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## THE BRIBERY OF WARREN HASTINGS: THE SETTING OF A STANDARD FOR INTEGRITY IN ADMINISTRATION

*John T. Noonan, Jr.\**

*He "did not only give and receive bribes accidentally." He "formed plans and systems of government for the very purpose of accumulating bribes and presents to himself."<sup>1</sup> He descended into "the muck and filth of speculation and corruption."<sup>2</sup> He was "not only a public robber himself, but the head of a system of robbery, the captain-general of the gang."<sup>3</sup>*

In such and similar language did the most philosophical member of Parliament, Edmund Burke, describe the man who had been the British Governor of Bengal for thirteen years, from 1772 to 1785. The occasions of his descriptions were public and formal—sessions in the House of Lords in which Burke, as the chairman of the Managers of an impeachment committee of the House of Commons, sought the conviction of the defendant. Of the object of these attacks, Warren Hastings, Burke observed, "Do you want a criminal, my Lords? When was there so much iniquity ever laid to the charge of any one?"<sup>4</sup>

Hastings, as portrayed by Burke, had been as cruel as he had been corrupt. Bent on taking all he could, he had instigated, approved, or collaborated with the use of torture to produce the reve-

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1. E. BURKE, *Speech in Opening the Impeachment* (Feb. 18, 1788), in 10 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 3, 7 (1867) (emphasis added) [hereinafter cited as THE WORKS OF EDMUND BURKE].

2. E. BURKE, *Speech in General Reply* (June 14, 1794), in 12 THE WORKS OF EDMUND BURKE, *supra* note 1, at 235, 295 (emphasis added).

3. E. BURKE, *Speech in General Reply* (May 28, 1794), in 11 THE WORKS OF EDMUND BURKE, *supra* note 1, at 157, 175 (emphasis added).

4. E. BURKE, *Speech in Opening the Impeachment* (Feb. 19, 1788), in 10 THE WORKS OF EDMUND BURKE, *supra* note 1, at 99, 142.

nues he needed; and he had not stopped at arranging a judicial murder to stifle an accuser. "Do we want a cause, my Lords? You have the cause of oppressed princes, of undone women of the first rank, of desolated provinces, of wasted kingdoms."<sup>5</sup>

Hastings had no doubt as to the model he was being made to fit. He did not wish to sustain "the vile and abhorred character of a Verres."<sup>6</sup> Charles Fox, one of Burke's co-Managers, explicitly evoked Cicero and paraphrased his appeal to the judges of Verres, Hog in Latin.<sup>7</sup> Burke himself was wonderfully plain:

We have all, in our early education, read the Verrine Orations. We read them not merely to instruct us, as they will do, in the principles of eloquence and to acquaint us with the manners, customs, and laws of the ancient Romans, of which they are an abundant repository, but we may read them from a much higher motive. We may read them from a motive which the great author had doubtless in his view, when by publishing them he left to the world and to the latest posterity a monument by which it might be seen what course a great public accuser in a great public cause ought to pursue, and, as connected with it, what course judges ought to pursue in deciding upon such a cause. In these orations you will find almost every instance of rapacity and peculation which we charge upon Mr. Hastings.<sup>8</sup>

A "great public accuser" in a "great public cause," Burke spoke as Cicero, and Hastings became Hog.<sup>9</sup>

The outcome, however, was different from the classic model. In 1795, after a trial of seven years—a very intermittent trial, for the Lords met thirty-five days the first year, five days the fourth year, etc.—Hastings was formally acquitted. Of some two hundred and fifty Lords, only twenty-nine thought themselves sufficiently familiar with the case to vote,<sup>10</sup> and no more than six of these found Hastings

5. *Id.*

6. K. FEILING, WARREN HASTINGS 341 (1954)(quoting unidentified letter of W. Hastings).

7. 2 SPEECHES OF THE MANAGERS AND COUNSEL IN THE TRIAL OF WARREN HASTINGS 271 (E. Bond ed. 1860) (Speech of C. Fox, Manager for the House of Commons (June 7, 1790)) [hereinafter cited as SPEECHES OF THE MANAGERS].

8. E. BURKE, *Speech in General Reply* (June 16, 1794), in 12 THE WORKS OF EDMUND BURKE, *supra* note 1, at 334, 349.

9. For a discussion of the influence that Cicero's orations had upon Burke, see Canter, *The Impeachments of Verres and Hastings*, CLASSICAL J., Feb. 1914, at 199.

10. See Report from the Committee of the House of Commons Appointed to Inspect the Lords' Journals (Apr. 30, 1794), reprinted in 11 THE WORKS OF EDMUND BURKE, *supra* note 1, at 1, 4.

guilty on any count.<sup>11</sup> The East India Company reimbursed his legal expenses of 71,000 pounds<sup>12</sup> and voted him an annuity of 4,000 pounds a year and a loan of 50,000 pounds without interest.<sup>13</sup> In 1804, repayment of the loan was waived.<sup>14</sup> Four years later, a company ship was named the *Warren Hastings*.<sup>15</sup> In 1813, he was awarded an honorary doctorate of laws by Oxford. In the same year a parliamentary committee seeking his advice on Indian affairs uncovered their heads, as before royalty, in his presence. In 1814, he was made a privy councilor.<sup>16</sup> He died in 1818, at age eighty-five, having lived the last twenty years in comfortable retirement in the house of his dreams, the old Hastings family estate at Daylesford.<sup>17</sup>

Not only did his material well-being and public reputation survive his long trial, posterity's treatment of Hastings has been benevolent as well. In 1932, for example, the Royal Empire Society celebrated the bicentenary of Hastings' birth as if he were a hero. Macaulay, his most famous critic, passed over the charges of bribery as based on "a few transactions which would now be called indelicate and irregular, but which even now would hardly be designated as corrupt."<sup>18</sup> Biographers, by profession inclined to indulgence, have emphasized his greatness as an administrator and rationalized his faults. The furthest that the author of a recent admiring life history would go was to say that "the true charge must not be corruption but an insensibility, a legacy of the India in which he had been bred."<sup>19</sup> A modern historian of the impeachment, attempting evenhandedness between Burke and his target, held that two of Hastings' dealings, herein discussed, were "very questionable,"<sup>20</sup> but refrained from calling them corrupt. He cites critics of Hastings who thought the trial itself was an ordeal which he "did not deserve."<sup>21</sup> He concludes, "It was Burke's tragedy that he could not see Hastings in

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11. P. MARSHALL, *THE IMPEACHMENT OF WARREN HASTINGS* 85 (1965).

12. See K. FEILING, *supra* note 6, at 370, 382-83.

13. *Id.* at 371.

14. *Id.* at 383.

15. *Id.* at 386.

16. *Id.* at 393-94.

17. *Id.* at 372.

18. T. MACAULAY, *Warren Hastings*, in 3 *THE COMPLETE WRITINGS OF LORD MACAULAY* 291 (Lady Trevelyan ed. 1898)(Cambridge ed.).

19. K. FEILING, *supra* note 6, at 368.

20. P. MARSHALL, *supra* note 11, at 189.

21. *Id.* at 190 (citing T. MACAULAY, *Warren Hastings*, in 6 *THE WORKS OF LORD MACAULEY* 637 (1866); J. MILL, *THE HISTORY OF BRITISH INDIA* 519-21 (4th H. Wilson ed. London 1848).

perspective."<sup>22</sup> In this modern view Hog Two is a cruel caricature.

*Hastings and the Company.* From the perspective of this article, Hastings is to be seen in terms of the accusation of taking bribes, the evidence supporting and refuting the charge, and the sanctions imposed and not imposed for what he had done. For any understanding at all, however, it is first essential to summarize his official position and the circumstances of his impeachment.

After his mother died in childbirth and his father, a minister, abandoned him, Warren Hastings was brought up by a grandfather in genteel rural poverty. At ten he was sponsored by an uncle at the Westminster School in London, and after seven years of classical education there, he was sent out to India as a clerk of the East India Company. His state of mind could not have been much different from that of other young men who went out in the Company's service, "every one aspiring to the rapid acquisition of lacs,"<sup>23</sup> a *lakh* being 100,000 current rupees or 10,000 British pounds and ten *lakhs* or one *crore* constituting a respectable fortune.<sup>24</sup>

One of a small band of British civilian employees—about 300 in Bengal<sup>25</sup>—Hastings rose through the Company's ranks until in 1772, at age forty, he was made Governor of Bengal. A director of the Company, informing Burke of the new appointment, wrote, "[h]is name is Hastings, lately sent down from the Coast (Madras) and chosen for his good sense and integrity."<sup>26</sup> Hastings was to remain in this position until his resignation and return to England in 1785.

For thirteen years he was the most important holder of political power in Bengal. He had to deal with a variety of Indian rulers, already dependent to varying degrees on the British, and had to face their insubordination or revolts. He had to deal with hostile neighbors, both native and European, who became or were seen as threats to British interests. A Supreme Council, made up of Englishmen appointed by the Company, hampered him for a period when the majority were his critics. Likewise, a Supreme Court of English judges was intractable for another period. But armed with inflexible determination and great resourcefulness, Hastings usually dominated the government. The population of millions ("Blacks" to the British), di-

22. *Id.*

23. P. MARSHALL, *supra* note 11, at x.

24. E. BURKE, *supra* note 2, at 302 (quoting Hastings "Minute").

25. H. FURBER, *JOHN COMPANY AT WORK* 27 (1948).

26. Letter from George Dempster to Edmund Burke (Aug. 4, 1772), in 2 *THE CORRESPONDENCE OF EDMUND BURKE* 321, 322 (L. Sutherland ed. 1960).

vided between a Hindu majority of many castes and a Moslem minority, generally submitted to what the ruler ordained for them, despite little indication that Hastings consciously took their needs or interests into account since there was no institutional mechanism to compel him to do so. Hastings' accountability was at home, in England. As the Company's employee or servant, to use the misleading eighteenth century term, he was responsible to the Company's directors in London. Orders on a variety of matters came from them, but given the distance from which they wrote and the time it took for their commands to arrive (four to five months minimum),<sup>27</sup> Hastings had a latitude of discretion that in practice had few limits.

The Company's supervision was further diluted by its structure. The East India Company—"the United Company," "the E.I. Co.," "John Company," or simply "the Company"—was a joint stock company in which every holder of over 500 pounds of stock possessed one vote,<sup>28</sup> so that domination by a few big stockholders did not occur. Instead, the directors, occasional falling-outs aside, tended to perpetuate themselves. The directors' interest in patronage was often as keen as their interest in protecting the stockholders.<sup>29</sup> Their official position was the obvious one of requiring integrity in the Company's employees; but there were splendid opportunities for the employees to develop reciprocal relationships with the directors. One example will serve: In 1780 Stephen Sullivan, the son of Laurence Sullivan, a leading director, arrived in Bengal. Hastings appointed him Judge-Advocate General, loaned him 10,000 pounds charged to his father's account, and assigned him for four years the most lucrative of the Company's monopolies, the trade in opium.<sup>30</sup> Laurence Sullivan was a strong backer of Hastings in the Company's headquarters at Leadenhall Street.<sup>31</sup>

Political pressure from England also was responded to in India by Company jobs for sons or dependents. But political pressure increased to the point where it could not be confined by the awarding of patronage. In part, greater involvement of the home government was inevitable when the Company became the de facto sovereign of a large and important nation, required British military support, and engaged in actual warfare. In 1773, Lord North's Regulating Act

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27. See C. PARKINSON, *TRADE IN THE EASTERN SEAS 1793-1813*, at 112 (1937).

28. H. FURBER, *supra* note 25, at 11.

29. See *id.* at 269.

30. P. MARSHALL, *supra* note 11, at 169.

31. See *id.* at 30.

had intervened in the Company's affairs: A Governor-General's post was created by law<sup>32</sup> with Hastings designated by name in the statute.<sup>33</sup> A Supreme Court, to be chartered by the King, was authorized for Calcutta.<sup>34</sup> By the same statute the Governor-General was required to obey the orders of the directors,<sup>35</sup> and the directors were required to furnish information on Company affairs in India to the government at home.<sup>36</sup>

Further government involvement accompanied the Company's increasing financial dependence on the state. By the 1780's the Company was not in flourishing condition. In Bengal its debt was immense, and its paper sold at a 25-30% discount.<sup>37</sup> At home it was seriously in arrears on routine debts. In the summer of 1783, it was unable to pay cash to tradesmen.<sup>38</sup> In March 1784, its offices were attached for 100,000 pounds owing the Customs. In the spring of 1785, it offered to pay half of an outstanding arrearage on duties of 1,000,000 pounds. The Company's problems could only be solved by government aid, usually disguised and always indirect. The simplest approach was to get the Treasury not to press for payment of the customs' duties. A slightly more complicated move was for the Company to issue annuities at 3½%, guaranteed by the King. By 1783, the Company had borrowed almost 3,000,000 pounds on the strength of the royal guarantee.<sup>39</sup> The credit of the Company, and therefore its existence, depended on the government, and knowledgeable persons in each institution were entirely aware that the Company had to be responsive to the administration in power.

*Hastings' Finances.* The Governor's salary was 25,000 pounds a year;<sup>40</sup> added to this sum were certain perquisites, such as the use of the Company's main house in Calcutta as the Governor's residence, that were worth an additional 5,000 pounds, for a total lawful annual compensation of 30,000 pounds.<sup>41</sup> The significance of such a

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32. An Act for establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe, 13 Geo. III, ch. 63, § 7 (1773).

33. *Id.* § 10.

34. *Id.* § 13.

35. *Id.* § 8.

36. *Id.* § 37.

37. H. FURBER, *supra* note 25, at 237.

38. *See id.* at 262.

39. *Id.* at 260-62.

40. 13 Geo. III, ch. 63, § 21.

41. Marshall, *The Personal Fortune of Warren Hastings*, 17 *ECON. HIST. REV.* 284, 292 (1964-1965).

sum may be measured by comparing it with two other contemporary figures. When Burke was seeking to raise funds for refugees from revolutionary France, the committee decided that a priest—a single man of respectability—could live decently in England on less than 25 pounds a year.<sup>42</sup> At the upper end of the scale, when Burke became Paymaster General in the Coalition government of 1782, he was assured of “4,000 certain,” plus a residence, while his son Richard became his deputy at 500 pounds a year.<sup>43</sup> Burke described the Paymaster General’s job with the emoluments attached as “giving a person who had some pretensions his Baton de Marechal de France en argent comptant”<sup>44</sup>—in short, as first-rate employment. Hastings, in other words, received over one thousand times the income of a man in genteel poverty and at least seven times as much as a major official in the home administration.

With this salary and emoluments, Hastings—for two years where records have been found, 1780-1781 and 1781-1782—spent more cash than he received by over 10,000 pounds.<sup>45</sup> It may be assumed, given his lifestyle as Governor-General and his generosity to his dependents, that in other years he saved little or nothing from his salary. Nonetheless, when he returned to England, rumors circulated about his great fortune. The Prince of Wales, a friend, applied for a loan of 200,000 pounds.<sup>46</sup> His own representatives, however, would not admit it to be greater than 50,000 pounds, and a modern effort to estimate it puts it no higher in 1795 than 75,000 pounds.<sup>47</sup> Although this figure is no pittance, a matter of far greater interest for our purposes is not the ascertainable remainder of his property but how much he sent out of India. Here one has to leave aside guesses as to what he may have sent through the Dutch East India Company; its records reveal him personally buying one 15,000 pound bill of exchange,<sup>48</sup> and his friends Richard Barwell and George Vansittart were its frequent customers and at times could have been his

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42. See 7 THE CORRESPONDENCE OF EDMUND BURKE 425 nn.4, 6 (P. Marshall & J. Woods ed. 1968).

43. Letter from Edmund Burke to William Burke (Mar. 27, 1782), in 4 THE CORRESPONDENCE OF EDMUND BURKE 430, 430 (J. Woods ed. 1963).

44. Memoranda for Consideration from Edmund Burke to Rockingham (n.d.), in 4 THE CORRESPONDENCE OF EDMUND BURKE 423, 424 (J. Woods ed. 1963).

45. See Marshall, *The Personal Fortune of Warren Hastings*, 17 ECON. HIST. REV. 284, 284-94 (1964-1965).

46. *Id.* at 284.

47. *Id.*

48. H. FURBER, *supra* note 25, at 79-80.



straws. Relying only on what is established by the records of John Company itself as to bills of exchange and diamonds sent home by Hastings, plus miscellaneous other records referring to him, it has been shown that Hastings, in his thirteen years of office from 1772 to 1785, remitted to England at least 218,527 pounds.<sup>49</sup> This sum was nearly ten times his annual salary, nearly ten thousand times the annual income of a poor gentleman. It is characterized by its modern calculator, a student of fortunes made in India, as "extremely large."<sup>50</sup>

*Prosecution.* As early as 1780, when Lord North was in power, Edmund Burke, then an opposition member of Parliament, had voiced concern about great abuses by the Company in India. In 1781, he began to focus in particular on Hastings. He was now supplied with data by a former member of the Supreme Council in Bengal, Philip Francis, an avowed and unrelenting enemy of the Governor. A Select Committee dominated by Burke began to issue reports on the administration of Bengal, nearly all of them highly critical of Hastings.<sup>51</sup> "I have undertaken a vast Task," Burke wrote Francis, "but with your assistance I may get through it."<sup>52</sup> In March of 1782, Burke's patron, Rockingham, came to power and Hastings was warned that Burke now sought his removal. Burke was supported by Charles Fox in the Rockingham administration and by Henry Dundas, the opposition's leading authority on India; but the Company resisted governmental pressure. Rockingham died and was succeeded by Shelburne, and Burke was out of the administration. Returned to influence in April 1783 as a member of the Coalition, Burke told Parliament "that he would bring to justice, as far as in him lay, the greatest delinquent that India every saw."<sup>53</sup>

Reform bills for India, drawn by Burke and Fox, were sponsored by the Coalition, presented to the Commons in November 1783, and defeated in the Lords, with the consequent fall of the Coalition. The government of William Pitt, which then took office, owed something to the Company interests that had opposed reform and had triumphed in the Lords, but Pitt's main advisor on India was Dundas, and Pitt's alliance with Hastings turned out to be "acciden-

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49. Marshall, *supra* note 45, at 291.

50. *Id.*

51. P. MARSHALL, *supra* note 11, at 14-18.

52. Letter from Edmund Burke to Philip Francis (Dec. 29, 1782), in 5 THE CORRESPONDENCE OF EDMUND BURKE 59, 60 (H. Furber ed. 1965).

53. P. MARSHALL, *supra* note 11, at 20; *see id.* at 19.

tal and temporary."<sup>54</sup> When Hastings returned in 1785, expecting a peerage, Burke, again in opposition, worked for his impeachment—impeachment in the British sense being not necessarily removal from office but conviction of high crimes committed while in office.<sup>55</sup> As one who had held a statutory appointment, Hastings was open to impeachment.

Burke observed to Francis that Hastings had been Governor-General under North, Rockingham, Shelburne, the Coalition, and Pitt, and that the parties had been "so perfectly jumbled" in their relations with him that it was "morally impossible to find any combination of them who can march with the whole body in orderly array upon the expedition before us." Burke insisted upon pressing forward before a "bribed tribunal." "Speaking for myself," he wrote, "my business is not to consider what will convict Mr. Hastings (a thing we all know to be impracticable) but what will acquit and justify myself to those few persons and to those distant times which may take a concern in these affairs and the Actors in them."<sup>56</sup>

In April 1786, charges of "High Crimes and Misdemeanors," drafted by Burke, were presented to the House. On May 1, Hastings spoke in response to them.<sup>57</sup> The rest of the month the House, meeting as a Committee of the Whole, heard prosecution witnesses. The opposition was united in supporting impeachment; the Pitt administration's attitude was crucial to the outcome. Dundas was clearly hostile to Hastings.<sup>58</sup> Pitt himself could well have calculated that he lost nothing by letting the impeachment proceed and that he risked criticism by blocking it. Those closest to him thought that he was persuaded on the merits that impeachment was justified. The matter of Hastings' "presents" was mentioned in particular to Hastings as something moving the First Minister against him. On a decisive vote on June 13, Pitt voted to support one charge. He did not make it an administration issue, but once he had decided personally against Hastings, he was followed by many ordinary members expressing their own "idealism and prejudices."<sup>59</sup> Although Burke and Francis worked the chief oars, the impeachment would not have occurred

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54. *Id.* at 23.

55. 4 W. BLACKSTONE, COMMENTARIES 260 (1st ed. 1765).

56. Letter from Edmund Burke to Philip Francis (Dec. 10, 1785), in 5 THE CORRESPONDENCE OF EDMUND BURKE 241, 241-43 (H. Furber ed. 1965).

57. P. MARSHALL, *supra* note 11, at 40-41.

58. *Id.* at 48-49.

59. *Id.* at 62.

without Pitt's approval. After an adjournment and the hearing, in early 1787, of further witnesses, pro and con, actual impeachment was voted in May 1787.<sup>60</sup>

*The Crime of Corruption.* The Preamble of the Articles of Impeachment announced that Hastings had held statutory office, "on the due and incorrupt Execution of which, the Welfare of the said United Company, the Happiness of the native Inhabitants of India, the Honour of the Crown of these Kingdoms, and the Character of the British Nation, did most materially depend."<sup>61</sup> Hastings, it was asserted, was bound by the duties of this office.

Sixteen Articles followed, many of them setting out abuses of authority outside the scope of this discussion, all of them constituting "high crimes and misdemeanors," and each one being a ground for impeachment.<sup>62</sup> The Sixth Article charged Hastings with having received "presents" and with having thereby "grossly violated the Duties of his Station"<sup>63</sup>—an invocation of the standard set by the Preamble. Breaching this standard, he was, the Sixth Article alleged, guilty of "Corruption, Peculation, and Extortion."<sup>64</sup>

For none of these "high crimes" was there a citation of the controlling law. Extortion would have required a showing of coercion which the Managers of the Impeachment did not attempt. "Peculation" was so unfamiliar to English law that it appeared in Blackstone only in its Latin form *peculatus*, defined as the embezzlement of public funds.<sup>65</sup> The Company's money was not public, and even if it had been, the technicalities of the law of embezzlement immunized an agent who received money in trust and simply failed to deliver it to his principal<sup>66</sup>—Hastings' position if the charges were true. "Corruption" was the one crime involving the presents where conviction might have seemed possible. But what was "corruption," as defined by English law and applied to acts performed in India?

The leading case was that of *The Trial of Thomas Earl of Macclesfield*,<sup>67</sup> a Lord Chancellor impeached in 1725. The grava-

60. *Id.* at 58.

61. House of Commons, Articles of Impeachment, Preamble (1787), in HOUSE OF LORDS SESSIONAL PAPERS, 1794-95, at 7 (2 F. Torrington reprint ed. 1974) [hereinafter cited as SESSIONAL PAPERS].

62. *Id.*

63. *Id.* art. 6, at 34, 36.

64. *Id.* art. 6, at 36.

65. 4 W. BLACKSTONE, *supra* note 55, at 121-22.

66. *See id.* at 230.

67. 16 A COMPLETE COLLECTION OF STATE TRIALS 767 (No. 466) (10 Geo. I,

men of his offense was the sale by him of Masterships and Clerkships in Chancery.<sup>68</sup> Although the impeachment was sustained on other grounds, the judges, when asked by the Lords, had specifically stated that the sale of an office related "to the administration of justice" was not an offense at common law. Over a sharp dissent,<sup>69</sup> this view had been followed by the majority of the Lords in assessing Macclesfield's punishment.<sup>70</sup> *Macclesfield's Case* was reflected in a diluted way in Blackstone's definition of bribery in 1765 in his famous *Commentaries on the Law of England*. It was for him a crime committed by "a judge or other person concerned in the administration of justice."<sup>71</sup> The implication, at least, was that the act had to involve a judicial decree or its execution. So limited, it might not reach the political or administrative actions of Hastings. True, Lord Mansfield in 1769, had held that the tender of money to the First Minister to "procure" a clerkship in Jamaica was a bribe at common law.<sup>72</sup> Whether this advance in the law would stand was an open question. Mansfield, moreover, had limited the common law of bribery to England, finding that it applied in this case only from the circumstance that the clerkship was awarded under the Great Seal.<sup>73</sup> None of Hastings' acts involved the use of such high English authority. Even if Mansfield were followed on the elements of the crime, none of Hastings' acts in India could constitute the crime of bribery or any other common law offense. The same conclusion was reached by reading Blackstone: The laws of England applied to the British Isles.<sup>74</sup> In "conquered or ceded countries"—the American plantations were instanced—common law did not apply, nor did statutes unless explicitly extended.<sup>75</sup> Hastings, by the standard rules of English jurisprudence, was beyond the force of any law save one expressly made for India.

By covenant with the Company in 1769, before he was Governor, Hastings had sworn to accept from any Indian prince no more than 400 pounds (4000 rupees) as reward or gift; anything above the

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1725)(comp. by T.B. Howell 1816)[hereinafter cited as STATE TRIALS].

68. *Id.* at 770-83.

69. *Id.* at 1397.

70. *Id.* at 1397-1402.

71. 4 W. BLACKSTONE, *supra* note 55, at 139.

72. *Rex v. Vaughan*, 98 Eng. Rep. 308, 310-11 (K.B. 1769).

73. *Id.* at 311.

74. 4 W. BLACKSTONE, *supra* note 55, at 139.

75. 1 W. BLACKSTONE, *supra* note 55, at 105.

limit was to be held in trust for the Company.<sup>76</sup> As Governor he had sworn to do his duties faithfully.<sup>77</sup> These two oaths appeared at least principally to be for the Company's benefit. If violation of them was a breach of law, it was difficult to see how breach of them was criminal, much less a "high crime." A statute was also germane—North's Regulating Act of 1773.<sup>78</sup> It explicitly prohibited the Governor-General from receiving from anyone "any Present, Gift, Donation, Gratuity or Reward, pecuniary or otherwise . . . any Usage or Custom to the Contrary thereof in any wise notwithstanding."<sup>79</sup> This law seemed to fit the case exactly, sweeping aside all excuses based on Indian practices of giftgiving. The difficulty was in characterizing the violation of it as a crime. No criminal sanction was attached to it. Examined closely, it regulated the Governor-General's conduct but did not make him a criminal if he disobeyed.

*Macclesfield's Case*, however, was of help here to the prosecution. No statute had been shown to make the receipt of substantial presents by the Chancellor a crime. He himself had argued that it was an old custom in disposing of the offices in Chancery. Nonetheless, he had been found guilty unanimously by the Lords.<sup>80</sup> Innocent of bribery by vote of the majority, he was impeachable—at least by implication, for there were lesser charges of misconduct and no judgment separating them from the main charge—merely for taking presents in return for jobs in the justice system. If *Macclesfield's Case* were followed, Hastings could be impeached for receiving presents in exchange for jobs. Because the statute addressed specifically the Governor-General, he did not have the defense that the statute did not apply in India.

With little case law, and with Mansfield's decision going beyond *Macclesfield's Case*, it was not hard to confuse the receipt of presents with bribery. Blackstone himself had already done this, saying in the passage where he spoke of bribery,

In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of

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76. Covenant between Warren Hastings and East India Co. (Feb. 10, 1769), reprinted in *SESSIONAL PAPERS*, *supra* note 61, at 959-60.

77. See 3 *SPEECHES OF THE MANAGERS*, *supra* note 7, at 511 (speech of Robert Dallas, counsel for Hastings (May 9, 1793)).

78. 13 Geo. III, ch. 63; see *supra* text accompanying notes 32-36.

79. 13 Geo. III, ch. 63, § 23.

80. 16 *STATE TRIALS*, *supra* note 67, at 1395.

government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. . . . And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.<sup>81</sup>

Blackstone made no analysis of the state of mind of the recipient of a bribe, and he provided no cases. But written long before Hastings' trial, this passage must have struck the Managers as a happy contrast of corrupt Eastern customs with English practice. When, frequently in the course of arguments, the Managers went beyond the Articles to speak of Hastings' "bribes," they followed the conflation of bribery and present-taking suggested by Blackstone and by Mansfield; even in Article Sixth, they made one reference to a "Bribe or Consideration;"<sup>82</sup> and they took no notice of the doctrine that bribery did not exist as a crime in the colonies.

The defendant and his counsel did not follow the course which the foregoing analysis might suggest. They did not contend that the law of bribes had no application in India. One must infer that they thought this path too risky in a political proceeding. Instead, they strenuously maintained that before the 1773 Act customary presents were legal and after the Act there was no prohibition against the Governor-General receiving presents for the Company and not for himself. Hastings, it would seem, had reached this conclusion on advice he received before leaving India. As he told the Lords in his own defense, "No person ever suggested to me that the Act of Parliament deprived the Company of the right of receiving the customary presents."<sup>83</sup> Corruption in this view consisted in the Governor taking for himself. Everything Hastings had taken, he maintained, was for the Company. Lord North's Act had no application to this kind of situation. That was clear from the fact that under Pitt, in 1784, the Act had been amended to bar gifts to the Company.<sup>84</sup> Because all the charges against Hastings antedated the amendment, he was home free, he believed, if he could show he personally took nothing.

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81. 4 W. BLACKSTONE, *supra* note 55, at 139-40.

82. See 3 SPEECHES OF THE MANAGERS, *supra* note 7, at 579 (speech of Robert Dallas, counsel for Hastings (May 9, 1793)).

83. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 503 (address by Warren Hastings (June 2, 1791)).

84. 24 Geo. III, ch. 25, § 47 (1784); see also 2 SPEECHES OF THE MANAGERS at 503 (address by Warren Hastings (June 2, 1791)).

Three examples—one pre-North's Act of 1773, two after it—will show how the case was fought.

*Entertainment by Munni Begam.* The woman Hastings had appointed head of the household of the young Nawab of Bengal had acknowledged to Company agents that she had paid Hastings 15,000 pounds. He admitted receiving the money.<sup>85</sup> The reason both he and she gave was that an allowance to the Governor-General was customary when he visited the Nawab. Hastings had made such a visit in 1772 for over two months and accordingly had been allotted an "entertainment" allowance of 2000 rupees, or 200 pounds, a day, amounting to 15,000 pounds in all.<sup>86</sup>

Munni Begam was reputed to be an ex-slave and an ex-dancing girl, who had been taken in polygamous marriage by the old Nawab. In the view of the Managers she was unfit to be the guardian of the nominal ruler of the country, her stepson, especially in disregard of the boy's own mother. This unnatural and unfit choice, as the Managers saw it, was made by Hastings to facilitate his bribetaking—the ex-dancing girl being his compliant agent—and to reciprocate the bribe she actually paid for the appointment.<sup>87</sup> Hastings defended his choice and contended that what he had received had no connection with his selection.<sup>88</sup>

There was no possibility of Hastings denying that the money he had taken fell literally within the comprehensive terms of his covenant to take no "allowance" or "donation" or "compensation" from an Indian prince.<sup>89</sup> (Since the payment had been made in 1772 it was not covered by North's Regulating Act). But was Hastings' breach of his oath a crime? The question, as put to the Lords by Hastings' counsel, Robert Dallas, was whether "established usage" did not grant "persons of distinguished rank" an "allowance for table expenses" when "resident at the court of eastern princes."<sup>90</sup> The practice of earlier Governors was cited as precedent; the allowance to the Nawab himself when visiting the Governor in Calcutta was invoked as parallel. Custom, Dallas argued, must be decisive as to

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85. 3 SPEECHES OF THE MANAGERS, *supra* note 7, at 534 (speech of Robert Dallas, counsel for Hastings (May 9, 1793)).

86. 2 *id.* at 287; P. MARSHALL, *supra* note 11, at 140.

87. *Id.* at 288-95 (speech of Charles James Fox, Manager for the House of Commons (June 7, 1790)).

88. 3 *id.* at 568 (speech of Robert Dallas, counsel for Hastings (May 9, 1793)).

89. *Id.* at 563.

90. *Id.*

whether the act was criminal. Even in England itself, there were “a great number of different practices with respect to the receipt of emoluments by persons in public situations”<sup>91</sup> that would not bear legal scrutiny, but which, sanctioned by custom, could not be the basis of a criminal charge.

To prove corruption the Managers tried to rely on a record made before the Supreme Council in Bengal. The Lords ruled the record inadmissible.<sup>92</sup> Alone, the record would not have been convincing; but there was a circumstance that strengthened its weight—the death of the accuser. Confined by less strict rules than the Managers, we can look at what had happened in Bengal. In 1775 when Hastings was Governor-General but outnumbered on his own Council by opponents fresh from England, he had been accused before the Council of taking 35,000 pounds in bribes from Munnī. His accuser, egged on by his English opponents, was a highly experienced Bengalese politician. Maharaja Nanda Kumar (Nundcomar to the English) was a Brahmin, at one time Hastings’ foe, at another his friend, and the most influential Indian in Calcutta. He no doubt believed he was striking a defeated and vulnerable man.

Nanda Kumar made his charge on March 11, 1775, providing amounts, payors, and dates. The Supreme Council began to investigate. Meanwhile, George Vansittart, Hastings’ friend, got in touch with Indians who were claiming that Nanda Kumar, in 1769, had tried to defraud an estate by a forged acknowledgement of debt. He was arrested, imprisoned by May 6, 1775, and put on trial by June 9. The English Chief Justice, Elijah Impey, an ally of Hastings, presided with two other English judges. There was a great deal of contradictory testimony from Indians, and the jury of Englishmen had to decide whom to believe. As a matter of law, it was doubtful that the document Nanda Kumar was said to have forged fell within the terms of the English forgery statute; it was quite probable—if Blackstone’s treatise was to be believed—that the statute itself did not apply in Bengal; and it was almost certain that the Supreme Court did not have jurisdiction to try an Indian for a crime against another Indian.<sup>93</sup> After six days, he was found guilty and sentenced to death.<sup>94</sup> Appeal, permission for which depended on the court, was

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91. *Id.* at 526.

92. SESSIONAL PAPERS, *supra* note 61, at 117-18.

93. See Derrett, *Nanda Kumar's Forgery*, 75 ENG. HIST. REV. 223, 232, 236-37 (1960).

94. A detailed basis for inference as to the part of Hastings and his associates in the Nanda Kumar affair is provided by a document written by George Vansittart, a Company



denied. In a last petition to the Council, which had no control over the court, he asserted, "They put me to Death out of Enmity and Partiality to the Gentlemen who have betrayed their Trust."<sup>95</sup> He was hanged in August. Opinions have differed as to whether the verdict was justified. No one has disputed that the death sentence

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employee on the Calcutta Board of Trade. Aide-Memoire from George Vansittart (Apr. 20 - Aug. 17, 1775), reprinted in Sutherland, *New Evidence on the Nandakuma Trial*, 72 ENG. HIST. REV. 438, 450-60 (1957). The aide-memoire, intended only for Vansittart's own use, is contemporary, guarded and self-justificatory. It appears to record only matters bearing on Nanda Kumar. The aide-memoire establishes the deep involvement with the prosecution of Nanda Kumar by Vansittart, Hastings' "most trusted friend and subordinate at this time," *id.* at 444, and, by implication, Hastings' own involvement.

A little over a month after Nanda Kumar lodged formal charges against Hastings, on April 19, 1775 (the day of Paul Revere's ride!), Kamal-ud-din confessed that he previously had made false charges against Hastings and his closest associates. Kamal-ud-din was a farmer of revenue, appointed to his post by Hastings and now in financial trouble. No reason was given for his sudden candor that conveniently implicated Nanda Kumar and Joseph Fowke, a merchant on the Council Majority's side. Three indictments were immediately secured against them on the grounds of conspiracy against Hastings, Vansittart, and Barwell, Hastings' ally on the Council. See *id.* at 440. The Council Majority responded two days later by publicly visiting Nanda Kumar. Vansittart noted, "a great noise is made about the town of Nundcomar's power and favour and inability of the Court of Justice to hurt him." Aide-memoire from George Vansittart (Apr. 22, 1775), quoted in Sutherland, *supra*, at 451. The next day, Saturday, Vansittart conferred with Kamal-ud-din and saw Hastings about it. Sunday he was visited by one Sudar-ud-din, an ex-servant of Nanda Kumar's. *Id.* at 446 n.2. Three days later this person brought to see him Mohan Prasad, an Indian high in Hastings' favor. *Id.* at 443. Mohan Prasad showed Vansittart a bond he said Nanda Kumar had forged and announced he was ready to prosecute him. Vansittart advised him on the choice of counsel. Aide-memoire from George Vansittart (Apr. 26, 1775), reprinted in Sutherland, *supra* at 451, 451-52. Vansittart then gathered information to support the case and got reports on Nanda Kumar's defensive strategy from false friends of the latter. On May 9, Kanta, Hastings' *banyan*, delivered one piece of information. On May 11, Vansittart consulted Hastings in person and later in the day delivered to Mohan Prasad's counsel a memorandum on the case. Aide-memoire from George Vansittart (May 11, 1775), reprinted in Sutherland, *supra*, at 454, 454-55.

In summary, unexpectedly but conveniently, an Indian indebted to Hastings produced a confession which let the Hastings group launch three criminal cases against Nanda Kumar. The same helpful Indian turned up as the star witness for the prosecution in the forgery trial. *Id.* at 462. When this ploy was met by the Council Majority, a more drastic move was made, in which the Indian actors were Nanda Kumar's ex-servant and an Indian much favored by Hastings. They moved only after checking with Vansittart and followed his advice on which lawyer to use. Vansittart helped to develop the evidence and provided the prosecution with guidance. On two occasions Vansittart specifically consulted Hastings as to what to do concerning Nanda Kumar; throughout the business he may be seen as acting for Hastings as his "most trusted friend and subordinate." It is fair to conclude that without the management of Vansittart and without the encouragement of Hastings indicated by Vansittart's participation, the prosecution of Nanda Kumar on a capital charge would not have been brought.

95. 63 HOUSE OF COMMONS SESSIONAL PAPERS OF THE EIGHTEENTH CENTURY 27 (S. Lambert ed. 1973)(Petition to the Council by Nanda Kumar (Aug. 1775)).

struck the Indians as "a savage punishment."<sup>96</sup> No one has doubted the stunning effect the execution of the most powerful Brahmin in Calcutta had upon would-be accusers of Hastings. "The change which this execution has worked is easily perceived," wrote a backer of Hastings. "The Blacks know not which way to look."<sup>97</sup> As Macaulay observed, everybody, "idiots and biographers excepted," has thought that "Hastings was the real mover in the business."<sup>98</sup>

*Murder will out.* When Impey ran for a seat in the Commons against Richard Brinsley Sheridan, an Impeachment Manager, Sheridan's supporters followed Impey with the figure of a black man with a noose around his neck. It was enough to defeat Impey. But murder will not always out at the right time and place. An attempt to impeach Impey foundered on the Pitt administration's unwillingness to support the charges.<sup>99</sup> No evidence was ever produced that Hastings dictated the result or interfered in any manner in the judges' conduct of the trial, so that "murder" seemed to many too strong a characterization of the proceeding. But it was and is a reasonable inference that Nanda Kumar would not have been prosecuted except for a nod given by Hastings, and if, as seems clear, the court had no jurisdiction, "murder" appears accurate.<sup>100</sup> The murder of a witness by a defendant is not necessarily proof of the truth of the witness' testimony; but courts have admitted evidence of such murder as a circumstance the jury may consider in evaluating the defendant's guilt.<sup>101</sup> So here Nanda Kumar's accusations and the manner of his death may be weighed together.

*Anonymous Money from Dinajpur.* In 1782, Hastings wrote the Secret Committee of the Directors, accounting for certain sums which "have occasionally been converted to the Company's Property through my Means."<sup>102</sup> He enclosed a paper headed, "An Account

96. 8 THE NEW CAMBRIDGE MODERN HISTORY 226 (A. Goodwin ed. 1965).

97. Letter from E. Sherwin to J. Graham (Aug. 25, 1977), *quoted in* P. MARSHALL, *supra* note 11, at 141.

98. T. MACAULAY, *supra* note 18, at 233.

99. P. MARSHALL, *supra* note 11, at 62.

100. *But see generally* J. STEPHEN, THE STORY OF NUNCOMAR AND THE IMPEACHMENT OF SIR ELIJAH IMPEY (1885).

101. *E.g.*, *People v. Spaulding*, 309 Ill. 292, 141 N.E. 196 (1923); *see generally* 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 278 (3d ed. 1940) (suppression of evidence receivable against a defendant as an indication of his cause's lack of truth and merit).

102. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (May 22, 1782), *reprinted in* SESSIONAL PAPERS, *supra* note

of sums received on the Account of the Honourable Company by the Governor-General, or paid to their Treasury by his Order, and applied to their Service." Under this heading appeared first the serial numbers, dates (October and November 1780), and amounts of three Company bonds, totaling 4,060,000 rupees (about 40,000 pounds) and the notation that these bonds were in the Governor's possession but endorsed with the statement that he had no claim on them against the Company. Nothing further appeared as to why the bonds had been issued. A second sum was noted in this Account as a deposit, then more bonds were listed. In the body of the letter, Hastings wrote:

Why these Sums were taken by me; why they were except the Second, quietly transferred to the Company's use; why Bonds were taken for the First, and not for the Rest, might, were this Matter to be exposed to the view of the Publick, furnish a Variety of Conjectures to which it would be of little Use to reply. Were your Honourable Court [of directors] to question me upon these Points, I would answer, that the Sums were taken for the Company's Benefit, at Times in which the Company very much needed them; that I either chose to conceal the First Receipts from publick Curiosity, by receiving Bonds for the Amount, or possibly acted without any studied Design which my Memory could at this Distance of Time verify; and that I did not think it worth my Care to observe the same Means with the Rest. I trust, Honourable Sirs, to your Breasts for a candid Interpretation of my Actions . . . .<sup>103</sup>

This letter was dated May 22, 1782 but was not sent until December 16, 1782, when it was accompanied by a second letter from Hastings to the Secret Committee, saying that the sailing of the ship intended to carry it had been "protracted, by various Causes" with "no other Conveyance since occurring"<sup>104</sup> (an assertion later shown to have taken liberties with the facts). The first letter, he protested, had been written when the "late Parliamentary Inquiries,"<sup>105</sup> those of April 1782 during the Rockingham administration, had been unknown. He continued:

[The] Honourable court [of directors] ought to know whether

61, at 1114, 1114.

103. *Id.*

104. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (Dec. 16, 1782), *reprinted in* SESSIONAL PAPERS, *supra* note 61, at 1115, 1115.

105. *Id.* at 1116.

I possess the Integrity and Honour which are the first Requisites of such a Station. If I wanted these, they have afforded me but too powerful Incentives to suppress the Information which I now convey to them through you . . . Upon the Whole of these Transactions, which to you, who are accustomed to view Business in an official and regular Light, may appear unprecedented, if not improper, I have but a few short Remarks to suggest to your Consideration . . . The Sources from which these Relief to the publick Service have come, would never have yielded them to the Company publicly; and the Exigencies of your Service (Exigencies created by the Exposition of your Affairs, and Faction in your Councils) required those Supplies.

I could have concealed them, had I had a wrong Motive, from yours and the publick Eye for ever . . .<sup>106</sup>

The directors, who received both letters in the spring of 1783, replied in March 1784, observing that with “[so] many Parts so unintelligible” they would like more information.<sup>107</sup> In particular they wanted to know when the sums were received and Hastings’ “Motives” for withholding earlier knowledge of them. The directors, however, were not so impolite as to remind Hastings that he had taken an oath to keep a daily account of all “Transactions and Occurences relating to his trust.”<sup>108</sup> Hastings acknowledged the directors’ inquiries over a year later, on July 11, 1785. The acknowledgment came after his return to England and after he had been “kindly apprized, that the Information required as above is yet expected from me.”<sup>109</sup> He referred now to “the Presents” and said the dates they were received were about those “prefixed to them in the Account,”<sup>110</sup> *i.e.*, the dates of October-November 1780. As to his motives, he quoted his letter of May 1782 and remarked, “It will not be expected that I should be able to give a more correct Explanation of my Intentions, after a Lapse of Three Years . . . .”<sup>111</sup> He continued, nonetheless, with suggestive amplifications:

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106. *Id.*

107. Letter from the Honourable Secret Committee of the Honourable Court of Directors to Warren Hastings (Mar. 16, 1784), *reprinted in* SESSIONAL PAPERS, *supra* note 61, 1149, 1150.

108. *Id.*; see *Covenant between Warren Hastings and East India Co.* (Feb. 10, 1769), *supra* note 76, at 961.

109. Letter from Warren Hastings to William Devaynes, Chairman of the Honourable Court of Directors (July 11, 1785), *reprinted in* SESSIONAL PAPERS, *supra* note 61, at 1151, 1151.

110. *Id.*

111. *Id.* at 1152.

I should have deemed it particularly dishonorable to receive, for my own Use, Money tendered by Men of a certain Class, from whom I had interdicted the Receipt of Presents to my Inferiors, and bound them by Oath not to receive them: I was therefore more than ordinarily cautious to avoid the Suspicion of it, which would scarcely have failed to light upon me had I suffered the Money to be brought directly to my own House, or to that of any Person known to be in Trust for me; for these Reasons I caused it to be transported immediately to the Treasury . . . . Although I am firmly persuaded that these were my Sentiments on the Occasion, yet I will not affirm that they were . . . . Of this I am certain, that it was my Design originally to have concealed the Receipt of all the Sums, except the Second, [the deposit] even from the Knowledge of the Court of Directors. They had answered my Purpose of public Utility; and I had almost totally dismissed them from my Remembrance. But when Fortune threw a Sum in my Way of a Magnitude which could not be concealed, and the peculiar Delicacy of my Situation at the Time in which I received it, made me more circumspect of Appearances, I chose to apprise my Employers of it . . . . This, Sir, is the plain History of the Transaction.<sup>112</sup>

These three extraordinary letters said a great deal, particularly if pondered. Hastings would not expose to public conjecture "why these Sums were taken by me;"<sup>113</sup> nor would he explain why he had taken bonds in his own name for money belonging to the Company. He could have concealed the receipt of the money forever and had first intended to do so. The money had come from persons who would not have paid the Company publicly and from whom it was prohibited to receive presents; but the sums were presents. At a time when his situation had become delicate, he had chosen to reveal them and make a species of accounting. He did his best not to connect this time with any inquiry in Parliament. For further answers he referred the directors to William Larkins, who "possessed, I believe, the original Paper which contained the only Account that I ever kept of it."<sup>114</sup>

Larkins was the Company's Accountant-General in Bengal. An affidavit by him had been enclosed in Hastings' letter of December 16, 1782, stating that the earlier May letter and the enclosed ac-

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112. *Id.* at 1152-53.

113. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (May 22, 1782), *supra* note 102, at 1114.

114. Letter from Warren Hastings to William Devaynes, Chairman of the Honourable Court of Directors (July 11, 1785), *supra* note 109, at 1152.

count "were written by me, at the Request of the Honourable Warren Hastings, Esquire, on the 22d May 1782 from rough Drafts written by himself in my Presence."<sup>115</sup> The purpose of this affidavit had been to confirm Hastings' claim that his disclosure was not prompted by the parliamentary inquiries of April 1782. It had also appeared to put the Company's chief accounting officer in Bengal in the position of asserting that the enclosed account of "sums received on the Account of the Honourable Company" was known by him to be true.

Now, on August 5, 1786, writing from Calcutta on Hastings' directions and signing himself as Hastings' "attorney," Larkins sent the directors "Copies of the Papers which I kept as Memorandums of the Particulars of the Dates on which the Sums contained in Mr. Hastings' Account of 22d May 1782 were received."<sup>116</sup> The first of these memoirs ("Paper No. 1") had under Dinajpur a list of monies totalling 200,000 rupees set opposite dates beginning in August 1779 and ending in July 1780. It listed a "balance" owing from one "G.G.S." of almost 100,000 rupees. The "Dinagepore" account was then summarized as follows:<sup>117</sup>

Cabooliats	Received	Balance
400,000	300,000	100,000
Dinagepore Peishcush		

A "cabooliat" or *kabulyat* meant an agreement; "peishcush" or *peshkash* was money payable like a feudal fine on the installation of a new *zamindar*. The account, therefore, indicated that, by agreement at Dinajpur, 400,000 rupees were payable on the *zamindar's* investiture, of which 100,000 had not been paid. If the summary were read in conjunction with the preceding list of moneys, only 200,000 had been received, and 100,000 was still due from G.G.S. When these amounts were turned into pounds, the account stated that Hastings had collected 20,000 pounds of *peshkash* from someone at Dinajpur and was owed 20,000 pounds more, half from an unknown, half of G.G.S.

If this paper were compared with the "account" enclosed in Hastings' May 22, 1782 letter, which was supposedly based on it, two discrepancies were noticeable. The amounts received had been

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115. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (Dec. 16, 1782), *supra* note 104, at 1115.

116. Letter from William Larkins to William Devaynes, Chairman of the Honourable Court of Directors (Aug. 5, 1786), *reprinted in* SESSIONAL PAPERS, *supra* note 61, at 1153, 1153.

117. *Id.* at 1157.

between August 1779 and July 1780, and the bulk of them, received in 1779, had not been at all near the October-November 1780 dates on the bonds; and the amount of the bonds differed from the collection. Neither discrepancy was enormous. Both were surprising when one account was said to be based on the other. A different and more basic discrepancy was noticeable when records outside these accounts were consulted. The old *zamindar* had been in office until July 1780 when he died, and the small, regular *peshkash* paid by his successor was duly recorded in the Company's books on August 1, 1780.<sup>118</sup> Payments beginning in August 1779 could not have been *peshkash*.

Further discrepancies appeared as to the time when Hastings noted on the bonds that he had no claim on them against the Company. In his letter to the Company of July 11, 1785, Hastings said he had made this endorsement "in order to guard against their becoming a Claim on the Company as part of my Estate,"<sup>119</sup> and that he had made it in the middle of 1781. His letter of May 22, 1782 said the endorsement then existed.<sup>120</sup> The bonds, when they were produced, carried a date of May 29, 1782 for Hastings' notation. They were not in fact delivered for cancellation to the Company until January, 1785.<sup>121</sup> By Hastings' own admission then, he had held the bonds for a substantial period in his own name; he had publicly stated two dates for the endorsement which proved to be inaccurate; and he did not finally let the Company have the bonds till shortly before he left India. Larkins was confronted by the Lords with the Interest Book for 1781-1782, which indicated that he had accrued the bonds' interest of eight percent in Hastings' favor.<sup>122</sup>

A mystery, rather than a discrepancy, was the balance shown owed by G.G.S. He was identified in Larkins' letter of August 5, 1786: "Although Mr. Hastings was extremely dissatisfied with the Excuses which Gunga Govind Sing assigned for not paying Mr. Croftes [the Company sub-treasurer] the Sums stated by Paper No.

118. P. MARSHALL, *supra* note 11, at 154.

119. Letter from Warren Hastings to William Devaynes, Chairman of the Honourable Court of Directors (July 11, 1785), *supra* note 109, at 1152.

120. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (May 22, 1782), *supra* note 102, at 1114.

121. Minutes of the Evidence taken at the trial of Warren Hastings, in *SESSIONAL PAPERS*, *supra* note 61, at 1118.

122. Minutes of the Evidence taken at the trial of Warren Hastings (Apr. 14, 1794), in *HOUSE OF LORDS SESSIONAL PAPERS, 1794-95* at 2727, 2733 (5 F. Torrington reprint ed. 1974) (cross-examination of William Larkins).

1 to be in his Charge, he never would obtain from him any further payments on this Account."<sup>123</sup> Gangha Gobinda Sinha (Gunga Govinda Sing to the English) was the executive agent of the Committee of Revenue, appointed to this post by Hastings in 1781. It was not clear why Hastings should have permitted him to retain Company money. Cross-examination of Larkins by the Managers before the Lords in 1794 revealed that G.G.S. had never been made to account for the 10,000 pounds. Larkins testified that Hastings had told him that G.G.S. said he had spent the money on jewels or diamonds for the wife of Wheeler, a member of the Council.<sup>124</sup> Larkins also testified that he believed part of the amount owing was paid by Nandalal, a revenue farmer with no clear connection with Dinajpur. The only inference that could be drawn from these stories—inconsistent with each other and with Larkins' first tale of Hastings' dissatisfaction—was that Larkins did not know what had happened to the money.

Larkins' letter and testimony led to further discoveries about Hastings' accounting to the Company. "The Particulars of the Paper No. 1," Larkins wrote in the August 5, 1786 letter, "were read over to me, from a Bengal Paper, by His Banyan, Cauntoo Baboo."<sup>125</sup> The reference was to Hastings' Indian *banyan* or business agent, Krishna Kanta Nandi. On examination, it turned out that Larkins did not read the Bengal language, but thought he would understand what was read to him. What he prepared in English was a "Translate" of what he got from Kanta. What Kanta read to him "was a detached piece of a paper put into Contoo Baboo's hands by Mr. Hastings."<sup>126</sup> Larkins rejected the characterization of this document as "his account." It was "a mere Translate of an Account kept by another Person." Who that other person was he did not know.<sup>127</sup>

Perhaps the most damaging question asked Larkins was, "When you were making up this Account, whether you considered it as making up an Account of the Company's Money?" He replied, "I considered myself as employed in drawing out an Account of Money

123. Letter from William Larkins to William Devaynes, Chairman of the Honourable Court of Directors (Aug. 5, 1786), *supra* note 116, at 1156.

124. Minutes of the Evidence taken at the trial of Warren Hastings, *supra* note 122, at 2733 (cross-examination of William Larkins).

125. Letter from William Larkins to William Devaynes, Chairman of the Honourable Court of Directors (Aug. 5, 1786), *supra* note 116, at 1153.

126. Minutes of the Evidence taken at the trial of Warren Hastings, *supra* note 122, at 2730 (cross-examination of William Larkins).

127. *Id.* at 2742-43.



which might eventually be the Property of the Company, but which was not so until they had determined that it should be so." He also testified, "I was not upon this Occasion employed as Accountant General."<sup>128</sup> He had written down totals supplied by Kanta from a paper handed him by Hastings, and he had listed them as "sums received on the Account of the Honourable Company." But Larkins was not sure for whose money he had given an account.

Burke had a theory as to why the Dinajpur money had been paid. On the death of the old *zamindar* in July 1781, the succession had been disputed between his son, who suffered the double disadvantage of being a minor and adopted, and his half-brother. Hastings did not regard *zamindari* as inheritable private property but as government property to which a *zamindar* was appointed as a government collector of revenue. But even he acknowledged that in practice the claims of the heir deserved recognition, and he never chose to defend the Dinajpur money as payment for his exercise of arbitrary power in the appointee's favor. Under the alternative view, *zamindari* succession was governed by law, and Hastings and his Council acted as judges in determining the true heir. The case in fact had gone to Hastings' Council for decision and been promptly decided in the son's favor. Burke claimed that the money was "corruptly taken" by Hastings "as a judge in litigation."<sup>129</sup> It was irrelevant that, as a matter of law, the decision was correct. It was a payment for a judgment.

This theory of course implied that Kanta's or Hastings' "Paper No. 1," showing payments from August 1779 to July 1780, was crooked. The intention would have been to show that nothing was received after the date of the dispute over the inheritance. The payments would have been recorded with whimsical irregularity in amounts and times. Since they could not have been *peshkash*, and since no agreement to pay them was ever produced, it would have to be inferred that they were made up arbitrarily.

Hastings admitted receiving the money. The accounts furnished by him and on his behalf were, to say the least, unconvincing. Must one infer that he had received the money as a bribe? When a high official of a government acknowledges receiving a large sum of money from an anonymous source and provides no explanation of its purpose except a demonstrably inaccurate one, it is a reasonable con-

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128. *Id.* at 2732 (cross-examination of William Larkins).

129. E. BURKE, *supra* note 1, at 62.

clusion that he received the money for a corrupt purpose. That there has been a corrupt payment is established by its size, its anonymity, and the payee's attempts to disguise its purpose. Such circumstances existed here. To them must be added Hastings' own acknowledgment to the directors that the amounts in Paper No. 1 were presents, received from persons from whom receiving presents was generally forbidden.

Hastings' defense had tried to merge the question of bribery with the question of what he did with the money. As Burke put it, "Mr. Hastings confesses it was a sum of money corruptly received, but honestly applied."<sup>130</sup> The first part of the sentence is inexact—Hastings did not confess to corruption but to facts from which Burke had inferred corruption—but the second part of the sentence correctly emphasizes Hastings' main contention: That he could not have been taking money corruptly when he was accounting for it and turning it over the Company. As a defense it was compared by Fox to that of a British ambassador taking a bribe from a European prince and saying he used it for the King's secret service, or a Member of Parliament taking a bribe for his vote and saying he had given it to the Sinking Fund.<sup>131</sup> To say one sold judgment to raise money for the Company could not have been said with a straight face; but as Hastings did not identify the source of the money, his claim that it was all for the Company's benefit had a certain plausibility.

Had there, in fact, ever been any intent on Hastings' part to benefit the Company? As Fox observed, the Dinajpur money was first applied to the Company's use in October 1780, much of it over a year after it had been received, according to Paper No. 1. If that memo were disregarded as fictitious, the capital facts remained that whenever the money was paid into the Company's treasury it was recorded as loan made by Hastings personally; he took bonds from the Company for it; and interest accrued to him on what he advanced.

Why, then, had Hastings disclosed at all what by his own boast he could have concealed from "the publick Eye for ever"? For the very purpose for which the letters and account were used, and have been used with some success even to this day, to argue that such candor was incompatible with corruption. When the facade was probed the candor disappeared. The skillful operator of a shell game

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130. *Id.*

131. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 367-68 (speech of C. Fox, Manager for the House of Commons (June 7, 1790)).

puts himself in the position that whatever shell is picked by his victim the winning pea is under another; yet the shell game operator, to gull customers, must make a great show of candor, picking up and turning over each shell and demonstrating that all is open to the eye of the beholder. The shell game operator may stand as a pale analogue of Hastings. What he told the Company seemed to be a changeable amount, as flexible as his circumstances. Hastings had told the Secret Committee of the directors that he trusted them for "a candid Interpretation" of his actions, meaning a benevolent interpretation conceding him everything and asking no questions. His own candor was correlative to such benevolence; he revealed only what he thought his own side would swallow.

It was the heart of his defense that he had applied to the benefit of the Company the money he had taken as presents. With great sincerity he had told the Lords, "No person ever suggested to me that the Act of Parliament deprived the Company of the right of receiving the customary presents."<sup>132</sup> He thought that he had set up a plausible shelter for what he had taken when he provided a colorable story that it was for the Company. When he failed to make a coherent accounting of what he had given the Company, he stood as the confessed recipient of illegal presents, guilty and impeachable.

*A Loan from Nabakrishna.* In 1783, Hastings observed, "the Company was in my debt, and it was not very convenient for them to pay it; but it was extremely convenient to me that my debt should be paid." He met the problem by "sending" to Nabakrishna and telling him, "I wanted to borrow of him three lacs of rupees."<sup>133</sup> Maharaja Nabakrishna, in fact, had had great experience with the British, had served both Governors Clive and Verelst, spoke English "in some degree,"<sup>134</sup> and had been particularly active in his friend Nanda Kumar's case, providing information on his friend of great value to the prosecution. Hastings knew Nabakrishna "to be rich because I had employed him in the service of the revenue."<sup>135</sup> Nabakrishna not

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132. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 503 (address by Warren Hastings (June 2, 1791)); see also *supra* text accompanying note 83.

133. Warren Hastings' Testimony before the House of Commons, *quoted in* 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 245 (speech of John Anstruther, Manager (Feb. 16, 1790)).

134. Minutes of the Evidence taken at the trial of Warren Hastings, *supra* note 122, at 2724 (testimony of Charles Cornwallis).

135. Warren Hastings' Testimony before the House of Commons, *supra* note 133, at 245.

only agreed to Hastings' request but "intreated" Hastings to take the money without executing a bond—that is, he asked Hastings to take it as a gift. "I neither accepted the offer nor refused it," Hastings testified. The following year, 1784, he decided "to accept the money for the Company's use."<sup>136</sup> He did so by paying himself what he said the Company owed him, an amount which exactly used up the three *lakhs*.

Hastings wrote the Company about this setoff on February 21, 1784. Stating that he was crediting the Company with "a sum privately received," he said nothing as to its source. He declared that he was charging against it "many Sums" which "I have hitherto omitted to enter in my public Accounts."<sup>137</sup> He appended a list of expenditures which he said he had made for the Company's benefit. These came out to equal the amount he now credited. The major items were of four kinds: academic, for the composition of a Code of Hindu law, a translation of Moslem law, and the foundation of a Moslem Academy; rent, for his aides de camp; secretarial and office; and transportation, for boats and budgeros or Ganges barges. In the appended list these charges were set out with much detail by Larkins, "Acting Attorney"<sup>138</sup> for Hastings.

On examination, Larkins maintained that he did not know when the money was borrowed from Nabakrishna and acknowledged that the "minute Expenditures" he had listed were furnished by "Cantoo Baboo's People."<sup>139</sup> Asked why they had not been furnished before, Larkins indicated that Hastings was careless about his own finances. It was then put to him that Kanta was the person keeping Hastings' accounts through the whole period, and he was asked if he thought Kanta negligent. "I do not know that he was negligent," he replied.<sup>140</sup> Kanta's ability to produce an itemized list of payments which carelessly had never been charged to the Company before remained unexplained.

When Hastings informed the Company of the setoff he urged its appropriateness lest he furnish the precedent of a life "spent in the Accumulation of Crores for your Benefit and doomed in its Close to

136. *Id.* at 246.

137. Letter from Warren Hastings to the Honourable Court of Directors (Feb. 21, 1784), reprinted in *SESSIONAL PAPERS*, *supra* note 61, at 1120, 1120.

138. *Id.* at 1146.

139. Minutes of the Evidence taken at the trial of Warren Hastings, *supra* note 122, at 2762 (cross-examination of William Larkins).

140. *Id.* at 2763.

suffer the Extremity of private Want, and to sink in Obscurity.”<sup>141</sup> The charge he described as “the Aggregate of a contingent Account of Twelve Years,” a phrase that excited the skepticism and contempt of the Managers. He meant, they said, “the rakings” of twelve years. By “some strange, unaccountable mistake,” Manager John Anstruther remarked, Mr. Hastings “had forgot to charge” these claims before.<sup>142</sup> As Burke put it, Hastings feigned and invented a service, “that he had, without any authority of the Company, squandered away in stationary and budgeros and other idle services, a sum amounting to [this].”<sup>143</sup>

According to Hastings’ testimony, he had reimbursed himself “in a mode most suitable to the Company’s affairs.” Manager Anstruther commented, “And the mode most suitable to the Company’s affairs is that of robbing one of the inhabitants of Calcutta of 30,000 pounds!”<sup>144</sup> What Charles Fox observed of another gift received by Hastings, and then of all his presents, applied with particular force here: “[E]ven though he applies it to the Company’s use, he does a fraudulent act, because that was not the intention of the giver.”<sup>145</sup> The intention of the donor, the Managers contended, must have been to influence Hastings. It was not the practice of the merchant caste to which Nabakrishna belonged to make large gifts for nothing.<sup>146</sup>

What was the *quid pro quo*? Burke observed that Nabakrishna “immediately afterwards enters upon the stewardship or management of one of the most considerable districts in Bengal.”<sup>147</sup> In fact, on July 21, 1780, Nabakrishna had been appointed administrator of the *zamindari* of Burdwan.<sup>148</sup> But Hastings had declared that he got the loan in 1783. How could Burke be right? Anstruther accordingly speculated that at the time of the loan Nabakrishna was in arrears as collector and needed Hastings’ indulgence.<sup>149</sup> As it turned out,

141. Letter from Warren Hastings to the Honourable Court of Directors, *supra* note 137, at 1121.

142. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 246 (speech of John Anstruther, Manager (Feb. 16, 1790)).

143. E. BURKE, *Speech on the Sixth Article of Charge* (May 5, 1789), in 10 THE WORKS OF EDMUND BURKE, *supra* note 1, at 306, 371.

144. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 246 (John Anstruther, Manager (Feb. 16, 1790)).

145. *Id.* at 352 (C. Fox, Manager for the House of Commons (June 7, 1790)).

146. *See* E. BURKE, *supra* note 143, at 372.

147. *Id.* at 373.

148. P. MARSHALL, *supra* note 11, at 151.

149. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 245 (John Anstruther, Manager (Feb. 16, 1790)).

however, the true date of the transaction between Nabakrishna and Hastings was July 26, 1780, five days after Nabakrishna's appointment.<sup>150</sup> Burke was right after all.

The true date came out in a suit brought in Chancery by Nabakrishna himself in 1792.<sup>151</sup> In Chancery, Nabakrishna denied that he had ever intended a gift and sought the recovery of his loan with interest. In Chancery, Hastings did not try to maintain that a gift had originally been made. Ultimately, he produced the bond, dated July 26, 1780, which he had executed for the money, and showed that at a later time it had been returned to him cancelled.<sup>152</sup> Given this information, it was beyond argument that Hastings had misrepresented the transaction to the Company, the Commons, and the Lords. That the loan was in exchange for Nabakrishna's 1780 appointment was a reasonable inference from the coincidence of dates and the concealment.<sup>153</sup> That the cancellation of the loan was for a fresh favor of the kind Anstruther had suggested was probable but not proved. But the Managers' case was clear as to the original transaction. The Lords in May 1794 refused to admit the Chancery bill and answer in evidence.<sup>154</sup>

In summary, the Managers in the instances examined here had shown that Hastings had violated his oath to the Company as to the taking of presents and the keeping of current, accurate accounts, and that he had violated the statute of 1773 as to the taking of presents. The Managers were not able to provide as much data as we have today on the prosecution of Nanda Kumar, and the Lords' ruling on evidence handicapped their case as to Nandakrishna. As to Dinajpur they had shown a large sum paid Hastings under circumstances from which his corruption could reasonably be inferred, and the existence of an equally large sum for which he had failed to account. As to both Dinajpur and Nandakrishna they had shown that what Burke

150. P. MARSHALL, *supra* note 11, at 151.

151. *Nobkissen v. Hastings*, Public Record Office, Chancery Proceedings Nos. 12-13 (1792).

152. P. MARSHALL, *supra* note 11, at 151-52.

153. *But see id.* at 151: "At first sight, it seems difficult to avoid the conclusion that Nobkissen had bribed Hastings to send him to Burdwan. There were, however, strong grounds why Hastings should have accepted Nobkissen's petition without any personal inducement . . . . [T]he imputation of bribery remains unproven . . . ." Marshall's reasoning would clear of bribery any judge who had "strong grounds" for a decision apart from the present he received. *See id.*

154. *See Minutes of the Evidence taken at the trial of Warren Hastings (May 5, 1794)*, *supra* note 122, at 2775, 2775.

called "Bengal bookkeeping"<sup>155</sup> was not the product of carelessness but characteristic of Hastings' operations. They had taken full advantage of his admissions and demonstrated the incoherence of his explanations. They had caught the shell game operator with his hand transferring the pea. They had shown Hastings' candor to be fraud. Why did the prosecution fail to win a conviction?

*The Failures of the Prosecution.* At the most obvious level, the prosecution failed because it had the wrong jury. The Lords were not a body likely to convict Hastings. Burke and Dundas were aware of this from the beginning when they maneuvered the Lords into moving the trial from their own limited quarters to the more spacious setting of Westminster Hall with the deliberate intent that the trial be held before a wider audience than those who were the nominal judges.<sup>156</sup> The trial itself was presided over by the Lord Chancellor, Edward Thurlow, whose wishes regarding an appointment had been met by Hastings in India and whose legal rulings, supported by the other judges, almost always favored Hastings. In 1792 Pitt removed Thurlow as Chancellor but, remaining as a member of the Lords, he then acted more as Hastings' advocate than his judge.

Thurlow once told Dundas that the bribes were "a very Nasty Business."<sup>157</sup> "[T]he Closestool of the Bribery," Burke thought, "is too potent to enable him to carry it off under his Robes,"<sup>158</sup> *i.e.*, the privy containing the filth could not be smuggled off by the Chancellor. But this optimism was unfounded. Thurlow's view of the possibilities of India was scarcely concealed. It was, he told the Lords, "the weak part" of Hastings' character that had led to his need to borrow from Nabakrishna. He should have left Bengal "fairly and honourably possessed of four hundred thousand pounds from the known, allowed emoluments of his office, and the accumulating interest upon his fortune."<sup>159</sup> That Hastings should have been tried at all was an outrage to Thurlow. As he was reported to have re-

155. E. BURKE, *Speech on the Sixth Article of Charge* (May 7, 1789), in 10 THE WORKS OF EDMUND BURKE, *supra* note 1, at 396, 404.

156. See Letter from Edmund Burke to Henry Dundas (Nov. 1, 1787), in 5 THE CORRESPONDENCE OF EDMUND BURKE 356 (H. Furber ed. 1965).

157. Statement of Lord Thurlow to Henry Dundas, *quoted in* 6 THE CORRESPONDENCE OF EDMUND BURKE 199 n.1 (A. Cobban & R. Smith ed. 1967).

158. Letter from Edmund Burke to William Adam (Jan. 4, 1791), in 6 THE CORRESPONDENCE OF EDMUND BURKE 197, 199 (A. Cobban & R. Smith ed. 1967).

159. DEBATES OF THE HOUSE OF LORDS, ON THE EVIDENCE DELIVERED IN THE TRIAL OF WARREN HASTINGS, ESQUIRE 218 (1797) (remarks of Lord Thurlow).

marked, no one could consider the trial "but with horror."<sup>160</sup>

In Burke's analysis of the Lords, "Thurlow [was] at the bottom of the whole."<sup>161</sup> But the corps of bishops in the Lords was also unsympathetic to the prosecution. "The humility of the Bishops will leave the honour of vindicating the Christian religion to others," Burke mordantly observed as early as 1787.<sup>162</sup> The most vocal was his own former friend, William Markham, archbishop of York, whose son had been Hastings' secretary. He interrupted Burke's examination of a witness to compare it to the work of a Marat or Robespierre—a comparison, which, given Burke's view on the French revolutionaries, could not have been more personal or unkind.<sup>163</sup> By 1793, Burke knew exactly how the score stood for Hastings in the Lords: "Of the thirty-six who attend, thirty are dead votes for him, who will not be shocked either at his cruelties nor his corruptions. They will swallow the whole, Bribes, forgeries, every thing."<sup>164</sup>

The prosecution failed not only because of the character of the jury but also because of the character of its case with its many separate issues, complex concatenations of facts, prolixness, argumentativeness, and, despite the great detail, abstractness. The attempt to prove Hastings guilty of multiple crimes was a conscious decision. "Even in a temper less favourable to Indian delinquency than what is now generally prevalent," Burke advised Francis, "the people at large would not consider one or two acts, however striking, perhaps not three or four, as sufficient to call forth the reserved justice of the State." Before a "*publick political tribunal*," it was essential to show "*a corrupt, habitual, evil intention*."<sup>165</sup> In particular Burke was not confident that the showing of individual acts of bribetaking would be enough. People talked excusingly of "his taking but a bribe here and a bribe there."<sup>166</sup> Hastings, he told the Lords, formed "sys-

160. Oracle, May 22, 1793, *quoted in* 7 THE CORRESPONDENCE OF EDMUND BURKE 372 n.3 (P. Marshall & J. Woods ed. 1968) (emphasis omitted).

161. Letter from Edmund Burke to Henry Dundas (June 7, 1793), in 7 THE CORRESPONDENCE OF EDMUND BURKE 371, 372 (P. Marshall & J. Woods ed. 1968).

162. Letter from Edmund Burke to Thomas Burgh (July 1, 1787), in 5 THE CORRESPONDENCE OF EDMUND BURKE 340, 341 (H. Furber ed. 1965).

163. P. MARSHALL, *supra* note 11, at 84.

164. Letter from Edmund Burke to Henry Dundas (June 7, 1793), in 7 THE CORRESPONDENCE OF EDMUND BURKE 371, 373 (P. Marshall & J. Woods ed. 1968).

165. Letter from Edmund Burke to Philip Francis (Dec. 10, 1785), in 5 THE CORRESPONDENCE OF EDMUND BURKE 241, 242-43 (H. Furber ed. 1965) (emphasis in original).

166. E. BURKE, *Speech in General Reply* (June 12, 1794), in 12 THE WORKS OF EDMUND BURKE, *supra* note 1, at 143, 163.



tems" for "the very purpose of accumulating bribes."<sup>167</sup> "Governors, we know very well, cannot with their own hands be continually receiving bribes,—for then they must have as many hands as one of the idols in an Indian temple . . . ."<sup>168</sup> Hastings had to be aided by a tribe of agents, "some white and some black," among them Larkins, Kanta, and G.G.S., "that most atrocious and wicked instrument of the most atrocious and wicked tyranny."<sup>169</sup> Even Hastings' "system of peculation," in Burke's judgment, was not enough to awaken or sustain popular indignation; he must show its "consequences." When he came across a report of atrocities in revenue collection at Dinajpur, he wrote Francis, "I am clear that I must dilate upon that; for it has stuff in it that will, if any thing, work upon the popular Sense;"<sup>170</sup> and he tried to link these alleged misdeeds to the money anonymously received at Dinajpur. If Hastings could have been tried like a common criminal at Old Bailey for the single offense of taking a bribe, Burke might have secured his conviction. But he catered to the popular temptation to think a bad man must be thoroughly bad: "There is, my Lords, always a close connection between vices of every description."<sup>171</sup> Facing a political tribunal and making his own judgment of how seriously bribery would be rated by it, Burke took the Ciceronian route.

That course had a momentum whose escalation can be shown by an instance where Burke was publicly rebuked for exceeding his mandate. Opening the impeachment in February 1789, Burke spoke of Hastings' claim that no one in India complained of him and observed, "It is generally true. The voice of all India is stopped. All complaint was strangled with the same cord that strangled Nundcomar. This murdered not only that accuser, but all future accus[ers] . . . ."<sup>172</sup> Here, only a cord was specifically charged with murder. Two months later, expanding on the Article on the presents, Burke went further and became more specific: "[T]here is an action which is more odious than the crimes he attempts to cover,—for he has murdered this man by the hands of Sir Elijah Impey . . . ."<sup>173</sup>

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167. E. BURKE, *supra* note 1, at 7.

168. *Id.* at 14.

169. E. BURKE, *supra* note 2, at 277.

170. Letter from Edmund Burke to Philip Francis (circa Jan. 3, 1788), in 5 THE CORRESPONDENCE OF EDMUND BURKE 372, 372 (H. Furber ed. 1965).

171. E. BURKE, *Speech in General Reply* (June-3, 1794), in 11 THE WORKS OF EDMUND BURKE, *supra* note 1, at 300, 306.

172. E. BURKE, *supra* note 1, at 30.

173. E. BURKE, *Speech on the Sixth Article of Charge* (Apr. 21, 1789), in 10 THE

The Commons had not charged Hastings with murder, and it promptly voted that Burke's words "ought not to have been spoken." Burke was reduced to explaining that he had used "murder" in the "moral and popular sense."<sup>174</sup> A critic might have added that, applied to a country where no English bribery law was applicable, "bribe" too was used by Burke only in the moral and popular sense, and yet he used it ad infinitum.

Cicero had touched on Hog's sexual misconduct.<sup>175</sup> Burke said nothing of the relations between Hastings, and his second wife, and his second wife's ex-husband, although they were the subject of London satirists. He did appear to consider the possibility that Hastings "might really be in love with Munny Begam,"<sup>176</sup> but he dismissed the fancy. He did use such a familiar sexual metaphor for corruption as "pollute"—with "purity" set in contrast—to characterize Hastings' conduct; and to describe Hastings' financial relations with Munni he quoted a stinging couplet from Swift's *Phillis or the Progress of Love*:

"They keep at Stains the old blue Boar  
Are Cat and Dog, and Rogue and Whore."<sup>177</sup>

His figures of speech were more often non-sexual. "Bribery, filthy hands, a chief governor of a great empire receiving bribes from poor, miserable, indigent people, this is what makes government itself base, contemptible, and odious in the eyes of mankind":<sup>178</sup> so Burke had said in 1788, employing one of the most basic metaphors for a corrupt official, "filthy hands." When he neared the end in 1794 he told the Lords, "I have had a great encyclopedeia of crimes to deal with."<sup>179</sup> Between those dates Hastings had been compared physically to a pig: "for years he lay down in that sty of disgrace, fattening in it, feeding upon that offal of disgrace and excrement. . . ." <sup>180</sup> To another Manager Hastings seemed to be the faithless steward, making money for himself by dealing with the

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WORKS OF EDMUND BURKE, *supra* note 1, at 149, 218 (emphasis in original).

174. E. BURKE, *supra* note 144, at 317.

175. See Canter, *supra* note 9, at 199.

176. E. BURKE, *supra* note 2, at 275.

177. *Id.* at 269.

178. E. BURKE, *supra* note 1, at 7.

179. E. BURKE, *supra* note 2, at 317.

180. E. BURKE, *Speech on the Sixth Article of Charge* (Apr. 25, 1789) in 10 THE WORKS OF EDMUND BURKE, *supra* note 1, at 240, 251.

Company's debtors.<sup>181</sup> When Burke thought of New Testament comparisons, he recalled Satan surveying the kingdoms of the world and said of Hastings that "he looked out over the waste of Oude with a diabolical malice which one could hardly suppose existed in the prototype himself."<sup>182</sup> Each of the metaphors or images dehumanized Hastings.

Minutely examined and marshalled in the final nine days of oratory, Hastings' faults made him evil personified. The degree of abstraction Burke reached is measured by his ultimate assault on the advice that one should "hate the sin and love the sinner," paraphrased by him as "hate the crime and love the criminal." Burke became incredulous that he should be asked to love a Nero or Domitian. "No," he affirmed, "we hate the crime, and we hate the criminal ten times more . . . ."<sup>183</sup> The maxim of charity he represented as "the language of false morality."<sup>184</sup> As a convinced Christian he was required to love his enemies, but he put that conviction aside; he could not love the abstract symbol of corruption that Hastings had become.

Cicero's Hog had run away. The real man had never stood for judgment by the court. But Burke's Hog was visible to everyone, a man devoted to his wife, generous to his relatives, kind to his dependents, admired by many of the English in India, trusted by many stockholders of the Company, on good terms with a variety of Indians, a friend of peers, above all a ruler who had some political successes to his credit. A political tribunal may be expected to reach its conclusions politically and pragmatically, balancing successes against derelictions, not exclusively vindicating justice. There was no such person as Hog Two, corrupt and cruel and dishonest in his every move. When asked to judge the abstract Hog, the embodiment of evil, the Lords judged the politician and the man.

Finally, the prosecution failed because it failed to touch Hastings. He could not at first take it seriously. When his agent, Scott, told him that Thurlow was ashamed at the attention given "the ravings of a madman,"<sup>185</sup> Scott echoed Hastings' own sense of Burke as

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181. 2 SPEECHES OF THE MANAGERS, *supra* note 7, at 477 (speech of James Erskine St. Clair, Manager (May 30, 1791)).

182. E. BURKE, *Speech in General Reply* (June 7, 1794), in 12 THE WORKS OF EDMUND BURKE, *supra* note 1, at 3, 31.

183. E. BURKE, *supra* note 2, at 277.

184. *Id.*

185. Letter from Major John Scott to Warren Hastings (Jan. 18, 1786), *quoted in* P. MARSHALL, *supra* note 11, at 33.

a fool. A later and more considered conclusion was that Burke was motivated by misanthropy. Hastings concluded that Burke's "hatred of others infinitely exceeds his love of himself"<sup>186</sup>—a sharp judgment by a man himself so noticeably not deficient in self-love. Holding his chief prosecutor to be unnatural in his tendencies, Hastings preserved an attitude of icy disdain when on trial before the Lords. As Burke noted disparagingly, Hastings' demeanor lacked decorum and suggested audacity.<sup>187</sup> Wearing such armor, he could not be convinced that he had erred in any way. The armor reflected the inner man. Years before, in 1773, Hastings had written the Company that three-year appointments in India were too short, that they operated as a stimulus to rapacity. "The Care of Self-preservation," he wrote, "will naturally suggest the Necessity of seizing the Opportunity of present Power . . . ."<sup>188</sup> The words put his own philosophy succinctly. Self-preservation was a duty; it implied the use of opportunities. Naturally its suggestions should be followed. It was not only natural but necessary that power, while it was enjoyed, should be used for oneself. A man who naturally had done what was necessary could not feel fright, remorse or guilt when a hater of his fellow man denounced him as a criminal. Hastings' aplomb was unshaken.

*The Accomplishments of the Prosecution.* Inwardly untouched, outwardly complacent, Hastings nevertheless felt the strain of his trial. It began with the public humiliation of kneeling before the Lords at the opening of the trial, "punishment not only before conviction, but before the accusations"<sup>189</sup> as he described it with a Hastingsism which conveniently ignored the votes taken with Commons. The strain continued with the publicity that attended the case and made him notorious in the public eye. His legal expenses, eventually recouped, were large—over 70,000 pounds.<sup>190</sup> Expenses for propaganda and the promotion of selected candidates for seats in the Commons, never reimbursed, ran to at least another 26,000 pounds.<sup>191</sup> Confident of his acquittal, untroubled in conscience, Has-

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186. Diary of Warren Hastings (n.d.), quoted in K. FEILING, *supra* note 6, at 358.

187. E. BURKE, *supra* note 3, at 165-66.

188. Letter from Warren Hastings to the Honourable Secret Committee of the Honourable Court of Directors (Nov. 11, 1773), reprinted in HOUSE OF LORDS SESSIONAL PAPERS, *supra* note 122, at 2829.

189. Diary of Warren Hastings (May 21, 1787), quoted in K. FEILING, *supra* note 6, at 348.

190. See K. FEILING, *supra* note 6, at 370, 382-83.

191. See P. MARSHALL, *supra* note 11, at 84 (6,000 pounds spent by Scott during trial); Marshall, *supra* note 45, at 298 (over 20,000 pounds spent by Scott by 1786).

tings was acutely aware that he was involved in a process where something could destroy him. For “nine, long years,” as he put it, calculating from the Commons’ first vote, he had been “[b]ound to the stake.”<sup>192</sup>

By conventional standards trial is not punishment, and a trial that ends in acquittal is no sanction at all. But a trial of seven years on a large public stage was a punishment. To this sanction was added a second: For the period of the trial, and for well over a decade after the acquittal, Hastings existed in a political limbo. He experienced “total insignificance in public life.”<sup>193</sup> The most knowledgeable man in England on Indian affairs, he was given no voice in their management. At age fifty-two he was retired, and when finally he was consulted formally in 1813 he was an old man speaking from another time. The third sanction was of a similar kind. He never received the peerage that his position as Governor-General led him to expect. Pitt put off his friends’ importunities in 1784;<sup>194</sup> the trial assured that he would never be elevated. The Lords were ready to acquit him; no administration was willing to make him a lord himself. In these ways, social not legal, pragmatic not theoretical, indirect and tempered, not direct and absolute, Hastings was sanctioned for the presents he had taken.

The governor who replaced Hastings, John Macpherson, tried “to preserve what he could of the system which had enabled the group about Hastings to make their profits.”<sup>195</sup> But the next Governor, Charles Cornwallis—the same Cornwallis known to Americans by his surrender at Yorktown—brought about reforms. Concentrating on the future, he took no interest in punishing Hastings. Personally Cornwallis found him “amiable” and regretted the prosecution. He publicly testified before the Lords in support of Hastings’ reputation: No one in India had complained to him about Hastings—he was, in general, respected.<sup>196</sup> But in those forums he thought appropriate he left no doubt of his convictions: Writing the chairman of the directors in 1787, he said the directors knew “the shocking evils” of Hastings’ era and had quarrelled over whether their friends or

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192. K. FEILING, *supra* note 6, at 271.

193. *Id.* at 383.

194. P. MARSHALL, *supra* note 11, at 33.

195. H. FURBER, *supra* note 25, at 235.

196. Minutes of the evidence taken in the trial of Warren Hastings (Apr. 9, 1794), *supra* note 122, at 2719, 2720 (testimony of Charles Cornwallis).

Hastings' "should enjoy the plunder."<sup>197</sup> Writing the directors in 1788, he enlarged on the need for breaking from "the temptations, dangers and discredit of the former system of conceal'd emolument."<sup>198</sup> Writing Dundas, head of the government's Board of Control for India, he mocked "the good old principles of Leadenhall-street economy" of "small salaries and immense perquisites,"<sup>199</sup> whose victims were not the directors but the British nation. Denouncing Governor Macpherson to Dundas, he found his conduct as impeachable "as Mr. Hastings's."<sup>200</sup>

Chosen by Dundas as one who had "no broken fortune to be mended,"<sup>201</sup> Cornwallis arrived in Bengal in the fall of 1786 as the impeachment proceedings were going on in the Commons. The "senior members of the Company's civil and military services were quickly made aware that the Bengal government would henceforth not be conducted for their private advantage."<sup>202</sup> Governors still would come to India to seek their fortune, but Cornwallis' achievement was to be a substantial reduction of corruption among the Company's civil employees.<sup>203</sup> This achievement can scarcely be understood apart from the sanctions visited on Hastings at home. If he had not been impeached, if he had not been tried, if he had not been reduced to political impotence, if he had not been denied his peerage, the efforts of Cornwallis would have been, if not derisory, at least very much less effective. When, as any member of the Company could appreciate, Hastings was paying a substantial social price in England for his conduct in India, there were tangible sanctions supporting Cornwallis' requirements.

What the prosecution accomplished domestically was less tangible. Namier's classic analysis of British politics at the accession of George III in 1760<sup>204</sup> shows it to have been riddled with reciproci-

197. Letter from Earl Cornwallis to John Moffeux, Esq. (Dec. 16, 1787), in 1 CORRESPONDENCE OF CHARLES, FIRST MARQUIS CORNWALLIS 317, 318 (C. Ross 2d ed. 1859).

198. Letter from Earl Cornwallis to Directors of the East India Company (Nov. 1, 1788), quoted in F. WICKWIRE & M. WICKWIRE, CORNWALLIS: THE IMPERIAL YEARS 50 (1980).

199. Letter from Earl Cornwallis to Henry Dundas (Dec. 31, 1790), in 2 CORRESPONDENCE OF CHARLES, FIRST MARQUIS CORNWALLIS 67-68 (C. Ross 2d ed. 1859).

200. Letter from Earl Cornwallis to Henry Dundas (Nov. 1, 1788), in 2 CORRESPONDENCE OF CHARLES, FIRST MARQUIS CORNWALLIS 383 (C. Ross 2d ed. 1859).

201. Statement of Henry Dundas in the House of Commons, quoted in J. MILL, *supra* note 21, 537.

202. H. FURBER, *supra* note 25, at 240.

203. *Id.* at 256.

204. L. NAMIER, THE STRUCTURE OF POLITICS AT THE ACCESSION OF GEORGE III (2d

ties. Landlords delivered their tenants' votes in parliamentary elections; it was thought normal for the tenants to be responsive to their wishes.<sup>205</sup> Nepotism determined the choice of parliamentary candidates and was "an acknowledged principle in administration."<sup>206</sup> Businessmen entered Parliament as a good way to get a government contract or were paid off by a government contract for running in an expensive constituency; even the parliamentary franking privilege was used for business profit. Patronage—expressed in appointments and promotions in all branches of government, civil, ecclesiastical, and military; in contracts; in the distribution of titles; in the award of totally discretionary pensions—was the way an administration nourished its parliamentary following.<sup>207</sup> Discounting the need of any administration to use much secret service money for political bribes, Namier generalized,

Bribery, to be really effective, has to be widespread and open; it has to be the custom of the land and cease to dishonour the recipients, so that its prizes may attract the average self-respecting man. Such were political emoluments in Great Britain about the middle of the eighteenth century, and the real mystery about the secret service fund of that time is why it should have existed at all, when, to say the very least, nine-tenths of the subsidizing of politicians was done in the full light of the day.<sup>208</sup>

No structural changes occurred between 1760 and 1795. If open bribery was "the custom of the land" when Hastings' impeachment began, it was so when it ended. By adept use of patronage Dundas himself built a political machine in Scotland. His power as Chairman of the Board of Control in India profited his relatives and his Scottish allies. The "Scottization" of India was his monument.<sup>209</sup> Meanwhile he engaged in conduct at home which led to his own impeachment by the Commons, and acquittal by the Lords, in 1805.<sup>210</sup>

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ed. 1965).

205. *Id.* at 68-69.

206. *Id.* at 359.

207. *See id.* at 46-49.

208. *Id.* at 176.

209. H. FURBER, *HENRY DUNDAS: FIRST VISCOUNT MELVILLE 1742-1811* at 32.

210. Dundas, as Treasurer of the Navy, borrowed money from his subordinate, Alexander Trotter, paymaster of the Navy. Trotter had been embezzling Navy funds to finance his private speculations. Dundas apparently knew of Trotter's activities and accepted the loans as a quid pro quo for his silence. *See id.* at 157-61. Dundas was censured by the House of Commons and then impeached in 1805. He was, however, acquitted. *See id.* at 155-64. His biographer writes in his defense that the embezzlements "occasioned no actual loss to the government. Trotter was uniformly successful [in his private speculation] and paid all his Navy

Burke's own career is another case in point. Aged thirty, an aspiring Irish writer from Dublin, a law studies drop-out without definite employment or income in London and with a wife and two children, Burke entered the political realm by becoming the secretary of a minor English politician, William Hamilton. In 1761, Hamilton became Chief Secretary to the Lord Lieutenant of Ireland. After two years service to Hamilton in this capacity, Burke was awarded a pension of 300 pounds per year chargeable to the Irish budget. Like many other government pensions of the era, this was terminable at the government's pleasure, not retirement pay but an act of patronage intended to reciprocate and maintain loyalty to the patron. Samuel Johnson—though he was, with embarrassment, to take a pension himself—in his dictionary defined a pension as “[a]n allowance made to any one without an equivalent. In England it is generally understood to mean pay given to a state hireling for treason to his country”; and he defined a pensioner as “[a] slave of state hired by a stipend to obey his master.”<sup>211</sup> Burke's candid view of his pension was “if it had come from Hamiltons [sic] Pocket instead of being derived from the Irish Treasury, I had earned it by a Long and Laborious attendance.”<sup>212</sup> The pension continued after both Hamilton and Burke had left Ireland, and they quarrelled over whether Burke's taking it meant that he was bound to keep on working for Hamilton. Burke thought this a kind of servitude—he was perhaps not far from Johnson's view—but neither master nor man admitted any illegality in making the Irish compensate Burke for his past service to Hamilton. In the end, Burke gave up both the pension and his employer.

In retrospect, Burke was glad to be free from Hamilton: “the wear and tear of mind, which is saved by keeping aloof from crooked politicks, is a consideration absolutely inestimable.”<sup>213</sup> When Burke wrote these lines he was private secretary to a major Whig politician, Lord Rockingham. He could not have meant that all politics were crooked; he was reflecting on the work of Hamilton—“extremely disgusting to me”<sup>214</sup>—in a central position in the

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accounts.” *Id.* at 149. Indeed, every embezzler hopes for just that—that he will be “uniformly successful.”

211. S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London 1785).

212. Letter from Edmund Burke to Henry Flood (May 18, 1765), in 1 THE CORRESPONDENCE OF EDMUND BURKE 192, 193 (T. Copeland ed. 1958).

213. Letter from Edmund Burke to Charles O'Hara (Dec. 23, 1766), in 1 THE CORRESPONDENCE OF EDMUND BURKE 284, 285 (T. Copeland ed. 1958).

214. Letter from Edmund Burke to Henry Flood (May 18, 1765), *supra* note 212, at



English government of Ireland. Hamilton acquired a "ministerial fortune"<sup>215</sup> by his endeavors and gave Burke an insider's view of colonial government that he did not forget when he spoke of Hastings.

Serving Rockingham, Burke became a member of Parliament and, losing his constituency at Bristol, was glad in the 1780's and 1790's to be the member from Malton, the Rockingham family's pocket borough. Here he owed his parliamentary existence not to the public will but to the good graces of his patron. Rockingham's heir could congratulate him on "the credit and reputation you have confer'd upon me by receiving the seat at my hands";<sup>216</sup> Burke nonetheless sat indebted to a single landlord's nod. When Rockingham came in in 1782, he had his share of the spoils—himself Paymaster General of the Forces; his younger brother Secretary of the Treasury;<sup>217</sup> Champion, a debt-ridden backer, Deputy Paymaster;<sup>218</sup> his own son Richard, another Deputy.<sup>219</sup> They were all out with Shelburne and back again with the Coalition.

For Richard, the center of his care, "the best and dearest part of me,"<sup>220</sup>—"You need stipulate nothing, except for my poor Lad,"<sup>221</sup> he had told Rockingham—he struggled to secure a life sinecure, finally doing so under the Coalition. Richard was appointed Receiver of Land Revenues, holding the position jointly with a straw who, even after Richard's unexpected death, held the office in trust for "Mr. Burke and his family," paying 7,000 pounds to their account.<sup>222</sup> Richard's father saw the money as coming from a useful fund meant to provide "a reward to publick service"<sup>223</sup>—in this case, whether his own past service or his twenty-five year old son's future

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215. Letter from Edmund Burke to John Monck Mason (May 29, 1765), in 1 *THE CORRESPONDENCE OF EDMUND BURKE* 195, 196 (T. Copeland ed. 1958).

216. Letter from Earl Fitzwilliam to Edmund Burke (June 26, 1794), in 7 *THE CORRESPONDENCE OF EDMUND BURKE* 555, 555 (P. Marshall & J. Woods eds. 1968).

217. Letter from Richard Burke, Sr. to Mrs. Juliana French (Apr. 6, 1782), in 4 *THE CORRESPONDENCE OF EDMUND BURKE* 437, 437 (J. Woods ed. 1963).

218. 5 *THE CORRESPONDENCE OF EDMUND BURKE* 96 (H. Furber ed. 1965).

219. Letter from Richard Burke, Sr. to Mrs. Juliana French (Apr. 6, 1782), *supra* note 217, at 437.

220. Letter from Edmund Burke to Unknown Lord (May 19, 1796), in 9 *THE CORRESPONDENCE OF EDMUND BURKE* (pt. 1) 12, 12 (R. McDowell ed. 1970).

221. Edmund Burke, Memoranda for Consideration (n.d.), in 4 *THE CORRESPONDENCE OF EDMUND BURKE* 423, 424 (J. Woods ed. 1963).

222. Letter from Walter King to Lord Fitzwilliam (Dec. 30, 1807), *quoted in* 5 *THE CORRESPONDENCE OF EDMUND BURKE* 82 n.7 (H. Furber ed. 1965).

223. Letter from Edmund Burke to Richard Burke, Jr. (Nov. 25, 1782), in 5 *THE CORRESPONDENCE OF EDMUND BURKE* 51, 52 (H. Furber ed. 1965).

service is not clear. Even during the impeachment trial, Burke looked out for his relations—his brother became one of the feed counsel to the Managers,<sup>224</sup> son Richard served as one of their clerks.<sup>225</sup>

For a widowed sister in Ireland who had no public service to her credit he bestirred himself, unsuccessfully, to obtain a pension of 100 pounds a year for life.<sup>226</sup> On behalf of his close friend, financial manager, and courtesy cousin, William Burke, he was more successful. William had made money by an investment in the Company in the '60's, enabling their joint purchase of an estate at Beaconsfield,<sup>227</sup> and then had lost heavily in Company stock. Broke, he set out for India itself, accompanied by a letter from Edmund to Francis, then on the Supreme Council in Bengal, speaking of his departure as the loss of "a friend, whom I have tenderly loved," and adding:

Indemnify me, my dear Sir, as well as you can, for such a loss, by contributing to the fortune of my friend. Bring him home with you an obliged person and at his ease, under the protection of your opulence . . . Remember that he asks those favours which nothing but his sense of honour prevented his having it in his power to bestow.<sup>228</sup>

A letter from a mutual friend to Francis informed him that to help William would "oblige E.B. by serving his nearest and dearest friend."<sup>229</sup> When Rockingham took office, Edmund assured William that he would be taken care of "in the new Indian arrangements,"<sup>230</sup> and he finally made him Deputy Paymaster General in India, a lucrative position and a "most unnecessary job . . . and a material hindrance to the public business,"<sup>231</sup> according to Cornwallis when he had seen William at work in India. William traded on Edmund's name, securing in 1786 a "scandalous" rate of exchange on money

224. 5 THE CORRESPONDENCE OF EDMUND BURKE 324 n.3 (H. Furber ed. 1965).

225. Letter from Edmund Burke to Edmond Malone (Feb. 12, 1788), in 5 THE CORRESPONDENCES OF EDMUND BURKE 378, 378 (H. Furber ed. 1965).

226. Letter from Edmund Burke to Thomas Lewis O'Beirne (Aug. 27, 1787), in 5 THE CORRESPONDENCE OF EDMUND BURKE 31, 32 (H. Furber ed. 1965).

227. See 1 THE CORRESPONDENCE OF EDMUND BURKE 351 n.2 (T. Copeland ed. 1958).

228. Letter from Edmund Burke to Philip Francis (June 9, 1777), in 3 THE CORRESPONDENCE OF EDMUND BURKE 348, 348 (G. Guttridge ed. 1961).

229. Letter from John Bourke to Philip Francis (Apr. 29, 1777), in 3 THE CORRESPONDENCE OF EDMUND BURKE 348 n.1 (G. Guttridge ed. 1961).

230. Letter from Edmund Burke to William Burke (Mar. 27, 1782), *supra* note 43, at 430.

231. Letter from Earl Cornwallis to Lord Rawdon (Dec. 2, 1789), in 1 CORRESPONDENCE OF CHARLES, FIRST MARQUIS CORNWALLIS 463, 465 (C. Ross 2d ed. 1859).

for the troops from Governor Macpherson, who found this a way “to pay his court to Edmund Burke.”<sup>232</sup>

One man’s “reward to publick service”<sup>233</sup> is another man’s bribe, it might be observed. A family that draws on the public trough cannot be reformed by the prosecution of someone who has succeeded more spectacularly; the prosecution may even be considered an outlet for their jealousy. Of course the prosecution had no impact at home when it was undertaken by those so thoroughly enmeshed in the system. Burke once said of an oration of the elder Pitt attacking “any sort of personal connections,” that it was “a Speech too virtuous to be honest.”<sup>234</sup> Was not the whole prosecution of Hastings too virtuous to be honest?

The foregoing analysis, however, is gross and indiscriminating and fails to take into account the element of convention in the definition of bribery. What is given, how soon it is given, how specifically it is exchanged—these determine what counts as a bribe. Not every reciprocity is bad by the standard of the day. By 1769, to offer money for an office was a crime, as Lord Mansfield had held, adding, “If these transactions are believed to be frequent, it is time to put a stop to them.”<sup>235</sup> Quid pro quos in patronage, preferment, and even pensions were distinguished by eighteenth century politicians from the payment of ready cash. Johnson, as has been seen, was more censorious. Fox’s casual example of an MP taking money for a vote showed that everyone would have understood that act as indefensible. It was in an altogether different category from a parliamentary follower being remunerated by a plum. When James Boswell sought his held in getting office in the wake of Rockingham’s victory, Burke wrote him, “My friends in power have come in with equally long claims upon them, with a divided Patronage, and a reduced Establishment. If I could serve you I tell you in sincerity, that the bringing you to a residence here would be no mean Bribe to me.”<sup>236</sup> To Boswell, Burke was as innocent as Isabella’s calling her prayer a bribe in *Measure for Measure*.

With no sense of hypocrisy or irony—only with a nice and lim-

232. *Id.* at 464 (parenthesis omitted).

233. See *supra* note 223 and accompanying text.

234. Letter from Edmund Burke to Charles O’Hara (Apr. 23-24, 1766), in 1 *THE CORRESPONDENCE OF EDMUND BURKE* 251, 252 (T. Copeland ed. 1958).

235. *Rex v. Vaughan*, 98 Eng. Rep. 308, 310 (K.B. 1769).

236. Letter from Edmund Burke to James Boswell (Apr. 23, 1782), in 4 *THE CORRESPONDENCE OF EDMUND BURKE* 445, 445 (J. Woods ed. 1963).

ited sense of the meaning of bribery—Burke told the Lords: “[I]f there is any one thing which distinguishes this nation eminently above another, it is, that in its offices at home, both judicial and in the state, there is less suspicion of pecuniary corruption attaching to them than to any similar offices in any part of the globe, or that have existed at any time . . . .”<sup>237</sup> The emphasis here was on “at home” and on “pecuniary corruption.” When Burke further told the Lords that bribes in England were indeed so “little known” that we “can hardly get clear and specific technical names to distinguish them,”<sup>238</sup> he unconsciously confessed how little thought had been given to the variety of reciprocal exchanges in English political existence. But taking the English system as it was, he knew that a bribe was a payment for the specific use of official power. The assault of the prosecution on cash bribery could only reinforce the rules at home against it and do nothing to disturb the accepted forms of patronage—except that persons of another generation, less implicated in the system, might be led to reflect, reading Burke, that by his own principles there was much need of reform in England.

The final accomplishment of the prosecution was the education of future generations. Defeated, ill, despondent, Burke in 1797 wrote the Impeachment Managers’ old counsel, French Laurence, laying on him the “solemn charge and trust”<sup>239</sup> to write a history of Hastings’ trial. “If ever Europe recovers its civilization, that work will be useful. Remember! Remember! Remember!”<sup>240</sup> Laurence did not carry out the charge, but historians of all kinds have kept alive the memory. Not all have remembered it as Burke would have wanted, but his own words and deeds are available to anyone who cares to read.

Burke complained on occasion that it was the policy of Hastings’ party to treat the prosecution “as nothing more than the private Business of one Mr. Burke” and to make it out to be “no more than a scuffle between Mr. Burke and Mr. Hastings.”<sup>241</sup> Biographers of each have found it easy to fall into this trap, and every account of the trial inclines to this focus on the two chief combatants. A prose-

237. E. BURKE, *supra* note 1, at 7.

238. E. BURKE, *supra* note 173, at 161.

239. Letter from Edmund Burke to French Laurence (July 28, 1796), in 9 THE CORRESPONDENCE OF EDMUND BURKE (pt. 1) 62, 62 (R. McDowell ed. 1970).

240. *Id.* at 63.

241. Letter from Edmund Burke to Henry Dundas (Mar. 22, 1792), in 7 THE CORRESPONDENCE OF EDMUND BURKE 107, 114 (P. Marshall & J. Woods eds. 1968).

cution voted by Parliament with the consent of the government was clearly no vendetta in the sense Hastings' friends suggested, and Burke alone would have been powerless. Among the Managers of the prosecution were John Anstruther, future Chief Justice of Bengal; Charles Fox, past First Minister; John Grey, future Prime Minister; Richard Brinsley Sheridan, the leading playwright of the day; aided by such counsel as the learned Laurence, later Regius Professor of Civil Law at Oxford. But Burke was the principal force in bringing the impeachment about, and in terms of the record made for posterity it is he who has had the greatest impact.

For Burke, concrete responsibilities arose with particular employments. "Humana *qua parte* locatus es in re?" he quoted and italicized Persius' *Satires*.<sup>243</sup> In what human place are you situated in the affair? This Burke pronounced "the best rule both in morals and in prudence."<sup>243</sup> Of all situations public employment was the most demanding. "[A]ll political power which is set over men," he declared, arguing for the Coalition's East India Bill in 1783, "ought to be some way or other exercised ultimately for their benefit."<sup>244</sup> All political power was therefore a trust; and "it is of the very essence of every trust to be rendered *accountable*."<sup>245</sup> So Hastings must account. On this basis the Articles of Impeachment were framed in terms of the office Hastings held, and Burke could tell the Lords that "every office of trust, in its very nature, forbids the receipt of bribes."<sup>246</sup>

In one of the noblest of his speeches, on conciliation with America, spoken prophetically a month before the events at Concord and Lexington, Burke told Parliament that what gave it an army and a navy and a revenue was nothing but "the love of the people." His words, he said he knew, would appear "wild and chimerical" to "vulgar and mechanical politicians." To Parliament, near the close of his peroration, he addressed words taken from the Latin mass—"the old warning of the Church" as he described it—"Sursum corda!" Only by the members lifting up their hearts beyond "the gross and material"<sup>247</sup> to the level where love reciprocated fidelity could revolution

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242. Letter from Edmund Burke to Richard Shackleton (May 25, 1779), in 4 THE CORRESPONDENCE OF EDMUND BURKE 78, 79 (J. Woods ed. 1963) (emphasis in original).

243. *Id.*

244. E. BURKE, *Speech on Mr. Fox's East India Bill* (Dec. 1, 1783), in THE WORKS OF EDMUND BURKE, *supra* note 1, at 432, 439.

245. *Id.* (emphasis added).

246. E. BURKE, *supra* note 1, at 12.

247. E. BURKE, *Speech on Conciliation with America* (Mar. 22, 1775), in 2 THE

be avoided and government endure.

Sealing these responsibilities of man was the "one law for all, namely, that law which governs all law, the law of our Creator, the law of humanity, justice, equity,—the Law of Nature and of Nations."<sup>248</sup> For Burke, this single law was not a legal or philosophical abstraction but was linked in a lively way to his religious faith. In an extraordinary letter to a young woman, Joshua Reynolds' niece, whose "friend" in India spoke ill of him, Burke wrote:

"I have no party in this Business, my dear Miss Palmer, but among a set of people, who have none of your Lillies and Roses in their faces; but who are the images of the great Pattern as well as you and I. I know what I am doing; whether the white people like it or not."<sup>249</sup>

The Indians without English complexions were his clients because they were made in the image of God. Service to them was based on the imitation of Christ. As he told the Lords in a rare direct evocation of his religion:

[W]hen the God whom we adore appeared in human form, He did not appear in a form of greatness and majesty, but in sympathy with the lowest of the people, and thereby made it a firm and ruling principle that their welfare was the object of all government, since the Person who was the Master of Nature chose to appear Himself in a subordinate situation.<sup>250</sup>

That, by the example of Christ, the welfare of the people was "the object of all government" was the foundation of Burke's view of the trust that went with office.<sup>251</sup> The view co-existed with Burke's immersion in the politics of patronage, the only political system he knew. It co-existed with a willingness to provide office for his relatives and friends. It co-existed with the belief that there were honest ways for Englishmen to enrich themselves while governing India. "My dearest Miss Palmer, God bless you; and send your friend home to you Rich and innocent. . . .", Burke's letter to Reynolds' niece concluded.<sup>252</sup> In the same way he had wanted William Burke's

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WORKS OF EDMUND BURKE, *supra* note 1, at 99, 181.

248. E. BURKE, *supra* note 3, at 225.

249. Letter from Edmund Burke to Miss Mary Palmer (Jan. 19, 1786), in 5 THE CORRESPONDENCE OF EDMUND BURKE 252, 255 (H. Furber ed. 1965).

250. E. BURKE, *supra* note 4, at 144.

251. For a discussion on the centrality of Christian belief for Burke, see G. CHAPMAN, EDMUND BURKE, THE PRACTICAL IMAGINATION 271-73 (1967).

252. Letter from Edmund Burke to Miss Mary Palmer (Jan. 19, 1786), *supra* note 249,

rectitude rewarded in Bengal. Becoming rich and remaining innocent in India were inconsistent goals; serving oneself and those one governed were incompatible objectives, not propositions he would have entertained.

In 1792, isolated by his horror of the French Revolution from his old associates like Fox, Burke was harassed by a motion in the Commons by Hastings' agent, Scott. The motion asked for detailed accounts of the cost of the prosecution. Writing Dundas to get the administration's support against the bill, Burke observed that Hastings hoped to load "the whole of the publick disgrace" upon a person who had "become obnoxious to his old party, without having secured protection from a new."<sup>253</sup> Yet he, Edmund Burke, would pay all the costs, except that of the short-hand writer, if Hastings could not escape. "Twelve years have been spent in this one Indian pursuit," Burke wrote looking back to his committee service in 1780. "What but some irresistible Sense of Duty could induce me to continue so unthankful, unfruitful and unpleasant an occupation . . . . He, who, in long publick service, obtains no rank, no emollument, no power, and no commendation from any publick party, expiates a good many smaller Offenses."<sup>254</sup> Plenty of other reasons could have been given—pride, stubbornness, lack of other occupation—as to why Burke went on with the case. The reason he had no rank, power or income was because he had chosen once, far back, not to join Pitt and had made the wrong choice in terms of political opportunities. Self-pitying as the letter to Dundas was, it was also true that he stuck to his task long after he knew of the stack of "dead votes" for Hastings. "God knows what a bitterness I feel in my Mouth in returning to my Indian Vomit," he wrote at the beginning of the last year of the case.<sup>255</sup> Yet he went on, making the long closing speeches and urging the Lords to be "the perpetual residence of an inviolable justice!"<sup>256</sup>

"[E]ven my imputed thoughts," Hastings remarked before the Commons, "as at the final day of judgement, are wrested into accusation against me."<sup>257</sup> It was no accident that he should have had

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at 257.

253. Letter from Edmund Burke to Henry Dundas (Mar. 22, 1792), *supra* note 241, at 114.

254. *Id.* at 116.

255. Letter from Edmund Burke to William Windham (Jan. 8, 1795), in 8 *THE CORRESPONDENCE OF EDMUND BURKE* 113, 113 (R. McDowell ed. 1969).

256. E. BURKE, *supra* note 8, at 398.

257. Statement of Warren Hastings, *quoted in* K. FEILING, *supra* note 6, at 340.

this sense of being arraigned before such an ultimate bar. When Burke set out on his "vast Task" to vindicate the principles of just government against Hastings, he had acknowledged that convicting Hastings was impracticable. Realism of this kind vacillated with hope of victory as he proceeded, but his more sober belief was in vindication by a judgment of posterity that was an eighteenth century stand-in for the Last Judgment; and at times Burke counted only on divine vindication.

In his peroration before the Lords, Burke spoke of Justice as "emanating from the Divinity."<sup>258</sup> It "will stand," he declared, "after this globe is burned to ashes, our advocate or our accuser before the great Judge, when He comes to call upon us for the tenor of a well-spent life."<sup>259</sup> Now knowing but not believing that the Lords would not convict, Burke put himself and his listeners before the tribunal at the end of time and made Justice herself a party to the final litigation. He did so to evoke for himself and the human judges the sense that the judgment that was to be rendered would be reviewed by God.

On April 23, 1795, the Lords judged formally that Hastings was not guilty. A month later the Company proposed to indemnify his legal costs. Burke wrote to urge Dundas to prevent it, else "the House of Commons must go to the Dogs."<sup>260</sup> His protest was in vain, and the following year the Company awarded Hastings a pension. In Burke's view he was being "publicly rewarded" by the Company with a pension for "crimes" which had been "*proved* against him."<sup>261</sup> Pitt and Dundas failed to prevent the Company from paying. In 1797, Burke concluded that it was publicly established that he had "with such incredible pains both of himself and others, persevered in the persecution of innocence and merit."<sup>262</sup> To pragmatic minds his concern with principle, past deeds, and vindictive justice had seemed ridiculous, misanthropic, mad. For starting such a quixotic crusade he could be characterized by even a modern historian as

258. E. BURKE, *supra* note 8, at 395.

259. *Id.* at 395-96.

260. Letter from Edmund Burke to Henry Dundas (June 5, 1795), in 8 THE CORRESPONDENCE OF EDMUND BURKE 260, 260 (R. McDowell ed. 1969).

261. Letter from Edmund Burke to Lord Loughborough (Mar. 7, 1796), in 8 THE CORRESPONDENCE OF EDMUND BURKE 406, 406 (R. McDowell ed. 1969) (emphasis in original).

262. Letter from Edmund Burke and Edward James Nagle to French Laurence (Feb. 10, 12, 1797), in 9 THE CORRESPONDENCE OF EDMUND BURKE (pt. 1) 236, 238 (R. McDowell ed. 1970).



possessed of a “‘disordered’ mind.”<sup>263</sup> Irony alone was left him, and his “Remember! Remember! Remember!”

What the Commons sought, he had told the Lords in May 1794, was to “see corrupt Pride prostrate under the feet of Justice.”<sup>264</sup> What he furnished in his own person was a different image—a politician, an M.P., an orator, suffering in heart and mind and spirit for his failure to achieve the chastisement of corruption. That his posture was more Christian, if less comfortable, than Cicero’s might have occurred to him.

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263. 2 L. NAMIER & J. BROOKE, *THE HISTORY OF PARLIAMENT* 153 (1964).

264. E. BURKE, *supra* note 3, at 180.