirits, tanning, malting, the various operations of processing milk for whey, cheese, and butter.”¹²⁴ As to Johnson’s considerable knowledge of manufacturing, Richard Arkwright, of spinning-wheel fame, asserted Johnson was “the only person who, in a first view, understood both the principle and powers of [Arkwright’s own] . . . most complicated piece of machinery.”¹²⁵ Nor was Johnson’s interest in business that of a literary figure catching a glimpse of the practical world from his study. In several instances where the opportunity presented itself he plunged into the business world as a vigorous participant, as he had in the world of law. Especially after his friend Henry Thrale’s death, he took an active hand in the management of Thrale’s large brewing interests—and did so with vigor. Mrs. Thrale speaks of Johnson’s “odd delight in signing drafts for hundreds and for thousands, to him a new, and so it appeared delightful occupation.”¹²⁶ In these endeavors he was further perceived as bustling about “with an ink-horn and pen in his button hole like an excise man.”¹²⁷ It was in this connection that Johnson made that immortal remark—so often repeated by or about other entrepreneurs—concerning “the potentiality of growing rich beyond the dreams of avarice.”¹²⁸

121 *Id.* at 302.

122 *Id.* at 300. As suggested earlier, *supra* note 15 and accompanying text, Johnson didn’t get on well with Smith; he thought Smith too critical of Oxford and too bookish in his conversation. *Id.*

123 *Id.* at 304. Johnson’s views on economics, like all his beliefs, were filtered through his moral judgments:

no motive can sanctify the accumulation of wealth [he wrote], but an ardent desire to make the most honourable and virtuous use of it, by contributing to the support of good government, the increase of arts and industry, the rewards of genius and the relief of wretchedness and want.

Id. at 305. If all these desiderata take one far beyond the ken of most modern economists, see O’Connell, Book Review, 1971 U. ILL. L.F. 540 (reviewing J. K. GALBRAITH, *ECONOMICA, PEACE AND LAUGHTER* (1971) and J. K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (2d ed. 1971)), they nonetheless all seem to apply to that most eminent of all modern economists, John Maynard Keynes. See, e.g., H. JOHNSON & E. JOHNSON, *THE SHADOW OF KEYNES* (1978).

124 Mathias, *supra* note 94, at 298-99.

125 *Id.* at 309. It was, Peter Mathias tells us, Johnson’s passion for the business world that contributed greatly to his role as one of the most perceptive observers of 18th century life. Nor did his interests flag as he got older. This catholicity of interests was just another illustration of what Sir Joshua Reynolds called his “vigorously inquiring mind,” a “mind which was always ready for use.” *Id.* at 299.

126 *Id.* at 314.

127 *Id.* at 315.

128 *Id.*

Although Johnson often got a kick out of business and even businessmen, he had no illusions about the merit of making money, beyond its general innocence, as mentioned earlier. Boswell, in his account of the Tour of the Hebrides with Johnson writes:

At breakfast, I asked, "what is the reason we are angry at a trader's having opulence?" "Why, sir," said Mr. Johnson, "the reason is (though I don't undertake to prove that there is a reason), we see no qualities in trade that should entitle a man to superiority. We are not angry at a soldier's getting riches, because we see that he possesses qualities which we have not. If a man returns from a battle, having lost one hand and with the other full of gold, we feel that he deserves the gold; but we cannot think that a fellow, by sitting all day at a desk, is entitled to get above us." "But," said I, "may we not suppose a merchant to be a man of an enlarged mind, as the *Spectator* makes Sir Andrew Freeport?" Johnson. "Why, sir, we may suppose any fictitious character. We may suppose a philosophical day-labourer, who is happy in reflecting that by his labour he contributed to the fertility of the earth and to the support of his fellow-creatures; but we find no such philosophical day-labourer. A merchant may, perhaps, be a man of an enlarged mind; but there is nothing in trade connected with an enlarged mind."¹²⁹

In encouraging a reluctant Mrs. Thrale to take on the management of her husband's brewery, Johnson told her, "[d]o not be frightened, [t]rade could not be managed by those who manage it if it had much difficulty."¹³⁰

VI. Conclusion

Johnson was a uniquely diverse man, one for whom almost any subject was worthy of careful scrutiny. The ultimate goal of his thinking, though, was a straightforward one: What is it that will result in the greatest human happiness? Given that this world is not a happy place, how to make it as livable as possible? Given that people must perforce live together with competing needs and desires, how to keep conflict and acrimony to a minimum? Hence Johnson's deep interest in the law. Since humans had become sufficiently civilized to realize that all conflicts could not be resolved by force, the law, in his view, had become the principal means for establishing order, the *sine qua non* of a civilized society. Granted that law is useless without power, it goes far beyond raw power in making society predictable. The pragmatic test of laws for Johnson was always: Is the law clear enough to be understood? Will people know the consequences of their actions if those actions encroach on their neighbors?

Johnson's incomparable grasp of the essentials of human experience makes his observations on the law—as on so many subjects—well worth the examination of thoughtful students of the law everywhere.

He stands out as having so much to impart to all people of all eras because above all, in Bate's words, he "lived . . . so close to the edge of

¹²⁹ J. BOSWELL, JOURNAL OF A TOUR OF THE HEBRIDES 319-20 (R. W. Whapman ed. 1924).

¹³⁰ Mathias, *supra* note 94, at 313.

human experience in so many different ways"¹³¹—physically, intellectually, psychologically. He was strong, he was weak; he lived in poverty, he lived in affluence; he was ignored, he was lionized; he suffered, he enjoyed; he was sexual, he was celibate; he was sensual, he was abstemious; he was rural, he was urban; he was old-fashioned, he was modern; he was loved, he was hated; he was brave, he was fearful; he was industrious, he was lazy; he was gentle, he was a bully; he was humorous, he was saturnine; he was euphoric, he was depressed; he was arrogant, he was humble; and except for Shakespeare, he conveyed more of all this in the English language than any human has ever done. Hence the fascination of Johnson's character for lawyers whose work cuts so intensely across Johnson's worlds of words, argumentation, morality, altruism, economics—and law itself.

131 W. J. BATE, *supra* note 1, at 297.