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From Hume to Smith on the Common Law and English Liberty: A Comment on Paul Sagar

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In a *Political Theory* article, “On the Liberty of the English: Adam Smith’s Reply to Montesquieu and Hume,” Paul Sagar (2021) treats Smith in relation to Montesquieu and David Hume on the origins, development, and robustness of English liberty. In doing so he fashions something of a divide between Smith and Hume with respect to their views on the development of liberty in England. Sagar suggests a difference between Smith and Hume on the importance of the common law, that “Smith took more seriously than Hume the idea that liberty required not just an appropriate constitution but quotidian security as realized via law” (2021, 18). Sagar goes further to say that Hume would underestimate, or miss entirely, the idea “that liberty must be understood not just in terms of the form of constitution and wider political order, but also regarding the security of citizens as achieved via the legal system, and especially the operation of fair trials” (ibid., 14).

Upon reading and reflecting on Sagar’s paper, I felt that Sagar had failed to do justice to Hume. I drafted a comment along the lines of the present article and submitted it to *Political Theory*, where Sagar’s paper appears, but it was turned down without explanation.

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Sagar on Smith and Hume

According to Sagar, Montesquieu, in a manner like Tacitus, traces English liberty back to the ancient customs of the Germans, rooted in bottom-up way in local practice and judgment. But in Montesquieu's estimation, English liberty was fragile. In Sagar's article, Hume is cast as counterpart to the Frenchman. Hume, according to Sagar, dated the origins of English liberty to the Glorious Revolution when Parliament secured its supremacy over the king. In Hume's estimation, English liberty was robust.

Sagar does not define what he means by liberty. Nor does he wade into interpreting how Montesquieu, Hume, and Smith use the word themselves. I do not fault him for that. In this paper I myself will avoid wading into debating the many meanings of liberty. But it is worth remembering that there are many meanings of liberty. Hume talks of liberty with many different modifiers. At times, Hume seems to see liberty as synonymous with general rules that are consistently and equitably applied. But other times, Hume's liberty is more akin to a particular constitutional order, particularly the post-revolution British constitution. Daniel Klein and Erik Matson (2020) argue that a central meaning of liberty in Hume is "others not messing with one stuff," which they dub "mere-liberty." Keeping these different senses of liberty in mind, even if in the background, is important.

Sagar then turns to Smith, arguing that we should situate the Scotsman "as intervening in the debate between Montesquieu and Hume on the origins, age, and robustness of English liberty" (2021, 2). He argues that Smith agreed with Hume on the importance of the Glorious Revolution for securing English liberty, but unlike Hume, Smith recognized that the reforms of the Revolution were "grafted onto, and...greatly enhanced by, a wider preexisting legal framework," namely the common law (*ibid.*, 15). For Sagar's Smith, the common law, particularly the legal and administrative reforms of king Edward I (r. 1272–1307), constituted a major development in the story of English liberty, a development that Sagar supposes Hume underappreciated or missed entirely. In the course of making his argument about the importance of the common law in Smith's historical narrative in *Lectures on Jurisprudence*, Sagar overlooks Hume's discussions of the common law in *The History of England*.

Sagar (2021, 14) argues that Hume was "comparably inattentive," relative to Smith, on the importance of English common law for the development of liberty. *Comparably* inattentive—perhaps. But throughout his article Sagar regularly portrays Hume as *highly* inattentive to such historical developments. According to Sagar, Hume's narrative is "focused on the high politics of court and parliament and not the day-to-day affairs of legal administration," and, as a result, Hume

supposedly misses the importance of the common law as an element of English liberty (*ibid.*). Instead, Hume’s theory of English liberty supposedly turns merely on the serendipities of 1688. Sagar faults Hume for his supposed oversights: “Core aspects of English liberty long predated the Glorious Revolution in ways Hume had not appreciated” (*ibid.*, 2).

Sagar is right to highlight Hume’s emphasis on the Glorious Revolution for the development of English liberty. But he is wrong to conclude that Hume failed to recognize earlier elements of liberty prior to 1688. In volume 2 of the *History*, Hume discusses arbitrary measures Edward I took to secure funds for his war with France in 1296. The English barons mount a dissent and subsequently forced Edward I to cease and desist and to renew his oath to uphold Magna Carta. They even empowered knights in each county to investigate and punish royal officials for violating Magna Carta. Hume, reacting to the baronial response, writes:

A precaution, which, though it was soon disused, as encroaching too much on royal prerogative, proves the attachment, which the English in that age bore to liberty, and their well-grounded jealousy of the arbitrary disposition of Edward. (*H*, 2:119–121)²

Nearly 400 years before the Glorious Revolution, Hume seems to believe the English bore an attachment to liberty. Liberty may not have been solidified, and the medieval institutions often worked against it, but its spirit inhabited the island.

Sagar (2021, 8) quotes volume six of the *History* in support of his claim that Hume felt it was “only in 1688 that English liberty was finally established and secured”:

The revolution alone...put an end to all these disputes: By means of it, a more uniform edifice was at last erected: The monstrous incoherence, so visible between the ancient Gothic parts of the fabric and the recent plans of liberty, was fully corrected: And to their mutual felicity, king and people were finally taught to know their proper bounds (*H*, 6:475–476; quoted in Sagar 2021, 8).

Sagar follows Hume’s quotation by saying: “Against Montesquieu, Hume’s verdict was that English liberty was not old but very new indeed” (2021, 8). But Hume is not saying here that only in 1688 did liberty spring forth. Hume’s use of “fully corrected” does not preclude the development of elements prior to the revolution and partial corrections along the way. Earlier in the volume 5, Hume again speaks

2. The notation “*H*, 3:76” means page 76 in the third volume of the Liberty Fund edition of Hume’s *History of England*. I adopt such notation throughout. For Adam Smith’s *Wealth of Nations* I adopt the abbreviation *WN* and for his *Lectures on Jurisprudence* I use *LJ*.

of elements of liberty that existed well before 1688:

The grievances, under which the English laboured, when considered in themselves, without regard to the constitution, scarcely deserve the name; nor were they either burthensome on the people's properties, or anywise shocking to the natural humanity of mankind... [Under Charles I's administration] all ecclesiastical affairs were settled by law and uninterrupted precedent; and the church was become a considerable barrier to the power, both legal and illegal, of the crown. Peace too, industry, commerce, opulence; nay, even justice and lenity of administration, notwithstanding some very few exceptions: All these were enjoyed by the people; and every other blessing of government, except liberty, *or rather the present exercise of liberty*, and its proper security. (*H*, 5:249–250, my emphasis)

In Hume's estimation, and, as Sagar argues, Smith's, something meaningful did happen in 1688, but that did not mean that elements of liberty did not exist or were not upheld prior to 1688.

Sagar admits that Hume discusses habeas corpus a few times in his *History*, but correctly points out that Hume "tended to do so only incidentally" (2021, 14). Sagar then concludes that "there is no sustained effort by Hume to tell a story in which the liberty he believed was only secured by the 1688 revolution was itself augmented and buttressed by a wider legal culture that was by that point centuries old." He goes on to detail Smith's account of the English common law and the legal reforms of Edward I. But Sagar overlooks Volume 1 and 2 of Hume's *History* where his discussions of the common law can be found, which dovetail with Smith's narrative.

As I see it, the divide between Smith and Hume is less than Sagar suggests, if it exists at all. Hume did in fact recognize the English common law as an element of English liberty. Rather than replying to Hume, Smith should be seen as developing on Hume's ideas and disseminating the results.

Sagar provides a fine summary of Smith's story given in the *Wealth of Nations* and the *Lectures on Jurisprudence* concerning the medieval barons' embrace of luxury goods and commerce over retainers, retinues, and other instruments of war and plunder. Smith's narrative serves as a great example of his tendency to take the ideas of his friend, Hume, and refine and improve them. Hume's historical account of the civilizing of the barons occurs over two and a half volumes in a disjointed fashion. Hume only once comes out and identifies the phenomenon clearly (*H*, 3:76). Smith's *WN* account is a concise and straightforward 44 paragraphs. Notice how Smith condenses time in his famous "diamond buckles" passage:

But what all the violence of the feudal institutions could never have effected,

the silent and insensible operation of foreign commerce and manufactures gradually brought about. ... For a pair of diamond buckles perhaps, or for something as frivolous and useless, they [the barons] exchanged the maintenance, or what is the same thing, the price of the maintenance of a thousand men for a year, and with it the whole weight and authority which it could give them. (*WN*, 418–419.10)

We might ask, “How gradually did the civilizing process unfold?” Hume would say 450 years, give or take, and it was by no means monotonic. Smith was synthesizing and reformulating the arguments of Hume to make it coherent and understandable to his audience. By drawing out one distinct process taken up in Hume’s *History*, Smith made the civilizing process of commerce more concrete and graspable.

But we should not say that Hume did not understand the importance of that civilizing process for English political development. He did. He even discusses mechanisms unmentioned in Smith’s account, such as Henry VII’s prohibition on baronial military retainers (*H*, 3:75) and his allowance of the barons to alienate their estates (*H*, 3:77). Nor would we say that Smith disagreed with Hume on the importance of that civilizing process for English liberty. Smith cites Hume favorably as “the only writer who, so far as I know, has hitherto taken notice of it” (*WN*, 412.4).

Sagar does not paint a divide between the two Scots on the dynamic by which the barons became gentlemen. He rightfully notes that Smith built upon Hume (Sagar 2021, 12). But on the importance of the common law, and England’s legal system more generally, he does make a separation between Smith and Hume. That separation strikes me as inappropriate. Hume does not have a chapter on the common law in the *History*, nor is it discussed at length in an appendix. Also, there is no “Of the Common Law” in Hume’s *Essays*. We are impoverished because of that. Hume does, however, take up the common law at many key moments in its development in his *History*. The common law is one example of his larger theme of jural integration and its importance for the development of English liberty.

Just as he builds upon, clarifies, and refines Hume’s account of the barons becoming gentlemen, Smith takes up the common law in the *Lectures on Jurisprudence*. Hume spends two volumes giving his readers a rich display of examples of just how violent and licentious the barons were and how the common law (among other things), backed by the increasing authority of the king, suppressed their local authority. Smith distills Hume and combines him with the work of other scholars and his own knowledge to tell a coherent story about the development of the common law and its importance for English liberty. We will never know the extent to which Hume grasped the importance of the common law for development of English liberty, an importance that Smith teaches in his lectures. Hume had more to do than time allowed for, and he understood more than he passed down to us in

essays. Hume certainly had much more than an inkling of the narrative that Smith would come to flesh out with greater detail.

Jural integration in England

Hume's *History of England* is situated between two grand arrivals to Britain: those of Julius Caesar in 55 BCE and William of Orange in 1688. Between those two men, Hume spends six volumes detailing England's high politics and the slow development of the English constitution. And like another great six-part epic saga that began 200 years after his death, Hume produced the *History* out of order. Nowhere in it does Hume have a sweeping analysis of the English common law. In fact, searching the text for "common law" yields only trivialities.

But that does not mean Hume neglects the development of England's legal system. In a sense, that development is a major theme of Hume's *History*. From Arthur to Henry VIII, England was ruled by multiple, competing powers. In volumes 1 and 2 Hume shows us, often in bloody detail, that the quantum of authority and legitimacy of the average medieval king was built on shifting sands (*H*, 2:283–284). In addition to the king, England was home to a number of powerful actors such as the towns, independent barons, and the Roman Church and its affiliate ecclesiastical bodies, not to mention the potential influence of the Welsh, Scottish, and French aristocracies. Each separate authority had its own jurisdiction, source of power and influence, and instruments for making their voice heard.

The existence of multiple powers capable of violence made medieval England a dangerous place to live. Hume characterizes the ancient constitution as one of minimal economic growth plagued by violence and political instability:

The towns were situated either within the demesnes of the king, or the lands of the great barons, and were almost entirely subjected to the absolute will of their master. The languishing state of commerce kept the inhabitants poor and contemptible; and the political institutions were calculated to render that poverty perpetual. The barons and gentry, living in rustic plenty and hospitality, gave no encouragement to the arts, and had no demand for any of the more elaborate manufactures: Every profession was held in contempt but that of arms: And if any merchant or manufacturer rose by industry and frugality to a degree of opulence, he found himself but the more exposed to injuries, from the envy and avidity of the military nobles. (*H*, 1:463)

In addition to plundering their societal inferiors, the barons engaged in private warfare against each other, leaving the countryside in a continual state of chaos

and lawlessness (*H*, 1:231, 237, 250, 284, 288, 350–351, 371–372, 400, 463, 2:11, 143, 189, 279). Even during periods of relative peace between the bigger political players, “men were never secure in their houses” and bands of robbers, often supported by encastellated barons, were known to plunder entire villages (*H*, 1:69, 288).

A main theme of Hume’s *History* is the integration of the separate powers into a single unified government (Forbes 1975, 263; Whelan 2004, 256; Sabl 2012, 65). Dan Klein and I have produced a lengthy compendium that gives 142 quotations from Hume’s *History* touching upon jural pluralism or jural integration (Hall and Klein 2020). Barry Weingast (2015; 2016; 2017) identifies similar themes in Smith’s *Wealth of Nations* and *Lectures on Jurisprudence*. Integration went hand-in-hand with the increasing power and authority of the king. It was a slow process. Two steps forward, one step back. The personal characters of kings were of great importance, as evidenced by both Hume’s historical narrative and his lengthy character portraits. The strongest and most respectable of kings always seemed to sire the weakest and least respectable heirs. Henry II begets John, and Edward I begets Edward II.

But through the centuries, the authority of the king increased in scale and in scope. Individual kings may have been weak, but the crown was growing stronger. The medieval era eventually gave way to what is now called the early modern period. Dating the achievement of establishing an integrated nation-state is not an exact science. If we wish to be poetic, perhaps that transition occurred at Bosworth when Henry Tudor crushed Richard III and his Yorkist supporters. Henry VII and his successor Henry VIII crafted reforms that led to demilitarization of the English aristocracy on a grand scale (*H*, 3:75, 77). By the time Hume discusses the reign of Elizabeth I in volume 4 the competing powers of the medieval era have fallen away and he speaks of *the* government. The Tudors and Stuarts still faced various political challenges, but the section header “Discontent of the Barons,” used five times by Hume in the first two volumes, is absent from the early modern volumes, that is, volumes 3, 4, 5, and 6.

Hume on the common law

Hume hailed from a family of common-law lawyers.³ Both his father and his two grandfathers were trained formerly in the law and were practiced barristers. He attended school in Edinburgh at an early age, which he abandoned at 14 without receiving his degree. But upon returning Hume took up studying the law, guided

3. I thank an anonymous referee for bringing these biographical facts about Hume to my attention.

partly by Henry Home, Lord Kames (Mossner 2001, 53–54). Ernest Campbell Mossner has praised Hume’s legal knowledge:

In the end, Hume’s legal knowledge, both theoretical and practical, was not inconsiderable. The theoretical, forming an integral part of moral philosophy, appears so frequently in his published works as to require no special comment. Of theoretical jurisprudence, Hume was a master. (Mossner 2001, 55)

Hume also would have had the entirety of the Advocates’ Library collection at his disposal while working on the *History*. Post-Norman England experienced an explosion of administrative documentation, and it is reflected in Hume’s citations in the early volumes.

In medieval England, the rules enforced in the King’s court were in competition with the other courts of the realm. An aggrieved man could seek justice in the county courts which administered local customary law or he could go to the ecclesiastical courts which administered canon law. A town merchant could take his case to a borough court to be judged by the rules of the *Lex mercatoria*. One might even go to one’s feudal lord to make his case under the rules of feudal custom. The royal law, however, was common throughout the realm and was the origination point of what has come to be known as the common law (Hogue 1986/1966).

Arthur Hogue defined common law as “the body of rules prescribing social conduct and justiciable in the royal courts of England” (1986/1966, 5), and I use the phrase *common law* along those lines. At a more abstract level, common law is simply law held in common throughout the polity. A third sense of common law is law worked out through precedent. The three senses of common law are all rooted in the historical development of English common law. The royal law applied to all Englishmen, no matter where the crime was committed or who the perpetrator may have been. As royal judges travelled the kingdom hearing cases they learned and refined their legal judgments. By travelling, they made the royal law common throughout the realm. Through their travels they amassed a bank of precedent that they could call upon in subsequent cases.

Over time, the common law, enforced by the royal courts, subsumed or marginalized its competitors. As the authority and power of the king grew the “justice done in the king’s name by men who [were] the king’s servants became the most important kind of justice” (Pollock and Maitland 2010/1895, 91). The success of the common law went hand in hand with the centralization of power around the king. Hume said as much:

It [the people’s freedom] required the authority almost absolute of the sovereigns, which took place in the subsequent period, to pull down those

disorderly and licentious tyrants, who were equally averse from peace and from freedom, and to establish that regular execution of the laws which, in a following age, enabled the people to erect a regular and equitable plan of liberty. (*H*, 2:525)

As the king's power and authority grew, so did the impact of his laws. Frederick Pollock and Frederic Maitland (1895), Arthur Hogue (1966), Harold Berman (1983), and John Baker (1995), all scholars of the common law, attest to that fact.

Another reason for the rise of the common law cited by Hume was the rediscovery of Justinian's Pandects, a compendium of juristic writings on Roman law (*H*, 2:520). For Hume, the rediscovery in 1130 of Justinian's Pandects was a glimmer of light from a more civilized era that would begin to illuminate a dark world. No other event "tended further to the improvement of the age" (*ibid.*).

With Justinian's Pandects in their hands, the clergy took up legal studies with great zeal. Less than ten years later, according to Hume, lectures in civil law were being given in Oxford. Although Roman civil law never rose to the same level of prominence in England as it did on the continent due to "the jealousy [of] the laity," and perhaps England's island geography, it left a permanent mark on English law (*H*, 2:520–521). The English jurists imitated their civil law equivalents, "rais[ing] their own law from its original state of rudeness and imperfection" (*H*, 2:521). Here Hume complements Larry Siedentop's *Inventing the Individual* (2014) on the importance of Christianity and the Catholic Church for the development of western liberalism. In chapter 16 of his book, Siedentop discusses the re-discovery of Justinian's Pandects, tracing its effects on both ecclesiastical and lay law over the subsequent chapters.

To find Hume's discussions of concrete legal development, we need to look at his coverage of the strongest medieval English kings: Henry II and Edward I. Only these men were able to extend their authority and carry out reform without having their political coalitions turn on them.

The reign of King Stephen (r. 1135–1154) was marked by "The Anarchy," a succession crisis that led to the complete breakdown of civil order in England (*H*, 1:279–295). Henry II (r. 1154–1189), upon winning the war and ascending to the throne, was tasked with cleaning up the mess and restoring order and justice to the kingdom. Hume depicts Henry II as a good and strong king who led England with a steady hand and an "equitable administration" (*H*, 1:359, 301, 370). He was a politically savvy man, as shown by his swift actions to demolish the castles illegally built by the local barons during The Anarchy (*H*, 1:360). He had his share of dark days (*H*, 1:310–338, 348–358), as all medieval kings did, but he was responsible for increasing the power of the monarchy over the licentious barons and executing long-lasting reforms to England's legal system. In 1176, Henry II partitioned

England into four divisions and appointed itinerant justices to travel along a circuit to hear and decide on the cases brought before them in the counties (*H*, 1:359–360). The general eyre, as the law circuit was called, furthered the mission of making the king’s law common throughout the realm. The eyre increased the geographical influence of the king’s laws and regularized Englishmen to its enforcement. It protected the lower gentry and the peasants from the arbitrary violence and corruption of the barons, and, albeit slowly, acted to curb baronial power (*H*, 1:360). This is all Hume’s narrative, not mine, and it is a narrative of the common law.

But the expansion of royal justice and the common law was not a matter of force. Royal justice passed the market test and came to be the preferred court of law because it administered better justice. The justices in eyre were notable men of honor, in contrast to the local courts, thus the respectability of the common law was bolstered by their character (*H*, 1:360). They were also better trained and less corrupt than their local counterparts. Additionally, the common law possessed what no other court in England did—the weight of the monarchy.

After looking at the common law reforms under Henry II, Hume drops common law until his discussion of Edward I (r. 1272–1307). That is understandable. What occupies Hume during the reigns of Richard I (r. 1189–1199), John (r. 1199–1215), and Henry III (r. 1216–1272) is tracing out the events that led to John’s capitulation at Runnymede and the solidification of Magna Carta into the English political ethos. Like Henry II, Edward I inherited a mess. Edward’s father, Henry III, was a relatively weak king who bumbled his way into a civil war against a group of discontented barons led by Simon de Montfort. Upon inheriting the crown, Edward “immediately applied himself to the re-establishment of his kingdom, and to the correcting of those disorders” introduced by Henry III’s weak administration (*H*, 2:75).

Edward I was a strong king. A weak king would never have earned the nickname “Hammer of the Scots,” which is reminiscent of the great Frankish king Charles Martel (688–741 CE), as *martel* in old French means ‘hammer.’ As recognized by Smith and discussed by Sagar, Edward I was a great legal reformer. Smith puts Edward I alongside Henry II as one of the greats in terms of his legislative capacity (*LJ(A)*, v.34).

Hume’s account of Edward I’s legal reforms is similar to Smith’s as recounted by Sagar, but not once does Sagar’s article cite volumes 1 or 2 of the *History*. To diminish the power of the great barons, Edward offered his protection to the gentry, merchants, and serfs by instituting “an exact distribution of justice” and by “a rigid execution of the laws” (*H*, 2:75). He did so by insisting that, as he obeyed Magna Carta with respect to the barons, they too should extend and uphold Magna Carta with respect to their own vassals. He replaced judges that had grown

corrupt under the former administration, and he provided the justice system as a whole with force sufficient to execute the law properly (*H*, 2:75). Hume says that by Edward's actions "the face of the kingdom was soon changed; and order and justice took place of violence and oppression" (*H*, 2:75–76). In fact, Hume argues that Edward's legal reforms were the chief advantage which the English attained from his reign—and even more importantly, that Englishmen "still continue to reap" the benefits of Edward's vigor in Hume's day (*H*, 2:141).

From Hume to Smith on English history

Samuel Pufendorf wrote in the preface to *An Introduction to the History of the Principal Kingdoms of States of Europe*:

I hope therefor, that the Discreet Reader will look favourably upon this Work, not as a Piece design'd for Men of great Learning, but adapted to the Apprehensions and Capacities of young Men, whom I was willing to shew the Way, and, as it were, to give them a tast[e], whereby they might be encouraged to make a further search into this Study. (Pufendorf 2013/1695, 7)

Smith's *Lectures on Jurisprudence* can be read as engaging in the same mission, to impart the history and practice of jurisprudence to his young students. In crafting each lecture, Smith would have distilled the works of a number of writers, to deliver a coherent presentation of the subject matter. Reviewing the course material and preparing a lecture forces the mind to explore multiple potential angles, to see connections between seemingly disjointed phenomena, and to make concrete the abstract. As a result, Smith improved and refined the arguments of a number of great writers, not least Hume.

If a student approached Smith after his lecture to inquire about further reading on feudalism and medieval history, Smith may have pointed him towards the first two volumes of Hume's *History*. Smith cribs from Hume on multiple occasions over the course of his lectures, synthesizing Hume and folding in other bits of information from other sources to round out the lecture's topic. The influence of Hume and his *History* on Smith is clear. The editors of the Liberty Fund edition of the *Lectures* write in their introduction that "Smith's use of Montesquieu is clear from LJ(B), his dependence on Hume's *History* and *Essays* is more pronounced in LJ(A)" (*LJ*, 32). Simply searching on "Hume" in the body of the text of *LJ* yields 53 results, mostly contained in footnotes by the editors showing likeness between what Smith says and things Hume had said previously.

Smith's long discussions of feudal history and law place him in the camp

of Hume, Henry Spelman, Matthew Hale, and Robert Brady in their efforts to debunk the idea of the ancient constitution of Edward Coke and the common-law lawyers. By teaching his students about the origins of feudalism and its implications for English legal developments, Smith educated his students against Coke's ideas. Simply by situating the origins of the common law with the Plantagenets kings, he stakes out a position, alongside Hume, against the idea of the ancient constitution.

As Sagar (2021, 17) discusses, Smith gives some importance to juries in his story of English liberty. Hume had a similar appreciation for the jury. He writes in volume I of his *History* that the jury is the best institution “calculated for the preservation of liberty and the administration of justice” (*H*, 1:77). He attributes the innovative legal practice to Alfred the Great's (r. 886–889) “popular and liberal plan” of the administration of justice (*H*, 1:77).

We moderns think of juries as an obvious form of adjudication. But the main competitor of the jury, trial by ordeal, or trial by combat if the dispute involved multiple parties, was a hardy weed. Hume saw trials by ordeal or combat as a mark of barbarism and backwards superstition (*H*, 1:181, 359, 486). Throughout the *History*, Hume uses the existence of ordeals and trial by combat as a way to gauge England's degree of civilization. When trial by ordeal was outlawed in England during the reign of Henry III, Hume wrote that it was “a faint mark of improvement in the age” (*H*, 2:72). Trial by combat would not ever be officially outlawed, but the legal reforms of Henry II brought about its gradual decline (*H*, 1:486). Hume clearly appreciated the importance of trial by jury and its role in developing a legal system that respected liberty.

Another common theme shared by the Smith and Hume is the importance of island geography for the development of British politics. In Hume's *History*, Britain's island geography protects it from would-be military invaders and provides a buffer from continental politics and foreign influence (*H*, 1:11–12, 207, 229, 299–300, 2:362, 522, 3:51, 88, 146, 348, 4:55). Smith extends Hume by explaining how Britain's island geography explains Britain's long tradition of not having a standing army, which Smith argues was the reason Britain did not fall prey to an authoritarian monarch like the French or the Spanish (*LJ(A)* iv.168–169).

Securing liberty or elements of a system of liberty?

I argue above that Hume recognized common law as an important element of English liberty. Elements come together to form compounds, and compounds are in a sense more than the sum of their parts. That brings me to a final point about

Sagar's article: I find his grouping of Montesquieu, Hume, and Smith into a two-by-two matrix unsatisfactory. Sagar's Montesquieu thinks English liberty is old and fragile. Sagar's Hume thinks English liberty is new and robust. But after learning of Smith's discussions of the common law, how does Sagar want us to think about Smith?

At points in his article, Sagar seems to suggest that Smith fits into the two-by-two matrix. After discussing Smith's Humean affirmation of the Glorious Reformation, Sagar writes: "But this did not mean that English liberty was only as old as 1688, as Hume concluded" (2021, 15). After his account of Smith on the common law, Sagar suggests that Smith thought liberty to be new, but not as new as Hume: "But as a result, English liberty was much older in its core elements than the reforms effected by the Glorious Revolution alone" (*ibid.*, 19). Does Sagar mean to suggest that Smith thought English liberty was mostly secured in 1307?

At other points, Sagar seems to suggest that Smith does not fit neatly into one of the cells of the two-by-two matrix. Instead, Sagar suggests that Smith saw the common law as an element of English liberty, much as I say that Hume did. Sagar (2021, 15) writes that although Smith understands the importance of the Glorious Revolution, Smith believes the 17th-century reforms stuck because they were "grafted onto, and [were] greatly enhanced by, a wider preexisting legal framework."

In the conclusion of his paper, Sagar poses a puzzle to the reader:

[T]here remains obscurity in Smith's account as to how exactly his Humean story of England's constitutional liberty being secured in 1688 meshes with his jurisprudential account of liberty in terms of the security delivered by the common law as already being largely in place before the late seventeenth century, and which (if either) he considers most important. (Sagar 2021, 19)

Reading Smith and Hume as articulating important elements of English liberty helps to resolve Sagar's puzzle. The common law did not secure liberty in England; rather it was a single element in liberty's development.

After recognizing that Smith and Hume thought of the common law as an important element, it does not necessarily follow that they felt English liberty was robust. If it was so robust, why would Smith need to mount an extensive case for liberty in *The Wealth of Nations*? Why outline and argue for his vision of a liberal England if liberty were robustly secured by the Glorious Revolution and its aftermath?

Conclusion

On a careful reading of Hume's *History*, and from an awareness of Smith's pervasive cribbing from Hume, Sagar (2021) may wish to reconsider the gap he sees between Smith and Hume on the importance of English common law for the development of liberty. Smith should be seen as distilling, developing, and even disseminating Hume's interpretations. Smith's treatment of the Edwardian common-law reforms is similar to Hume's in terms of both the factual account and its importance for the English constitution. The development of the English common law can be read in Hume as a byproduct of the increasing power of the crown at the expense of the violent and licentious barons. With the local authority of the barons suppressed, and finally put to rest sometime between the Battle of Bosworth and the reign of Elizabeth I, England's stability was enhanced, allowing a more regular plan of liberty to take root and grow into a salient characteristic feature of the British state.

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