Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings

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The impeachment trial of Warren Hastings has long been considered one of the key political trials in the history of the British empire.[1] It was the first major public discursive event of its kind in England, and arguably in Europe as a whole, in which the colonial ambitions and practices of European powers in the east stood exposed to a close and comprehensive critique. In addition, the legal and moral legitimacy of colonialism itself was thrown into question before the highest judicial body in Britain, the

1. For a general account of the trial, see P. J. Marshall, *The Impeachment of Warren Hastings* (London: Oxford University Press, 1965). Also see *The Impeachment of Warren Hastings: Papers from a Bicentenary Commemoration,* ed. Geoffrey Carnall and Colin Nicholson (Edinburgh: Edinburgh University Press, 1989).

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House of Lords. The fact that the prosecution was led by Edmund Burke, one of the most articulate and prescient political statesman of modern Europe, has only added to the trial's enduring significance as a moment of critical reflection on colonial practices. Indeed, it could be argued that it was on this occasion, and in this act of defending the rights of an alien population against coercive colonial rule, that some of Burke's long-held political and ethical convictions found their clearest expression.

Paradoxically, the historical contribution of the trial and Burke's intervention in India to the construction of a discourse of imperial sovereignty have remained largely unexplored in existing scholarship.[2] While historians have focused almost entirely on the question of the legality of the trial and the truth of Burke's allegations against Warren Hastings, political theorists have analyzed the trial only to the extent that it throws light on what they believe to be Burke's political philosophy or core political beliefs.[3] In most of the interpretations by political theorists India emerges either as an instance of, or as an exception to, an otherwise coherent set of political beliefs, such as natural law, trusteeship, and liberal utilitarianism that, in being European in origin, were manifested in their essences in the western context.[4] In general, almost all these interpretations presuppose the bound-

2. Indeed, some historians of eighteenth-century England and India, most prominently P. J. Marshall, have argued that Burke's vision of an empire of justice had little significance for the British empire as it evolved over the nineteenth century and, in fact, "was already beginning to look irrelevant to the British empire of the 1790s." See his Introduction in *The Writing and Speeches of Edmund Burke,* vol. 6, *India: The Launching of the Hastings Impeachment, 1786–1788,* ed. P. J. Marshall (Oxford: Clarendon Press, 1991), 35–36.

3. In the course of the nineteenth century, liberal historians like Macaulay and Morley defended the truth of Burke's accusations against Warren Hastings. See Thomas Babington Macaulay, *Warren Hastings* (New York: Chautauqua Press, 1886) and John Morley, *Edmund Burke, a Historical Study* (New York: A. A. Knopf, 1924). On the other hand, in the late nineteenth and early twentieth centuries, a series of imperial historians like Fitzjames Stephen, John Strachey, Sophia Weitzman, Lucy S. Sutherland, and Keith Feiling dismissed Burke's accusations that Hastings had been personally corrupt and argued that his arbitrariness was justified by the necessities of maintaining empire in the east, a view that Hastings himself articulated in the trial. See James Fitzjames Stephen, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey,* 2 vols. (London: Macmillan and Co., 1885); John Strachey, *Hastings and the Rohilla War* (Oxford: Clarendon Press, 1892); Sophia Weitzman, *Warren Hastings and Philip Francis* (Manchester: Manchester University Press, 1929); Lucy S. Sutherland, *The East India Company in Eighteenth-Century Politics* (Oxford: Clarendon Press, 1952); Keith Grahame Feiling, *Warren Hastings* (New York: St. Martin's Press, 1954).

4. Peter Stanlis, for example, whose work has been invaluable in bringing attention to the centrality of natural law doctrine in Burke's works, does not explore the implications of the fact that the discourse of natural law and the law of nations found its sharpest articulation in Burke's speeches in the impeachment trial. He concludes that Burke's understanding of international relations was limited to the European context, his intervention in India being

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aries between Europe and India, and the latter appears as a mere appendage to what is essentially the history of European political thought, as it found articulation in Edmund Burke, one of its most eloquent spokesmen.

Historical scholarship on Burke has maginalized his intervention in Indian affairs. This has resulted in a neglect of what was arguably one of the more radical and innovative aspects of his thought—his effort in the historical context of the eighteenth century to go beyond the territorially bounded discourses of political sovereignty and institutional practices of nation-states and conceptualize a form of deterritorialized juridical-imperial sovereignty that would be exercised not in the pursuit of the exclusive interest of the colonizing nation but, rather, in ensuring that colonial administration in India remained firmly grounded in "native" society and prevented from exercising absolute and arbitrary power over it. In this article I will examine the construction of Burke's discourse of juridical-imperial sovereignty as it was revealed in his speeches for the prosecution in the impeachment trial of Warren Hastings, in opposition to a discourse of colonial sovereignty based on absolute power and national interests, articulated by Hastings's defense.

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merely an exception to his deep-seated convictions about European solidarity based on a common cultural inheritance. As a result, Burke emerges in his analysis primarily as a European conservative. His unprecedented use of natural law and the law of nations for the defense of an alien, non-European people against colonial oppression passes unnoticed. See P. J. Stanlis, "Edmund Burke and the Law of Nations," *The American Journal of International Law* 47 (1953): 400–401. Also see his *Edmund Burke and the Natural Law* (Ann Arbor: University of Michigan Press, 1958) and Francis P. Canavan, *The Political Reason of Edmund Burke* (Durham: Duke University Press, 1960). Again, scholars like Coniff have used the Indian case only to prove the inadequacy of Burke's political categories such as trusteeship, that, in Conliff's view, fail the test of universality when applied to a non-European people lacking the political culture of the west. See James Conniff, "Burke and India: The Failure of the Theory of Trusteeship," *Political Research Quarterly* 46 (1993): 291–309. Also see Frederick A. Dreyer, *Burke's Politics: A Study in Whig Orthodoxy* (Waterloo, Ontario: Wilfrid Laurier University Press, 1979). The most significant works that have attempted to establish Burke as a theorist of liberal utilitarianism are John Morley, *Edmund Burke, a Historical Study* and C. B. Macpherson, *Burke* (New York: Hill and Wang, 1980). Some excellent works in the recent past have departed from this general tendency and have emphasized the centrality of Burke's writings on empire, particularly on India, for an understanding of his political theory. See Frederick G. Whelan, *Edmund Burke and India: Political Morality and Empire* (Pittsburgh: University of Pittsburgh Press, 1996) and Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999). Also see Sara Suleri, *The Rhetoric of English India* (Chicago: University of Chicago Press, 1992). For connections between Burke's writings on India and other parts of the British empire like Ireland, see Regina Janes, "At Home Abroad: Edmund Burke in India," *Bulletin of Research in the Humanities* 82 (1979): 160–74, and Conor Cruise O'Brien, *The Great Melody: A Thematic Biography and Commented Anthology of Edmund Burke* (Chicago: University of Chicago Press, 1992).

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In recent years there has been a noticeable surge in interest in empires of the past and their continuities and discontinuities with the present global order.[5] Most earlier works on empire focused primarily on the essential links between imperialism as a political form and the economic phenomenon of capitalist expansion. But lately the realization that existing political institutions at an international level are proving inadequate to the task of meeting the challenges of globalization has prompted more work on questions of national and imperial sovereignty and their changing dynamics over time.[6] One of the most significant works in this direction that has gained much attention worldwide is an ambitious attempt to theorize the emergent processes of globalization. Authors Antonio Negri and Michael Hardt have proposed that one way to understand the complex dynamics of the new global order is to see it as a new empire, continuous in some aspects with older world empires, but also fundamentally different.[7] Departing from other theorists, who have denied the novelty of the processes of globalization and argued that globalism is merely a continuation and perfection of imperialism, Negri and Hardt contend that globalization marks a fundamental rupture and a paradigmatic shift not only in contemporary capitalist production and global relations of power but also in the creation

5. Phillip Darby, *Three Faces of Imperialism: British and American Approaches to Asia and Africa, 1870–1970* (New Haven: Yale University Press, 1987); D. C. B. Lieven, *Empire: The Russian Empire and Its Rivals* (London: John Murray, 2000); Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2003); Eric Hobsbawm, "America's Imperial Delusion: The US Drive for World Domination Has No Historical Precedent," *The Guardian,* June 14, 2003; Michael Ignatieff, "The Burden," *New York Times Magazine,* January 5, 2003.

6. Works that have focused on the relation between capitalism and imperialism include J. A. Hobson, *Imperialism: A Study* (London: J. Nisbet, 1902); Vladimir Il'ich Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular Outline* (New York: International Publishers, 1933); Maurice Herbert Dobb, *Studies in the Development of Capitalism* (London: G. Routledge and K. Paul, 1946); John Gallagher and Ronald Edward Robinson, "The Imperialism of Free Trade," *Economic History Review,* 2d ser., 6 (1953): 1–15; D. K. Fieldhouse, *Economics and Empire, 1830–1914* (Ithaca: Cornell University Press, 1973); P. J. Cain and A. G. Hopkins, *British Imperialism,* 2 vols. (London: Longman, 1993). Recent works that have brought attention to the question of political sovereignty in a globalizing world are Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Evan Luard, *The Globalization of Politics: The Changed Focus of Political Action in the Modern World* (New York: New York University Press, 1990); Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press, 1995); Martin Albrow, *The Global Age: State and Society beyond Modernity* (Stanford: Stanford University Press, 1997). For a sophisticated theoretical analysis of the relation between nation and empire, see Alain de Benoist, "The Idea of Empire," *Telos,* nos. 98–99 (Winter 1993–Fall 1994): 81–98.

7. Antonio Hardt and Michael Negri, *Empire* (Cambridge: Harvard University Press, 2000).

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of a new supranational sovereign power that is decentered, indeterminate, continually shifting, discontinuous, and virtual. The authors contend that this new form of supranational, deterritorialized imperial sovereignty is radically different from the sovereignty that characterized earlier colonial empires. These were, in their opinion, centralized political formations that had extended national sovereignty over various subject peoples, while being firmly rooted in national institutions and metropolitan culture. The new empire, in their view, is different from past imperialism, which was nothing but the extension of the sovereignty of European nation-states beyond their own boundaries. One of the most important signs that the empire has come into being, in the authors' opinion, is the existence of the United Nations as a global juridical institution, which, while predicated on the recognition and legitimation of the sovereignty of nation states, has also emerged as a real supranational institution whose legitimacy is grounded on the essential universal values of justice and morality that transcend the national interests of its member states.

While agreeing with Negri and Hardt that a distinction needs to be made between the category of "imperialism" and that of "empire," I contend in this article that the two categories do not characterize two separate chronological phases in the history of the contemporary world. Instead, they describe contesting and contradictory historical forces that pointed to radically different directions that empire could take even in the early years of European expansion in the eighteenth century. One of the problems with Negri and Hardt's analysis is that they make little attempt to rigorously trace the historical genealogy of the discourses and institutions that, in their view, characterize empire. Therefore, they fail to recognize that what they describe as "Empire" and its basic discourses and institutions emerged not after but contemporaneously with the advent of colonialism. Indeed, efforts to create both a discourse of deterritorialized, supranational sovereignty and institutions on which to ground it are evident even as early as the eighteenth century in the period of the American Revolution and the establishment of a second British empire in the East.

The relationship between nation and empire was one of the most contentious issues in late eighteenth-century British political circles. The critical question at the heart of this debate over empire was whether conquest based on national interests was a legitimate foundation for the sovereignty of empire, which was no more than an extension of the sovereignty of the nation state, or whether the sovereignty of empire was different from national sovereignty and had to be founded on juridical principles of universality and extraterritoriality that transcended the discourse of national interests and the simple domination and subjugation of one nation by another. An equally important related question was, could empire be based on existing

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national institutions, or did existing institutions have to be reconstituted to ground the new supranational discourse of imperial justice?

I will examine the articulation of this crucial debate in the speeches for the prosecution by Edmund Burke and defense in the impeachment trial of Warren Hastings. Hastings was impeached by the British House of Commons for "high crime and misdemeanours" as the governor-general of the East India Company's government in India (1772–1785). In 1788, proceedings began in the British House of Lords for a verdict. Along with charges of corruption, use of political power for extorting bribes from native rulers of India, abuse of judicial authority, despotism, and arbitrary rule, Hastings was being tried specifically for illegally occupying territory in India by launching aggressive offensive and criminal wars against native rulers, treaty violations, and for open violence against native rulers and the people of India.[8]

Through an analysis of the trial, I will argue that the British empire was a complex political phenomenon that often carried conflicting and competing visions and agendas of rule.[9] Under the general phenomenon of empire, I

8. Some significant works on Warren Hastings's life and times include Alfred Comyn Lyall, *Warren Hastings* (New York: Macmillan and Co., 1894); Penderel Moon, *Warren Hastings and British India* (New York: Macmillan, 1949); Lionel J. Trotter, *Warren Hastings* (Oxford: Clarendon Press, 1890); Jeremy Bernstein, *Dawning of the Raj: The Life and Trials of Warren Hastings* (Chicago: Ivan R. Dee, 2000). Also see Macaulay, *Warren Hastings* and Feiling, *Warren Hastings.*

9. The predominant tendency among historians of empire in general and of the empire in India in particular has been to arrive at a single essence of empire, thus reducing what was complex and contained within it differences, contradictions, and even conflicts to a homogenous phenomenon. While one of the oldest traditions of imperial historiography, which I identify as the pedagogical school, developed a seamless narrative of the spread of progress and enlightenment from the imperial center to the colonies, economic histories of empire have similarly constructed the development of empire in terms of homogenous narratives of the development of capitalism. Mountstuart Elphinstone's *The Rise of the British Power in the East,* ed. T. E. Colebrooke (London: J. Murray, 1887), John Robert Seeley's *The Expansion of England: Two Courses of Lectures* (London: Macmillan, 1895) and, more recently, D. A. Low's *Eclipse of Empire* (Cambridge: Cambridge University Press, 1991) are representative of the first school, while Dobb's *Studies in the Development of Capitalism* and Fieldhouse's *Economics and Empire, 1830–1914* are good examples of the second. In fact, even Marx who constructed contradiction as a driving force of history described the process of colonization in India very much in pedagogical terms, as the spread of the capitalist mode of production and also the values and knowledge systems of the enlightenment to the colonies. For a general Marxist interpretation of empire, see V. G. Kiernan, *Marxism and Imperialism: Studies* (London: Edward Arnold, 1974). It was only later Marxists like Lenin and other economic historians like Hobson who, in their studies of imperialism, focused on conflicts and the fact of economic exploitation rather than on pedagogical transfers of ideas, values, and institutions. See Hobson, *Imperialism: A Study;* Lenin, *Imperialism, the Highest Stage of Capitalism.* Cain and Hopkins's *British Imperialism: A Recent Economic*

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delineate two converging, but also often competing and conflicting aims and strategies of rule with respect to India. I have identified these as the "colonial" and the "imperial." The phenomenon and discourse of the colonial was articulated and operated in terms of conquest and domination of the colonized in the name of the national interests of the colonizing nation and was institutionally grounded in the governor-general's council in India, with the bureaucracy, the army and the police as its most important instruments. The imperial was articulated and operated in supranational critical juridical terms of justice, equity, and impartiality, with the Crown-in-Parliament, the House of Lords, and the Supreme Court in India providing the institutional agency. It was in the Hastings's trial that these two visions of the future of empire in India dramatically clashed. And, as the eighteenth century drew to a close, it was by no means clear whether the new empire in the east would unfold along one of these two visions, or some form of a combination of the two.

To underscore the complex and fractured nature of colonialism, I will begin by problematizing the question of the identity of Britian as a nation and an empire. In 1906 in India, a prominent Indian National Congress leader and theoretician, Dadabhai Naoroji published *Poverty and Un-British Rule in India,* a book that was to be crucial to the nationalist understanding of the colonial state in India. As the first detailed theoretical and critical analysis of the economic and administrative policies of the British government in nineteenth-century India, it related widespread poverty in the subcontinent to the drain of wealth from the colonized country to the metropole and to the destruction of its indigenous industry.[10] The primary purpose of this critique was to expose colonial governance in India as "un-British rule."

The deployment of the term "un-British" raises a critical question: un-

History of Empire has also developed some of the arguments of Hobson. However, the problem with these studies is that they confined contradictions to the economic domain at the expense of potential and real contradictions in other institutional domains, such as the judicial, bureaucratic, military, intellectual, educational, etc. In the process of privileging the economic over other domains, they also tended to dismiss most discourses of empire and even those of nationalism as either false consciousness or ideology that, as such, has no history. It is only recently under the rubric of postcolonial studies that works on empire have focused on the study of discourse in the analysis of empire. See Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) and *After Colonialism: Imperial Histories and Postcolonial Displacements,* ed. Gyan Prakash (Princeton: Princeton University Press, 1995). One of the important works that has brought attention to the contradictions within empire in the recent past is *Tensions of Empire: Colonial Cultures in a Bourgeois World,* ed. Frederick Cooper and Ann Laura Stoler (Berkeley: University of California Press, 1997).

10. Dadabhai Naoroji, *Poverty and Un-British Rule in India* (London: S. Sonnenschein, 1901).

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der what historical and discursive conditions could one make a critique of British colonial government in India as being "un-British," since, by "un-British," Naoroji could clearly not have meant rule by a non-British people? How could the government be British and "un-British" at the same time? It is clear that by using the term "un-British," Naoroji was not referring to the people in charge of the government (who were British), but the actual mode of governance, and by extension the term "British" referred to the fundamental principle on which, he thought, it ought to have been based. In fact, he was precisely critiquing the tendency of the government to identify colonial rule in India with rule by the British people, thereby reducing the colony to the status of mere property in the hands of the latter. Naoroji's critique assumed a homology between the terms "un-British" and "unjust." British rule meant the rule of justice, and any deviation from the principle of justice would transform it into an "un-British" despotic rule.

Thus, in the discourse of Naoroji and the Indian National Congress, the term "British" did not simply refer to the territorial or national identity of a people but was elevated to the status of a principle.[11] In this discourse, on the one hand, the term British came to be deterritorialized from a particular geographical, legal, and political unit and reconstituted in justice as a principle. On the other hand, justice itself was deterritorialized from the context of English common law as a system of national laws and reconstituted in the idea of empire.

In what follows, I locate the beginnings of the evolution of this homology of the term "British" with the principle of justice in terms of the historical construction of a denationalized and deterritorialized discourse of empire in the impeachment trial of Warren Hastings. My primary question is—under what imperatives and through what discursive and strategic manoevers was the discourse of empire constructed as a deterritorialized discourse of justice? How did this homology between the categories of justice and empire come about and how was it institutionally grounded?

The Trial

The impeachment trial of Warren Hastings took place in the last two decades of the eighteenth century in the midst of political turmoil and party intrigues in the British Parliament following the loss of the American colo-

11. Burk's writings and speeches were extremely popular with Indian nationalists in the late nineteenth and twentieth centuries, so much so that the British colonial administration in India, believing that his works encouraged disloyalty, interdicted his writings at Calcutta University. Many of Burke's famous speeches were memorized by leading Indian National Congress members and frequently recited in political meetings. See Ganesh Prashad, "Whiggism in India," *Political Science Quarterly* 81 (1966): 412–31.

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nies. As Bowen has pointed out, the years between 1756 and 1783 were of particular imperial instability, when Britons vigorously sought to rework ideas of empire, governance, rule, and supremacy.[12] An integrated concept of the British empire, according to David Armitage, had already emerged throughout the British Atlantic world by the 1730s, and both imperial officials and provincial elites had come to share some basic conceptions of what distinguished the British empire from both past empires and contemporary imperial formations. While Protestantism, commerce, and maritime supremacy had emerged as some of the British empire's distinguishing attributes, what contemporary observors saw as crucial to British imperial identity was the idea of liberty, the notion that its inhabitants, unlike those of other empires in the past and in the present, were free. This freedom was embedded in, and found expression in, institutions like the law (particularly the common law), property, rights, and the Parliament, which were exported all over the British Atlantic world.[13]

As the British Atlantic empire grew in size and prosperity in the eighteenth century, the precise relation between empire and liberty became one of the central points of contention. Metropolitan and provincial spokesmen on both sides of the Atlantic world debated vigorously both the nature of the constitutional relationship between the metropole and the colonies and the possibility of viable institutions that would balance the needs of empire and the requirements of liberty. The question that had emerged in these debates as fundamental was whether the colonies should be reduced to perpetual dependencies of Britain (as in the case of imperial Rome), which would make laws and appoint governors over them, a model that was advocated by metropolitan spokesmen like James Abercromby, Henry McCulloh, William Shirley, and others, or whether the relationship between the metropole and the colonies was to be a more balanced partnership (advocated by provincial spokesmen like Benjamin Franklin) in which the colonies would be more in the position of self-governing confederates, as in ancient Greece.[14] Closely related was the other critical question, were

12. H. V. Bowen, "British Conceptions of Global Empire," *The Journal of Imperial and Commonwealth History* 26 (1998): 1–27. For a comprehensive comparative analysis of ideologies of empire in Britain with those in Spain and France in this period, see Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven: Yale University Press, 1995).

13. David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 8. Also see Jack P. Greene, "Empire and Identity from the Glorious Revolution to the American Revolution," in *The Oxford History of the British Empire,* vol. 2, *The Eighteenth Century,* ed. P. J. Marshall (Oxford: Oxford University Press, 1998), 208–30.

14. Timothy J. Shannon, *Indians and Colonists at the Crossroads of Empire: The Albany Congress of 1754* (Ithaca: Cornell University Press, 2002), 57–113.

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colonists to share equal rights and liberties with all Englishmen, or did the necessities of empire require that they be reduced to a greater level of dependence than other Britons and denied the liberties and privileges that were enjoyed by British subjects in the metropole?

In the years preceding the impeachment trial, the reasons for the American Revolution were still being hotly debated in political circles in England, but there was little dispute about the main problem—the inability of the two sides, the colonists and the English Parliament, to come to an agreement on the constitution of the British empire and the distribution of power within it. As Jack P. Greene has pointed out in his analysis of the American Revolution, for a century and a half preceding the Revolution, there had been no explicit articulation of the precise relationship between the metropolis in England and the American colonies within the larger structure of empire. Thus, when the debates over the English Parliament's right to tax the colonies came to the fore during the Stamp Act Crisis in 1764–65 and the Townshend measures in 1767–72, there was little by way of precedent in the British constitution that could point to a resolution of the crisis.[15]

At the center of the constitutional debate between England and the American colonies was the nature of the legislative relationship between the metropolis and the colonies, specifically whether, and to what extent, America was to be legislatively subordinated to the British Parliament. The argument of the colonists for "constitutional multiplicity" within the empire, for each of its constituents to be autonomous entities with their own legislatures, but under the British Crown, was unacceptable to the majority of people in England, who insisted on the indivisibility of sovereignty and asserted that, without the maintenance of legislative supremacy of the British Parliament over the colonies, the empire would cease to exist.[16] The American Revolution was the result of a direct clash between two legislatures, the British Parliament on the one hand and the colonial legislatures on the other, and as Greene points out, "in the absence of any impartial tribunal to settle constitutional disputes between the center and the peripheries" of the empire, there was no means of resolving the conflict by law.[17]

15. Jack P. Greene, *Understanding the American Revolution: Issues and Actors* (Charlottesville: University Press of Virginia, 1995), 72–73. Also see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967), and John Phillip Reid, *The Concept of Representation in the Age of the American Revolution* (Chicago: University of Chicago Press, 1989).

16. Peter S. Onuf, ed., *Maryland and the Empire, 1773: The Antilon-First Citizen Letters* (Baltimore: Johns Hopkins University Press, 1974), 29.

17. Greene, *Understanding the American Revolution,* 85.

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At around the same time as the conflict between the British Parliament and American colonies was heating up, another affair at another corner of the world was beginning to occupy the attention of the English people. This involved the increasing financial and political influence in Parliament of the East India Company, a mercantile body, that, on the basis of its trade monopoly in the East, derived from a charter from the British Parliament, had amassed enormous fortunes from India, over which it was also rapidly extending its political power.[18] Registered with the London Stock Exchange, this trading company, that had also become the government in Bengal, was effectively directed by a group of jobbers and brokers who, for all practical purposes, had become legislators for Bengal, determining policies for the Company's government on behalf of the shareholders of the company.[19] However, the Company, in order to avoid the responsibilities of rule in the colony, had consistently refused to acknowledge the fact that it was no longer simply a mercantile body, but had come to acquire state power in eastern India.

The most important goal for this company's government in Bengal, in keeping with the logic of the stock exchange, was to make the maximum profit from the colony in the shortest possible time. The profit from India primarily came in two forms: (1) rent collected from cultivators at high rates, and (2) profits from often unfair trade practices. Since the government had established monopoly power over trade, it was in the position to fix prices on goods that the cultivators brought to the market after paying the rent and then to sell them at high margins in European markets or to other European trading companies. The immediate consequence of this double squeeze on the cultivators was large-scale devastation and pauperization of the Indian peasantry, leading ultimately to famine within the first fifteen years of the company's rule.[20]

It was in the wake of these governmental practices that complaints against the East India Company's government and its oppression and plunder of

18. Ramkrishna Mukherjee, *The Rise and Fall of the East India Company* (New York: Monthly Review Press, 1974), 222–83. Other works on the East India Company include Sudipta Sen, *Distant Sovereignty: National Imperialism and the Origins of British India* (New York: Routledge, 2002); John Keay, *The Honourable Company: A History of the English East India Company* (New York: Macmillan Publishing Co., 1994); Philip Lawson, *The East India Company: A History* (London and New York: Longman, 1993); P. J. Marshall, *East Indian Fortunes: The British in Bengal in the Eighteenth Century* (Oxford: Clarendon Press, 1976); C. A. Bayly, *Imperial Meridian: The British Empire and the World, 1780–1830* (London: Longman, 1989); C. H. Philips, *The East India Company, 1784–1834* (Manchester: Manchester University Press, 1961); Sutherland, *The East India Company in Eighteenth-Century Politics.*

19. Philips, *The East India Company,* 1–22.

20. Mukherjee, *Rise and Fall,* 299–385.

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the people of India started pouring into England from India. The prospect of a second empire in the east intensified the already heated debates about empire in England, particularly because the emerging colony in India was not a settler colony, like those in America, but was based on conquest, requiring new strategies of rule and new ideologies of governance and legitimacy. There was an awareness that Indian wealth had become crucial to the economic stability of England, and some imperial theorists like Thomas Pownall even argued that the loss of India might cause a "national bankruptcy" and result in the ruin of the whole edifice of the British empire. Yet, the old fear that an extended empire and the inflow of this vast wealth into the English system would corrupt institutions within England and eventually result in the collapse of the British constitution, and, with it, both empire abroad and liberty at home, was an equally powerful argument that resisted the drive toward imperial expansion.[21] In this new context, the constitutional implications of colonization and rule over a large alien population became a particularly urgent concern for metropolitan thinkers who began to debate not only how the constitutional relationship between Britain and this new empire of conquest was to be constructed but also the institutional framework within which empire was to operate.

Lord North's Regulating Act of 1773 was the first of the Parliamentary Acts that sought to impose restraints on the Company's authority in India and make it accountable to the British state. The primary goal of the Regulating Act was to create institutional barriers against the exercise of arbitrary power by the governor and the rampant corruption of the Company's servants by introducing a system of checks and balances in the Company's administration and establishing a proper mode of administering justice in India. With this purpose in mind, the Act created the institution

21. Bowen, "British Conceptions of Global Empire," 14. Parallels between the corruption that the East India Company's servants were introducing into England (particularly through the practice of buying seats in Parliament and thus threatening the existing political balance in the House of Commons) and the corruption in the days of the declining Roman Empire were not hard to imagine. Edward Gibbon in his *The Decline and Fall of the Roman Empire,* published between 1776 and 1788, attributed the ruin of the Roman Empire to "immoderate greatness," specifically, to the destruction of the virtue of the republic by the corruption that was the inevitable result of the acquisition of an extensive empire. It was the opportunity that empire provided to military commanders and economic speculators to acquire power that could not be controlled by law and conflicted with the virtue of equality, and the inevitable corruption that arose out the governance of the empire by military commanders, independently of the republic that ultimately resulted, in Gibbon's view, in the absorption of the city of Rome by the empire and thus in its ultimate decay. To contemporaries of Gibbon, the East India Company's emerging system of governance in the new colony in the east threatened to plunge the British state down a similar path of decline. See Edward Gibbon, *The Decline and Fall of the Roman Empire* (New York: The Modern Library, 1932).

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of the Supreme Court, an independent judiciary under the direct authority of the British Parliament, with the responsibility of acting as an effective external check against the absolute powers of the Company's administration in India. Bringing with it English common law, the Supreme Court was given jurisdiction over all persons in Bengal, Bihar, and Orissa. It had the power and responsibility to protect the "natives" of India from the Company's officials by prosecuting all offenses by the latter and even issuing summons against the governor-general and council in the event of cases being brought against the Company itself. It was also given the right to review and veto all laws passed by the governor-general's council, the supreme executive and legislative body in Bengal. Within the council itself, the Act placed severe restraints on the governor-general's actions by the requirement that all executive and legislative decisions be sanctioned by a majority vote in the council (over which he had no power of veto).[22]

The Regulating Act, however, failed in its objective of making the Company's administration in India accountable to the British state. Instead, the multiple levels of conflict over sovereignty that it unintentionally precipitated in India between the governor-general and his council on the one hand, and between the Company's executive and the Supreme Court as an autonomous external judiciary on the other, effectively brought the administration in India to a standstill. The situation was rendered more confusing by the conflict between English common law, which the Supreme Court brought with it to India, and the native systems of law, which already held sway in courts in the provinces of Bengal under the authority of the governor-general and council. These conflicts and contradictions made it imperative for the Parliament to intervene once again in the affairs of the Company in India by establishing a select committee of enquiry into the Bengal judiciary in 1781 under the guidance of Edmund Burke. Ultimately, there were two more Parliamentary Acts—Fox's India Bill of 1782 and Pitt's India Bill of 1784. The first of these Acts tried to resolve the fundamental conflict between the Company's trading interests and its responsibilities as a government by attempting to bring the administration of India under the direct control of the Crown. The second, in contrast, proposed that the Company retain control over the administration in India while, at the same time, a Board of Control was created in London, subordinate to Parliament, that would supervise the activities of the Company in India.

However, both these bills could accomplish little in terms of controlling the Company's commercial and political power, even though they problematized, for the first time, the contentious relationship between the

22. Motilal Chimanlal Setalvad, *The Common Law in India* (London: Stevens, 1960), 1–62.

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commercial interests of the East India Company and its political powers of governance in the newly emerging colony. While Fox's India bill was defeated in the House of Lords, sealing the fate of his ministry itself, Pitt's bill accommodated all the demands of the East India Company and left it almost entirely intact, fanning the view that his ministry was, in fact, in league with the Company.[23]

It was in the aftermath of the loss of the American colonies and the failure of the Regulating Act of 1773 and the two India bills in Parliament to bring about effective reform in the East India Company's administration in India that the impeachment trial of Warren Hastings began in 1788 in Westminster, charging the governor-general of the East India Company's administration in India with corruption, bribery, high crime and misdemeanors. After impeachment in the Commons, the case finally moved to the House of Lords, the highest court of appeal in England, where Edmund Burke and his team of managers launched a prosecution for the final verdict.

Conquest, Property, and National Interests: The Discourse of Colonial Sovereignty

I begin with an analysis of the arguments in defense of Warren Hastings that fundamentally challenged the very legal authority of the British Parliament to try him for crimes committed in India. The defense was constructed around two major claims about sovereignty. The first was based on an identification of the sovereignty that the East India Company exercised in India with its chartered rights, granted to it by the English Parliament.[24]

When Fox had introduced his bill in Parliament, based on the principle that the Company's commercial affairs ought to be separated from its functions as a government and, therefore, that its "patronage" should be taken away, the representatives and spokesmen for the Company had strongly opposed that bill.[25] In all the debates in Parliament about its administration in India, the Company had insisted that the bill was an encroachment on their chartered rights and their rights to private property, that it aimed at annihilating a body of commercial people and destroying their property,

23. Sutherland, *The East India Company in Eighteenth-Century Politics,* 365–415.

24. Philips, *The East India Company,* 20.

25. Patronage referred to a system wherein the Directors of the East India Company had the right to dispose of appointments in the East India Company's administration in India, such as those of civil servants, writers, cadets, and assistant surgeons for the Company's armies, and barristers and attorneys for the Company's courts. Each Director had at his disposal at least six or seven appointments in a year, and often, some Directors sold their patronage to buy and maintain seats in Parliament. See Philips, *The East India Company,* 14–17.

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and that it was, therefore, a despotic bill by its very nature. The Company had asserted that the territorial revenues of India could not be considered as belonging to the British government, any more than could the East India Company's commercial concerns be so considered, for both of these fell within the private property of the Company as a chartered body. In fact, they had argued, what was being attempted on the pretext of giving stability and permanency to the property of the inhabitants in India was a destruction of the rights of Englishmen in England. [26] The defense of Warren Hastings in the impeachment trial continued this line of argument.[27]

The second and more radical claim was that the "crimes" in India that Hastings was being tried for, such as aggressive offensive wars against "native" rulers, treaty violations, and abuse of judicial authority, were, in fact, legitimate exercises of sovereign power in the new colony. When faced with a compelling account of the political nature of the Company's operations in India, Warren Hastings defended his actions as the governor-general, making certain assertions about the source and nature of the sovereignty of the Company's administration in India.

In so far as the source of this sovereignty was concerned, Hastings claimed that the Company had inherited the sovereignty over Bengal through a grant of the Diwani (the right to collect revenue) from the Mughal emperor.[28] Rejecting the legitimacy of the English Parliament's repeated

26. *The Parliamentary History of England from the Earliest Period to the Year 1803: from which last-mentioned epoch it is continued downwards in the work, entitled "Hansard's parliamentary debates,"* ed. William Cobbet and T. C. Hansard (London: T. C. Hansard, 1814), 23:1210.

27. This claim needs to be seen in terms of a long history of contentious debates in late seventeenth and early eighteenth-century England between the supporters of English settlers and planters in America, intent on expanding British possessions in the new colony on the one hand, and opponents of colonization of America on the other. The opponents argued that, besides unfairly dispossessing the Native Americans of their land, colonization was enfeebling England, and, even if allowed to continue, the colonies ought to be kept in a position of strict dependence to the mother country. See Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon Press, 1996) and James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993). To a large extent the East India Company was reformulating the same contention in the context of the newly developing colony in India. This colonial claim that property rights in the new colony could not be interfered with by the Crown was closely tied to the Lockean argument that property was essentially grounded on man's labor and preceded the state. The state's only function was the protection and preservation of property and any attempt to interfere with property was an exercise in tyranny. See John Locke, *Second Treatise of Government,* ed. C. B. Macpherson (Indianapolis: Hackett Publishing Co., 1980), 18–30, 65–68.

28. This right to revenue collection, or Diwani, was obtained from the Mughal Emperor Shah Alam at the conclusion of the battle of Buxar (1764) in which the East India Company's army under Robert Clive defeated the combined troops of the Mughal emperor and the Nawab of Awadh. Rather than declare themselves the new sovereigns of Bengal and Awadh, the

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attempts to bring the Company's administration in India under its control, as reflected in the Regulating Act of 1773 and the two Parliamentary Bills of 1783 and 1784, Hastings asserted that since this sovereignty had nothing to do with the English Parliament, it was beyond its jurisdiction and had to be exercised in accordance with Mughal laws, customs, and conventions regarding sovereignty, not with those of the English.

> The sovereignty which they (the soubahdars, or viceroys of the Mughal Empire) assumed, it fell to my lot very unexpectedly, to exert; and whether or not such power, or powers of that nature, were delegated to me by any provisions of any act of parliament, I confess myself too little of a lawyer to pronounce. I only know that the acceptance of the sovereignty of Benares, etc. is not acknowledged or admitted by any act of parliament; and yet, by the particular interference of the majority of the council, the Company is clearly and indisputably seized of that sovereignty. If therefore, the sovereignty of Benares, as ceded to us by the vizier, have any rights whatever annexed to it (and be not a mere empty word without meaning), those rights must be such as are held, countenanced, and established by the law, custom and usage of the Mogul empire, and not by the provisions of any British act of parliament hitherto enacted. Those rights, and none other, I have been the involuntary instrument of enforcing.[29]

This claim about upholding indigenous customs, usages, and rights was not surprising, given that Hastings, in his position as governor-general in India, had been a staunch opponent of the imposition of English common law on the people of India and one of the most enthusiastic patrons in the East India Company of indigenous learning, particularly in the field of law. As governor-general, he had encouraged the systematization of different and often conflicting systems of law in India by commissioning some of the first translations into English of ancient Hindu and Muslim legal texts and setting up educational institutions for the teaching of indigenous law.[30]

East India Company persuaded the emperor to grant them the right to the land revenues of the province of Bengal on the payment of a small annual tribute, thus taking on the role of a tributary under the de jure sovereignty of the Mughal emperor. As a result of this settlement with the Mughal emperor, sovereign power in Bengal was split, with the East India Company controlling the reins of power by controlling the machinery of revenue collection, and the puppet ruler of Bengal continuing to bear the responsibilities of maintaining law and order and criminal administration. See Mukherjee, *Rise and Fall,* 268–84.

29. Edmund Burke, *Speeches on the Impeachment of Warren Hastings* (Delhi: Discovery Publishing House, 1987), 1:483–84.

30. Bernard S. Cohn has interpreted the emphasis given by Hastings to indigenous legal traditions as reflective of the fact that the East India Company's administration under Hastings in Bengal followed the model of a "theocratic state." See "Law and the Colonial State" in his *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), 65–67. Also see J. L. Brockington, "Warren Hastings and Orientalism," in *The Impeachment of Warren Hastings,* 91–108.

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However, even as Hastings encouraged the systematization of India's legal traditions that, he believed, was necessary for the administration of civil and criminal justice and the ultimate stability of British rule in India, he also asserted that these very traditions allowed for the exercise of arbitrary and exceptional power by the sovereign in the political domain as a matter of state necessity.[31] Moving from the source to the nature of sovereignty, Hastings, rather than deny the accusations of arbitrariness, argued that, in fact, in India, sovereignty in practice could mean nothing but despotism. According to him, this despotism that he inherited from the Mughals was provoked by the nature of the people themselves. It was a reaction to a permanently rebellious population, rather than a conscious choice on the part of the government:

> The Hindoos, who never incorporated with their conquerors, were kept in order only by the strong hand of power. The constant necessity of similar exertions would increase at once their energy and extent, so that rebellion itself is the parent and promoter of despotism. Sovereignty in India implies nothing else. . . . The whole history of Asia is nothing more than precedents to prove the invariable exercise of arbitrary power.[32]

What justified absolutism in India, then, and necessitated the unhindered exercise of sovereign power (in contrast to England where it was illegitimate), was a set of exceptional circumstances that could only be likened to the state of civil war, anarchy, and chaos, described by the political philosopher Thomas Hobbes in his book *Leviathan,* as a stage antecedent to the emergence of the state.[33] Resorting to the familiar Hobbesian discourse of sovereignty, Hastings contended that, given this natural state of rebellion, since the sovereign's power alone could guarantee the security and preservation of life and property, it necessarily had to be unlimited and unquestioned, and notions such as justice and liberty could have no existence independent of his will.[34]

31. For an analysis of Burke's understanding of state necessity, see W. H. Greenleaf, "Burke and State Necessity: The Case of Warren Hastings," in *Staatsrason: Studien zur Geschichte eines politischen Begriffs,* ed. Roman Schnur (Berlin: Duncker and Humblot, 1975), 549–67.

32. Burke, *Speeches,* 1:484–85.

33. Thomas Hobbes, *Leviathan,* ed. C. B. Macpherson (New York: Penguin, 1985), pt. 1, chap. 13, 185–86.

34. In making this claim, Hastings was also asserting the need to remove the institutional checks that the East India Company had imposed on his authority by making his decisions as governor-general subject to the approval of the members of the Council. In seeking the concentration of authority in his own hands, he claimed that, as governor-general, he was ultimately the representative of the British Crown and, therefore, had to exercise royal sovereignty in India in accordance with the interests of the king. These, he contended, were absolute and subject neither to the interests of a commercial body, the East India Company, nor to Mughal power. See Neil Sen, "Warren Hastings and British Sovereign Authority in

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Painting a picture of a society in a state of perpetual war, Hastings articulated the state's relationship with the people in terms of a permanent conflict, where the people were "rebels" and enemies of the state on an a priori basis. Thus, the wars that he had waged as governor-general against native rulers and people, or his breaches of faith and treaty violations, were, Hastings argued, not "crimes" but necessary and legitimate responses to rebellious governors and people and, to that extent, were punitive in nature. With respect to the Rohilla wars, he asserted that they were necessary because the Rohillas had refused to pay for the protection that the Company's government had given them against invasion. "We made war with them, on just grounds surely, unless any other process than that of the sword can be devised for recovering the rights of nations."[35] Similarly, in referring to his policy towards the Marathas, Hastings asserted that he had pursued war because peace could be attained not by concessions and entreaties, but by the "terrors of a continued War."[36] Affirming "as a fact unquestioned and unquestionable that we derive our original title to our possessions in Bengal from the sword alone," Hastings contended that the new political base of the colonial state had to be force, as it had been for the Mughal state, for, without force, chaos and anarchy would ensue and the very existence of the colonial state would be at risk.[37] Under the permanent threat of the dissolution of authority, the whole structure of the newly established colonial government could have but a single object, security, and the only bond between the subject people to the colonial government was that of fear.

It was the necessity of fighting these perpetual wars against a rebellious population that also made it imperative, Hastings asserted, for the East India Company's officials in Bengal to take bribes and presents, acts that had been condemned as crimes by Burke and his prosecutorial team. Given the limited revenue available to the Company's state in India, others sources of funds had to be found in a "time of most pressing Necessity, in

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Bengal, 1774–80," *The Journal of Imperial and Commonwealth History* 25 (1997): 68–70, and P. J. Marshall, "The Making of an Imperial Icon: The Case of Warren Hastings," *The Journal of Imperial and Commonwealth History* 27 (1999): 5.

35. Hastings to D. Anderson (13 September 1786) in G. R. Gleig, *Memoirs of the Life of the Right Hon. Warren Hastings, first governor-general of Bengal* (London: R. Bentley, 1841), 3:303.

36. Hastings to Sir John Macpherson (1 November 1781) in Warren Hastings, *Letters to Sir John Macpherson,* ed. Henry Dodwell (London: Faber and Gwyer, 1927), 99–100.

37. *The Defence of Warren Hastings, Esq., late Governor General of Bengal, at the Bar of the House of Commons, upon the matter of the several charges of High Crime and Misdemeanors, presented against him in the year 1786* (London: Printed for John Stockdale, 1786), 82.

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order to relieve the Exigencies of the State" which were "in such imminent Danger and Distress, that every little Aid of this Kind became an object of National Consequence."[38] Thus, Hastings argued in his defense that every policy that he had pursued in India had been dictated by the necessity of preserving the East India Company's state in India and not by his personal corrupt motives.

Sovereign power under the exceptional conditions in India had to be, as Hobbes had argued, absolute and unlimited. As the holder of this absolute power, Hastings had neither the obligations to respect previous covenants, nor was he bound by any laws. In opposition to theories of the natural freedom of the people that were relevant for England, it was the doctrine of the natural subjection of the people and patriarchal despotic power that was appropriate for India. The will of the sovereign was supreme and could not be subject to positive laws, and therefore, notions such as crime, punishment, and rights had little relevance.[39]

Deterritorialized Justice and the Discourse of Imperial Sovereignty

It was against the "colonial" discourse of sovereignty, based on the twin ideas of government as corporate property on the one hand, and arbitrary power on the other, that Edmund Burke developed what I have called the imperial discourse of justice. Faced with this unique logic of colonial discourse, he had two distinct tasks. First, he had to prove that the East India Company in its role in India was not simply a mercantile corporate body, but operated as a government, and that, therefore, the logic of private property, as defined by the common law, was not sufficient to account for the Company's operations.[40] Second, he had to prove Warren Hastings's characterization of "native" sovereignty false by arguing, on the one hand, that both the Mughal and Hindu rulers in India had well-developed systems of laws, which precluded the exercise of arbitrary power by the sovereign, and on the other, that Hastings's contention about a permanently rebellious population was historically and factually unfounded.[41]

As it turned out, Burke comprehensively developed both these lines of argument to great effect. He began his prosecution by establishing that the

38. Great Britian. Parliament. House of Commons. *Journals of the House of Commons,* vol. 41 (May 1–2, 1786): 711–12.

39. See the discussion of "oriental despotism" in Charles de Secondat Montesquieu, *The Spirit of the Laws,* ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 5.14–19.

40. Burke, *Speeches,* 1:58–95.

41. Ibid., 104–26.

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Mughal and Hindu kings of India were not arbitrary rulers. On the contrary, they ruled in accordance with established systems of jurisprudence, that were, in fact, far more advanced than those in England and Europe: " . . . those people lived under the Law, which was formed even whilst we, I may say, were in the Forest, before we knew what Jurisprudence was. . . . it is a refined, enlightened, curious, elaborate, technical Jurisprudence under which they lived, and by which their property was secured and which yields neither to the Jurisprudence of the Roman Law nor to the Jurisprudence of this Kingdom. . . ." [42] He asserted that the rights of the people of India had been established long before the advent of the colonial state, and it was, therefore, obliged to protect the people in their rights.[43]

However, in so far as this trial involved two exclusive national/municipal systems of laws, customs, and jurisprudence, Indian and English, it presented a series of jurisprudential dilemmas. Under what jurisprudence could an English tribunal try one of its own subjects for violence and "crimes" against an alien population? Could a subject of England be tried in the name of the laws of an alien land? How could those acts of violence be translated into the juridical language of crime and punishment? How was the Company's claim of corporate property, that was firmly based on English common law, to be delegitimated, while, at the same time, retaining the basis of the trial in some form of jurisprudence? Finally, how was the discourse of the will that was the basis of Hastings's defense, and also the basis of continental jurisprudence, to be firmly rejected in the discourse of empire?

These series of dilemmas were made even more acute by the fact that impeachment involved a trial for public crimes that were political in nature and, therefore, directly engaged some of the fundamental questions of politics—sovereignty, rights of an alien population, and rules of war. Thus, as Burke pointed out, it was not simply Warren Hastings as an individual, or the specific criminal acts that he, and the government he headed, might

42. See *The Writings and Speeches of Edmund Burke,* vol. 7, *India: The Hastings Trial 1789–1794,* ed. P. J. Marshall (Oxford: Clarendon Press, 2000), 285.

43. In opposition to the Hobbesian theory of absolute sovereignty that discursively framed Hastings's defense, the political thinker John Locke had proposed that the state of nature, rather than being characterized by chaos and anarchy, was a state in which people had property and rights. These rights were only conditionally surrendered to the monarch and the people had an obligation to obey only so long as the state worked for their good. In claiming that the rights of the people of India were prior to the state, Burke was resorting to this political tradition in England that prioritized the liberty of the people against claims of absolute power of the sovereign. As the king was subordinate to the law in England, as the Mughal and Hindu rulers in India were subordinate to the laws in India, so Burke argued, Hastings and the Company's government in India had to necessarily be subordinate to law. See John Locke, *Second Treatise of Government,* 101–24.

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have engaged in, but the colonial state itself, and the principles and maxims on which its discourse was founded, that were being indicted in this trial. The judgment given in this trial, therefore, would be crucial, because it would serve as a precedent and constitute the primary source of a critical discourse on colonialism in India. Emphasizing this point in no uncertain terms, Burke reminded the judges: "According to the judgement that you shall give upon the past transactions in India, . . . connected as they are with the principles which support them, the whole character of your future government in that distant empire will be unalterably decided."[44]

Burke was well aware of the historical significance of this trial and the unprecedented nature of the dilemma that faced the judges. As he pointed out, this trial brought forth a new set of conditions for "it has a relation to many things, it touches many points in many places wholly removed from the ordinary beaten orbit of our English affairs."[45] This case could not be contained and tried within any of the exclusive municipal traditions since "this cause is not what occurs every day in the ordinary round of municipal affairs." As a consequence, the trial presented a rupture between the traditional national systems of legal discourses and the emerging reality of empire: " . . . hitherto we have moved within the narrow circle of municipal justice. I am afraid that, from the habits acquired by moving within the transcribed sphere, we may be induced rather to endeavour at forcing nature into that municipal circle, than to enlarge the circle of national justice to the necessities of the empire we have obtained."[46]

The necessities of empire made it imperative that the familiar world within which the East India Company's operations had been discussed so far be abandoned. Burke launched a vigorous attack against what he termed Hastings's "plan of geographical morality." Hastings had claimed that two different territorial systems of laws and customs ought to be applied to judge the nature of the Company's affairs in India and his actions as the governor-general—the common law, on the one hand, that protected the Company's chartered rights as a corporate body, and, on the other, the tradition of arbitrary political rule as a phenomenon peculiar to India and the Asiatic state, which the Company had inherited from the Mughal empire, granting them immunity from any judgments grounded in the standards of English common law.

> . . . these gentlemen have formed a plan of geographical morality, by which the duties of men, in public and in private situations, are not to be governed by their relative relation to the great Governor of the universe, or by their

44. Burke, *Speeches,* 1:9–10.
45. Ibid., 19.
46. Ibid., 18.

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> relation to mankind, but by climates, degrees of longitude, parallels not of life but of latitudes; as if, when you have crossed the equinoctial, all the virtues die. . . . This geographical morality we do protest against. Mr Hastings shall not screen himself under it; . . . the laws of morality are the same everywhere.[47]

But on what theory of jurisprudence was this new discourse of empire to be based, if not on municipal law? For this, Burke turned to a discourse of jurisprudence that over the last two centuries had become central to legal debates, particularly in Europe—the discourse of natural law.[48] "There is but 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. So far as any laws fortify this primeval law . . . such laws enter into the sanctuary, and participate in the sacredness of its character."[49]

The historiography on Burke has not adequately accounted for the irruption of the discourse of natural law in his speeches during the trial. Given Burke's status as one of the greatest and most articulate exponents of common law jurisprudence, the privileging of natural law over common law jurisprudence in this trial has been read by some scholars like John MacCunn and Leslie Stephen as a sign of inconsistency, and even political opportunism, while others like Charles Vaughan have dismissed it as a rhetorical digression.[50] Yet others like Peter Stanlis, while rightly recognizing and emphasizing the importance of natural law in Burke's thought, particularly in his speeches on India and to some extent Ireland, have tried to suture all the seeming disparities into one coherent whole by finding the jurisprudence of natural law at work in all of Burke's writings, thus ignoring the obvious shift from Burke's earlier writings on judicial and political issues.[51]

47. Ibid., 94.

48. Significant works on natural law include Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999); Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford: Clarendon Press, 1991); Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

49. Burke, *Speeches,* 1:504.

50. All these authors have interpreted the importance that Burke gave to "expediency" as reflective of a form of conservative utilitarianism and a contempt for natural law. Charles E. Vaughan, *Studies in the History of Political Philosophy before and after Rousseau* (New York: Longmans, Green and Co., 1925), 3–4; John MacCunn, *The Political Philosophy of Burke* (London: E. Arnold, 1913), 193; Leslie Stephen, *History of English Thought in the Eighteenth Century* (London: Smith, Elder, and Co., 1881), 2:225–26.

51. Stanlis, *Edmund Burke and the Natural Law,* 231–33. Stanlis sees no inherent contradiction between Burke's appeal to common law on the one hand and to natural law on the other. Rather, in his interpretation, the two have a "close reciprocal relationship" in Burke's

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To understand why Burke created a sharp disjuncture between common law and natural law jurisprudence in this trial and privileged the latter in the context of the emerging empire in India, it is necessary to lay out the different senses in which the term common law was used in eighteenth-century England. First, it referred to a substantive system of territorial municipal laws specific to England, based on English customs and traditions. Second, it referred to a particular set of judicial procedures and practices such as adversarial rules of procedure, due process of law, trial by jury, and judgment based on precedents, that guaranteed protection against arbitrary power. Third, in a more general sense, common law jurisprudence referred to the process of making laws, locating the source of law in customs, tradition, and history, rather than in positive legislation based on the will of the legislator, or legal codes based on abstract rules.[52] Thus, implicit within common law jurisprudence were both universal normative principles of how laws were to be made and what procedures were to be followed in courts—principles that could be and were carried by British colonizers to different parts of the world in the process of building empire—and also particular claims about rights deriving from specific British territorial and municipal laws.

In the context of England, where the common law applied only to Englishmen, it was possible for legal scholars like Blackstone to argue for the compatibility of universal principles implicit in both common law and natural law jurisprudence and to attempt to ground English common law in natural law and what he called the "eternal principles of justice."[53] However, in contrast, in the emerging eastern empire, where the real challenge was determining the extent to which English common law and the rights that derived from it were universal and could be applicable to an alien people, it was the conflict and clash between the principles of universality and par-

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thought. See his *Edmund Burke: The Enlightenment and Revolution* (New Brunswick, N. J.: Transaction Publishers, 1991), 11. This interpretation prevents Stanlis from seeing the critical historical shift from common law to natural law in the impeachment trial and the role it fulfilled in Burke's discursive construction of empire.

52. William Searle Holdsworth, *A History of English Law* (Boston: Little, Brown and Company, 1922–72), 12:330–583.

53. Blackstone maintained that there was a root connection between natural law and common law: "For [God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former. . . . The law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. . . . [No] human laws are of any validity, if contrary to this and such of them as are valid derive all their force, and all their authority . . . from this original." See William Blackstone, *Commentaries on the Laws of England* (facsimile of 1st ed., 1765–69; Chicago: University of Chicago Press, 1979), 1: Introduction, 2:40–41.

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ticularity in common law that had acquired critical importance. The central question was, could the people of India make an equal and universal claim with British subjects to the rights deriving from the principles implicit in common law, or was common law a particular territorial system of laws and procedures that only Englishmen, who had carried it with them to the colonies, could claim as their common inheritance?

The collective assertion of Englishmen in eighteenth-century India had been that the rights deriving from the substantive and procedural elements of common law was a particular English inheritance to which they had an exclusive right. For example, in cases in which the Company's servants were accused of committing crimes against "natives," they rejected the authority of "native judges" in indigenous courts to try them and claimed that they had the special right to be tried by a jury of peers (i.e., Englishmen) in an English court, a right granted exclusively to them by common law and not to indigenous people. This made it impossible to prosecute Company servants and Englishmen in general who had committed crimes against Indians.[54] The Supreme Court instituted by the Regulating Act of 1773 tried to remedy the fundamental injustice of the situation by introducing procedural principles of equality, making it possible for Indians to bring cases against the British. Yet it failed to establish equality before the law as a universal principle in India, primarily because its jurisdiction did not extend to the courts in the provinces outside the Presidency town, over which the governor-general and council had authority. Also, its attempt to introduce substantive elements of English common law (particularly in criminal cases) in India, where native systems of law already held sway, made it unpopular with the people of India and was criticized by Burke himself as an unwarranted imposition on the colonized.[55] Thus, the claims by Englishmen in India to exclusive rights based on the procedural and substantive elements of common law continued well into the nineteenth century, depriving the people of India of any grounds on which they could claim impartial justice against the crimes of the colonizing English.[56]

54. Stephen, *The Story of Nuncomar,* 2:205. Also see Setalvad, *The Common Law in India,* 1–62.

55. Speech on Bengal Judicature Bill in Parliament, 27 June 1781, in *The Writings and Speeches of Edmund Burke,* vol. 5, *India: Madras and Bengal, 1774–1785,* ed. P. J. Marshall (Oxford: Clarendon Press, 1981), 140–42.

56. As late as 1883, when Sir Courtney P. Ilbert, a Law Member of Lord Ripon's legislative council, proposed a bill to end the judicial privilege of Europeans not to be tried by Indian justices, Europeans in India launched a massive agitation that forced the government to withdraw the bill and substitute a much weaker act that permitted the defendant to insist on a jury trial, where half the jurors were European. See Burton Stein, *A History of India* (Oxford: Blackwell Publishers, 1998), 272–73.

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In contrast to the earlier British empire in America, where the colonists, being largely English, had been able to claim the rights of Englishmen and make common law jurisprudence the source of impartial justice, in the case of India, the Indian population could not make any such claims, as the protections of English common law did not extend to them.[57] Thus, it was the inadequacy of common law jurisprudence as a substantive system of British laws to serve the needs of the newly emerging imperial formation in the east that made it necessary for Burke to privilege the discourse of natural law in this trial. In order to give the people of India an equal claim to justice with Englishmen, and make it possible to indict Warren Hastings and the East India Company's servants for their crimes against an alien population, it was imperative to turn from common law to the principles of natural law as a higher system that, in so far as it was supranational, could be the source of impartial justice for both colonizer and colonized.

It was to found the discourse of empire in the east on a deterritorialized notion of justice, humanity, and equity that Burke brought into play two synonymous notions of natural law and the law of nations, which not only had precedence over all positive/municipal laws but, in fact, constituted the ground on which the latter had to be justified. It was the conceptual split between the discourse of natural law and that of municipal law that cracked open the space for a critical juridical discourse on arbitrary colonial practices. This allowed Burke to strategically deploy the discourse of natural law to reign in the discourse of sovereign arbitrary will and claims about the extra-legal nature of war, on which Hastings's defense had been based.

Natural law, in its modern form, was first comprehensively articulated by Hugo Grotius in the early seventeenth century precisely to limit the violence and plunder associated with the unlimited nature of war at a time of incessant strife between nations, particularly in the context of colonial expansion.[58] The question that Grotius was trying to answer was whether

57. This is why, in America, efforts by people like James Otis to ground colonial rights in natural law did not succeed. Colonists preferred to resort to the much stronger and more easily defended argument that they were protected by English common law. In making this argument, they excluded non-British inhabitants of North America such as slaves and native Americans from the claim to equal rights. See James Otis, "The Rights of the British Colonies Asserted and Proved," in *Pamphlets of the American Revolution, 1750–1776,* ed. Bernard Bailyn (Cambridge: Belknap Press of Harvard University Press, 1965–), 1:409–82. Also see Shannon, *Indians and Colonists,* 99.

58. Hugo Grotius, *The Law of War and Peace, Three Books,* ed. Frances W. Kelsey, Arthur E. R. Boak, Henry A. Sanders, and James Brown Scott (Oxford: Clarendon Press, 1925), vol. 2; Also see Samuel Pufendorf, *De Jure Naturae et Gentium libri octo* (Oxford: Clarendon Press, 1934), vol. 2, and Emmerich de Vattel, *The Law of Nations, or, Principles of the Law*

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nations were justified in waging wars on other nations, killing their people, and pillaging their wealth with impunity, or if there were limits to how far nations could go, even in war, and whether aliens had rights in war. Grotius's answer in no uncertain terms was that there were limits to what could and could not be done in a war, that wars needed to be justified.[59]

Grotius's most important achievement was the characterization of war in terms of justice, as just and unjust wars, whereby he brought the phenomenon of war within the range of the discourse of jurisprudence. No longer was war perceived as the result of a total breakdown of the legal and the judicial, but could even be thought of as its very extension and continuation, to the extent that it was a just war. To be characterized as just, wars had to fulfill certain criteria. Apart from the procedural requirement of a prior declaration, wars required just causes such as self-defense and defense of property and could not be fought simply for purposes of self-aggrandizement or plunder. Thus, Grotius set up a homology between war and judicial proceedings, thereby marking a break with all preceding discourse, in which war signified the moment of the dissolution of all laws with which one could judge actions.[60]

In making this argument, Grotius was challenging the existing discourse of sovereignty, founded on the writings of Bodin, in which war was the ultimate moment of the exercise of sovereignty, and any consideration of setting limits to war was a contradiction in terms.[61] By bringing war within the domain of the discourse of justice, Grotius brought sovereignty within its domain too. In making the concept of justice supranational and universal, the discourse of natural law made states initiating wars vulnerable to the charge of waging criminal wars, and, therefore, under appropriate institutional conditions, indictable in a court of law. This opened up the space for a critical juridical discourse about war and its consequences.

At the trial, Burke deployed the existing discourse of natural law to the colonial setting in India, thus creating a second strata of discourse from which colonial discourse articulated by the East India Company could

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of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, ed. Joseph Chitty and Edward D. Ingraham (Philadelphia: T. and J. W. Johnson and Co., 1852). The idea of natural law had its beginning in Greek philosophy and was later taken up and transformed by the Roman Empire for its own purposes. Henry Sumner Maine gives a genealogy of the evolution of natural law from ancient Greek philosophy through its modifications in the course of the Roman empire in *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1878), 44–112.

59. See the Prolegomena in Grotius, *The Law of War and Peace.*

60. Grotius, *The Law of War and Peace,* 18.

61. Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth,* ed. and trans. Julian H. Franklin (Cambridge: Cambridge University Press, 1992), 59–63.

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be critiqued. Rejecting Hastings's claim that the wars that the Company had waged in India against native monarchs and people were a legitimate exercise of sovereign power against a habitually rebellious population, Burke argued that, on the contrary, it was Hastings and the Company's government that had waged criminal offensive wars against the people of India, leaving them no choice but to resist. Each case of rebellion that had broken out against the authority of the East India Company's government in India was provoked, Burke asserted, by the criminal policies, treaty violations, breach of trust, and violence perpetrated by Warren Hastings and the Company's government.

The war against the Rohillas, in Burk's view, was one of the most flagrant examples of an unjust war waged against a peaceful people, for there was no proof that the latter had engaged in any acts of hostility or aggression against the Company, or the King of Awadh, Nawab Shuja Dowla, with whom Hastings had entered into a criminal alliance for their extirpation. In the case of Benares, rebellion broke out when Hastings, in gross violation of the treaties and agreements of peace and friendship signed between the Company and the king, Chait Singh, guaranteeing the latter the protection of the East India Company on the payment of a regular tribute, not only attempted to criminally extort enormous bribes from him, but on his failure to pay, insulted and imprisoned the king, confiscated his property, and tyrannically expelled him from those territories that he had held on the basis of repeated agreements with the Company. The "Bloodshed, War and Confusion" that resulted from this "unjust war," Burke argued, were "solely imputable to the Misconduct, Violence, Tyranny and culpable Improvidence of the said Warren Hastings."[62] Finally, in Bengal, it was the exorbitant rents imposed by the Company's government on the peasants, and the cruel and inhumane methods deployed by their agents to extort payment, that ultimately resulted in unarmed rebellion in the districts of Rangpur and Dinajpur. In so far as all these rebellions were defensive and fought for the preservation of life and property, in Burke's opinion, they were just, legal, and legitimate.

In characterizing the widespread rebellions in India as just resistance, whose roots lay in the flagrant violation of treaties by the Company, Burke, while deploying the principles of natural law, was also marking a critical departure from earlier natural law theorists, who, until then, had debated the justice and injustice of wars primarily from the perspective of European colonizing states. The discourse of natural law had been developed in the period of expanding colonialism to govern relations between European states and to prevent wars between them. Many natural law writers had

62. Marshall, *Writings and Speeches,* 6:143.

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argued that the principles of natural law did not apply to nations and people lying outside Christian Europe, who, therefore, had no rights under natural law.[63] Even those natural law theorists who constructed rules that sought to limit aggrandizement by European colonizers in the Americas and Asia and wrote with sympathy about the rights of the colonized (i.e., the native Americans, in the American case) denied the "natives" the absolute right to resist, justifying the European acquisition of territory and property in non-European lands on grounds of just war (if, for example, the right of free passage and free missions was denied).[64]

In his speeches in the impeachment trial, Burke unequivocally inserted into the history of natural law discourse and the domain of just wars an alien and non-European colonized people's absolute right to resistance against aggressive colonizing powers, whether states or private companies. In so far as self-preservation was an obligation imposed by nature, the colonized people, he argued, had not just a right, but a duty to rebel against sovereign authority if it was tyrannical. Asserting that the same Law of Nations prevailed in Asia as in Europe, Burke contended that the right of resistance was not reserved just for the people of England and Europe, but could be found to be a fundamental right written into the very constitution of Mughal rule in India.[65] The Muslim ruler of India, far from being arbitrary, had to be by the laws of the country "a protector of the person and property of the subjects and a right of resistance is directly established by Law against him and even a duty of resistance."[66] Thus, if the people of India had resisted Hastings, in so far as the right of resistance was written into their very laws and, at the same time, guaranteed by the universal law of nations and of nature, their resistance was both legal and just.

In so far as Warren Hastings's discourse of sovereignty was based on

63. Tuck, *The Rights of War and Peace,* 40–46.

64. Francisco de Vitoria was one natural law writer who had emphasized equality between Christians and non-Christians in international law, in reference to the rights of Indians in South America. See his *De Indis et de Iure Belli Relectiones* (1557), ed. Ernest Nys and trans. John Pawley Bate (Washington: Carnegie Institution, 1917). However, ultimately, he justified the Spanish occupation and annexation of territory and the subjugation of indigenous people on grounds of just war (if right of free passage and free missions was denied). For a rich analysis of the development of European thinking on international law and the rights of the colonized, see Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Burlington, Vermont: Ashgate Publishing Company, 2002).

65. For a comprehensive history of the application of the principles of the law of nations to India from the sixteenth to the eighteenth centuries, see C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967).

66. Marshall, *Writings and Speeches,* 7:275.

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the will, Burke argued, it exceeded the domain of law and was, therefore, illegitimate and even criminal. For the idea of the will in any form was a negation of the very idea of law. In sharp contrast to continental political philosophy and jurisprudence of sovereignty, which founded law variously on the notion of general will and universal will, Burke deployed the discourse of natural law to argue that any construction of laws, either on the basis of general will or metaphysical principles of reason was, by its very nature, illegitimate.[67] Man, in Burke's view, was not above law, but was always already subject to a preexistent law. As he asserted, "man is born to be governed by law; and he that will substitute will in the place of it is an enemy to God."[68] In so far as Hastings had made his will the law, he had exceeded the bounds of legality, thus giving the people of India a natural right of resistance against his acts of aggression.

While arguing that the Mughal emperors were not arbitrary or despotic, Burke resorted to the discourse of natural law to contend that, even if some instances of arbitrary power could be found in Mughal history, all discourses of sovereignty based in the will were illegitimate. "Those who give and those who receive arbitrary power are alike criminal, and there is no man but is bound to resist it to the best of his power, whereever it shall show its face to the world. Nothing but absolute impotence can justify men in not resisting it to the best of their power."[69] Such a transfer of arbitrary power was a crime because "no man (could) lawfully govern himself according to his own will, much less (could) one person be governed by the will of another.[70]

The culmination of these just wars of resistance against Hastings and the Company's government, Burke was convinced, could be nothing but civil war, a state in which all bonds between the colonial government and the people would be broken, and the two parties would consider each other as enemies and acknowledge no common judge.[71] Such a state of affairs would surely imply the end of empire in the east as it had in the west. It was, therefore, imperative for the preservation of empire that a conceptual and institutional frame be constucted that would provide for a just and impartial settlement of disputes between the new colonial rulers and their subjects, and, thereby, foreclose the possibility of a recourse to arms. In

67. Jean-Jacques Rousseau, "On the Social Contract," in *Basic Political Writings,* ed. Donald A. Cress (Indianapolis: Hackett Publishing Company, 1987), 153; Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right,* ed. Allen W. Wood and trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 54–55.

68. Burke, *Speeches,* 1:101.

69. Ibid.

70. Ibid., 99.

71. Vattel, *The Law of Nations,* 542.

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opposition to the dyadic model of war in which the colonial government and the people of India faced each other as enemies, a triadic model would have to be created in which the empire itself would occupy the third position of the judge, the position of justice, neutrality, and impartiality, and mete out necessary punishment to the perpetrators of crimes, even those committed by colonial rulers like Warren Hastings.

The American Revolution had clearly shown that the empire could not be maintained for long by the forcible subordination of the colony to Parliament and the municipal laws of the metropole. Imperial justice, then, had to stand above the particular laws of different countries that formed the empire, so that the empire and the nations within it would constitute a complex whole. In the new imperial discourse, the empire was not simply to imply a hierarchical relationship between nations and the direct subordination of India to England. For it was not by subordinating the colonies to the laws of England, but precisely by deterritorializing the concept of justice from the soil of England and raising it above her national laws, laws of property, and rules of evidence that the discourse of the nation could be transformed into the discourse of empire.

The substantive elements of common law being municipal in nature were not adequate for imperial purposes, which had a larger and different field of operation. However, once the conceptual leap to natural law and imperial justice was made, the principles of common law jurisprudence once again came into play. The supremacy of the law over the will had been a rallying point for the Lords and the Commons for centuries in England in their struggle against the king and had been an integral part of common law jurisprudence from Bracton through Coke to Blackstone.[72] The common law tradition in England identified customs, conventions, and habitudes as the sources of law: " . . . this (law) is a choice not of one day, or one set of people, not a tumultory and giddy choice; it is a deliberate election of ages and civilizations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions and moral, civil and social habitudes of the people, which disclose themselves only in a long space of time. . . ."[73]

Placing himself in this tradition, Burke saw law not in terms of its deliberate construction by a process of philosophical reflection, or political decisions based on the notion of general will, or the will of the monarch,

72. See Matthew Hale, *The History of the Common Law of England,* ed. Charles M. Gray (Chicago: University of Chicago Press, 1971); Frederic William Maitland, *The Constitutional History of England, a course of lectures,* ed. H. A. L. Fisher (London: Cambridge University Press, 1963); Holdsworth, *A History of English Law.*

73. Edmund Burke, *The Works of the Right Honourable Edmund Burke* (London: Henry G. Bohn, 1854–56), 6:147.

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but as immemorial custom that acquired its force and binding power from long usage. In Burke's view, laws could only be found and declared by political institutions like the parliament—"all human laws are, properly speaking, only declaratory. . . ."[74]

The political implications of such an insistence on locating the source of law in longstanding customs was brought out by J. G. A. Pocock in his study on what he called "the common law mind."

> [T]he attraction which the concept of the ancient constitution possessed for lawyers and parliamentarians . . . resided . . . in its value as a purely negative argument. For a truly immemorial constitution could not be subject to a sovereign. . . . In an age when people's minds were becoming deeply, if dimly, imbued with the fear of some sort of sovereignty or absolutism, it must have satisfied many men's minds to be able to argue that the laws of the land were so ancient as to be the product of no one's will, and to appeal to the almost universally respected doctrine that law should be above will.[75]

Thus, a convergence took place in the trial between two independent traditions of jurisprudence—one, based on common law, and the other, based on natural law. On the one hand was the tradition of Brackton, Coke, Hooker, and Blackstone, and on the other, Grotius, Pufendorf, and Vattel. One grew out of the historical struggle between the king and the Commons and developed along the idea of the supremacy of law, and the other, out of the necessity to rein in centuries of destructive wars between the nations of Europe. One developed as an exclusively national tradition. The other began as an international discourse intended to regulate international relations. However, what was common to both of them, and what made their convergence in Burke's discourse possible, was their common goal to set limits to the will of the sovereign by locating the law in a "time out of mind," rather than in the legislative command of the sovereign.

Institutional Realignment: Toward the Creation of a Supranational Tribunal

While recourse to natural law provided Burke with a supranational and deterritorialized discourse of justice, it was essential that this discourse be grounded in an institutional site that was not tied down by the discourse of national interests. There was a crucial antinomy between the conceptual

74. Ibid., 145.

75. J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987), 51.

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and the institutional at the very heart of natural law theory, which, while constructing a discourse of universal justice over and above national interests, was unable to conceive of an institution that could enforce natural law against the will of individual sovereigns. The imperative of judicial neutrality and impartiality, which was fundamental to the jurisprudence of natural law, was rendered ineffective by the fact that the enforcement of justice was left by these theorists in the hands of national sovereigns. This defeated the very purpose for which the theory was developed in the first place. In practice, the international order, as it had come to be constructed after the Treaty of Westphalia, was predicated on the sovereignty of individual states and the sanctity of pacts and treaties. This antinomy of the institutional and the conceptual was noted by Kant, in his "Perpetual Peace," where he objected to the idea of just wars, specifically on the ground that the absence of a suprastate legal body, which could take decisions in an impartial and neutral way, defeated the idea of just wars. In the absence of such a body, with clear rules and fixed procedures of taking decisions, any claim in the name of justice appeared voluntaristic and, therefore, lost its required legitimacy.[76] This debilitating antinomy between the conceptual and the institutional had plagued natural law theory for many decades, and many treatises had been written on how it could be resolved.[77]

In Hastings's trial, Burke sought to resolve this antinomy by grounding the imperial discourse of justice in the institution of the House of Lords in its judicial capacity. To understand why Burke saw the House of Lords as the only institution in England capable of performing the role of a supranational tribunal with regard to empire, it would be appropriate to look briefly at its role in British history.[78] In the course of British history, the House of Lords had come to acquire a unique position as an institution in

76. Immanuel Kant, "Perpetual Peace, A Philosophical Sketch," in *Kant: Political Writings,* ed. Hans Siegbert Reiss (Cambridge: Cambridge University Press, 1991), 102–5.

77. Gottfried Wilhelm Leibniz, *Leibniz: Political Writings,* ed. Patrick Riley (Cambridge: Cambridge University Press, 1972), 165–83. The only other natural law theorist to envision an ad hoc supranational authority capable of conducting collective sanctions against lawbreaking nations was Emmerich de Vattel. See his *The Law of Nations,* 154.

78. British historiography has in the past paid little attention to the critical role of the House of Lords and the Crown in the creation and preservation of empire. This neglect can be attributed to what David Armitage has called the "persistent reluctance of British historians to incorporate the Empire into the history of Britain." See Armitage, *Ideological Origins of the British Empire,* 13. Also see Antoinette Burton, "Who Needs the Nation? Interrogating 'British' history," in *Cultures of Empire: Colonizers in Britain and the Empire in the Nineteenth and Twentieth Centuries: a Reader,* ed. Catherine Hall (New York: Routledge, 2000), 137–53. British historians have assumed a separation between the British nation that is seen as domestic and the empire that is viewed as external to the nation. They have either completely ignored the empire in their analysis of the growth of the British nation or assumed that intellectual, political, and institutional developments in England occurred

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which politics, even at the highest level, had been brought under the gaze of justice, not just in the domestic arena but also with respect to the empire. This role derived from its historical position as the council of the Crown, who was both the ultimate source of justice within the realm (subjects had the right to appeal to his mercy and sense of equity when they felt that the courts of common law had failed them), and the supreme arbiter of justice in the empire.[79]

The House of Lords, as Turberville described it, was different from the House of Commons in that it was a law-maker by two different methods—by the process of passing bills, which it shared with the Commons, and also by the process of interpreting the laws of the land as the supreme court of the land.[80] Commenting on what he called "the union of the judicial and political character" in the House of Lords, Macaulay, the renowned historian of England, pointed out that it was "not a mere accidental union." "The fact is," he argued, "not only that a Judge may be made a Peer, but that all the Peers, as Peers, are necessarily Judges. . . . the supreme Court of the realm is a great political assembly; that to this assembly go up all appeals from all Courts of equity and law in this country, from the Courts in Ireland and Scotland. . . ."[81]

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independently of empire and were not in any significant way affected by its existence. So that while the British state did formulate policies for its imperial possessions, it was not in any way seen to be constituted by empire. As P. J. Marshall put it, " . . . the needs of empire led to no structural reform of the British state. It developed on its own with little regard to what was happening in the empire." See P. J. Marshall, "Imperial Britain," *The Journal of Imperial and Commonwealth History* 23 (1995): 382–83. Thus, while the role of institutions like the Crown, the Privy Council, the House of Lords, or the House of Commons has been studied exhaustively in relation to English politics, little is known about how these institutions responded to imperial needs, or, indeed, of any attempts at reconstructing or realigning these institutions in terms of empire.

79. In the context of the empire, the king was not simply a national sovereign but was also an imperial sovereign, for it was common allegiance to him that united the empire as a whole. See Holdsworth, *A History of English Law,* 10:340–76. This point was emphasized in no uncertain terms during the American revolution by colonists who claimed that what bound them to England was their loyalty and allegiance to the Crown, and not any form of subservience to the House of Commons. See J. G. A. Pocock, "Political Thought in the English-Speaking Atlantic, 1760–1790: The Imperial Crisis," in *The Varieties of British Political Thought, 1500–1800,* ed. J. G. A. Pocock, Gordon J. Schochet, and Lois G. Schwoerer (Cambridge: Cambridge University Press, 1993), 262. This imperial role as the arbiter of justice in the empire already placed the Crown in an ambivalent position in which any narrow consideration of national interests could be construed as a betrayal of imperial trust and responsibility.

80. Arthur Stanley Turberville, *The House of Lords in the XVIIIth Century* (Oxford: The Clarendon Press, 1927), 10.

81. *Hansard's Parliamentary Debates* (London: T. C. Hansard, 1853), 999.

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As the highest court of appeal for Ireland and Scotland (which, together with England, formed part of the British imperial formation since the seventeenth century, as David Armitage has pointed out [82]), the House of Lords was already historically placed in the position of an supranational tribunal that was required to rise above narrow English national interests and play the role of an impartial judge in cases involving the conflicting interests of England, Scotland and Ireland.[83] With respect to other parts of the empire, it was the institution of the Privy Council (earlier the King's Council and composed of members of the House of Lords) that was responsible for addressing imperial appeals from all the dominions of the Crown, excepting Great Britain and Ireland.[84]

What made the House of Lords particularly suited, in Burke's view, to take on the role of a supranational tribunal with respect to the empire was that, in so far as its members were not elected, it was not a representative body, having, in Blackstone's words, "neither the same interests, nor the same passions as popular assemblies."[85] Thus, it was always in a position, unlike the House of Commons, to dissociate itself from popular nationalism and the discourse of national interests and could, therefore, be deployed as the site for a deterritorialized discourse of imperial justice.[86] The British

82. Armitage, *Ideological Origins of the British Empire,* 7.

83. Holdsworth, *A History of English Law,* 11:6, 26.

84. Luke Owen Pike, *A Constitutional History of the House of Lords from Original Sources* (New York: Macmillan and Co., 1894), 308. The difference between the institutions of the House of Lords and the Privy Council was that, while the House of Lords was a representative judicial body that included representative peers from Ireland and Scotland, the Privy Council was a royal council, adjudicating on behalf of the Crown. The Privy Council's "judgement" was more in the nature of a recommendation on which the Crown made the final decision. Also, a clear hierarchy was instituted between these two courts, with the Privy Council serving as the ultimate court of appeal for the colonies, while appeals from the United Kingdom itself were heard only by the House of Lords and were not subject to the jurisdiction of the Privy Council. See D. B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester: Manchester University Press, 1987), 1–21.

85. Blackstone, *Commentaries,* vol. 4, chap. 19, 258.

86. The independence of the House of Lords has been noted by the foremost constitutional scholars of England. As Walter Bagehot observed, the House of Lords was more independent than the House of Commons because, having "no consituency to fear or wheedle," it was best placed to form disinterested judgments. Walter Bagehot, *The English Constitution: and Other Political Essays* (New York: D. Appleton and Company, 1911), 180. Historians of the House of Lords have commented on the fundamental role that the upper House was seen to play in the mixed and balanced government of the eighteenth century by serving as the "equipoise" of the constitution. See A. S. Turberville, *The House of Lords,* 33; C. C. Weston, *English Constitutional Theory and the House of Lords, 1556–1832* (New York: Columbia University Press, 1965), 1–8; Michael W. McCahill, *Order and Equipoise: The Peerage and the House of Lords, 1783–1806* (London: Royal Historical Society, 1978), 12–38.

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Parliament had the unique ability to appear in two configurations—one, at ordinary times when it played a legislative role, and the other, during times of impeachment, when the two Houses of Parliament split themselves into two institutional and enunciative personae, the House of Commons taking on the role of the accuser/pleader, and the House of Lords that of the impartial judge. This allowed a possible discursive reconfiguration of English political institutions in reference to the newly emerging empire, so that, while the House of Lords could take on the position of impartial and neutral judge, the House of Commons could occupy the role of the petitioner/pleader on behalf of the colony, setting aside their respective legislative roles.[87]

The addressee of this imperial discourse of justice was the conceptual persona of an impartial judge. The institutional shift from a legislative assembly to a court of judicature was rendered essential, Burke told the Lords, because the House of Commons as an institution had failed to rise above the idea of national interests, which overdetermined its proceedings, and develop a comprehensive discourse of empire, thus rendering imperative "the plenary justice"[88] of the House of Lords. Burke, therefore, reminded the Lords of this absolutely essential imperative of impartiality and neutrality:

> . . . it is feared that partiality may lurk and nestle in the abuse of our forms of proceeding. It is necessary, therefore, that nothing in that proceeding should appear to mark the slightest trace, should betray the faintest odour, of chicane. God forbid that when you try the most serious of all causes, that when you try the cause of Asia in the presence of Europe, there should be the least suspicion that a narrow partiality utterly destructive of justice should so guide us, that a British subject in power should appear in substance to possess rights which are denied to the humble allies, to the attached dependents of this kingdom. . . .[89]

87. Charles Howard McIlwain points out that Parliament as an institution itself developed as a judicial body, a high court, and it was only later in its history that the functions of adjudication and legislation were separated, with the House of Commons becoming primarily a legislative body, and the House of Lords continuing to have both a legislative and an adjudicative role. See his *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven: Yale University Press, 1910). This historical role made it possible in Burke's view for the Parliament to split itself into two judicial roles with respect to empire, the House of Commons taking on the role of a lawyer and the House of Lords taking on the role of an impartial judge.

88. Burke, *Speeches,* 1:19.

89. Ibid., 17.

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In this discourse, the empire was to stand above the governments, both in England and in India, in its impartiality. The complex whole that was to comprise the empire was to be triadic, in the sense that the empire would emerge as the third person, standing above and in between the two parties—the two nations, England and India. The space of impartiality was to be constituted in the discursive position of the third person, the judge.

What is striking about this argument for the displacement of the legislative by the judicial in the case of India is the sharp contrast with the American case, in which Parliament even went to war with the American colonies to assert its rights to exercise parliamentary sovereignty over America. J. G. A. Pocock has argued that the heart of the American problem for Britain had been less the maintenance of imperial control than the preservation of essentially English institutions, particularly the unity of the Crown and Parliament, which the colonists were calling into question by claiming allegiance to the Crown, but not to the legislative authority of the House of Commons. In the end, Pocock contended, Britain preferred to lose her American provinces rather than modify her political institutions to accommodate them, for to give up on the unity of the Crown-in-Parliament was to give up on the idea and practice of liberty itself, which, in British history, had come to be indelibly tied to the existence of this institution.[90] It was in this historical context of the loss of the American colonies that Burke sought to convince the political establishment in England that the preservation of empire in the east need not necessarily imply the repudiation of existing British institutions. Rather, the only way to preserve empire without giving up on liberty at home, and, at the same time, preventing rebellion in the colonies and ensuring that the rights of the colonized were preserved, would be to foreground the juridical dimension of the existing institutions of Parliament with respect to empire, and to create a confederation tied not by legislative subordination to the House of Commons, but by a judicial attachment to the Crown and the House of Lords.[91]

Whereas the American war was fought in the name of the sovereignty of Parliament, Burke sought to preempt such a war in the east through a judicial reconfiguration of English political institutions and the construction

90. Pocock, "Political Thought in the English-Speaking Atlantic," 246–82.

91. Burke's proposition of reconstituting the House of Lords as a supranational tribunal, while not implemented in Britian in the eighteenth century, became a critical issue for the empire in the late nineteenth and early twentieth centuries. It was in this period that nationalists in Australia, Canada, and other colonies demanded that the distinction between the Privy Council and the House of Lords be abolished and a common imperial tribunal be created. This would include colonial representatives and render judgments impartially on appeals from the courts of all commonwealth countries including the United Kingdom itself. See Swinfen, *Imperial Appeal,* 1–112, 178–218.

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of a discourse of imperial justice in terms of natural law. Burke, who ruled out the viability of a judicial intervention in the case of America, spent fourteen years developing a comprehensive judicial discourse to situate India in the larger framework of the British empire. Burke the legislator (in the case of America) appeared in the enunciative persona of a lawyer to articulate the new imperial discourse of justice, while the people of Indian emerged, not as a people asserting their freedom, but as supplicants to justice at the bar of the House of Lords. "Exiled and undone princes, extensive tribes, suffering nations, infinite descriptions of men, different in language, in manners and in rites—men separated by every barrier of nature from you, by the providence of God are blended in one common cause and are now become supplicants at your bar."[92]

This was a decisive moment in the history of empire, when, even as one phase of the British empire had drawn to a close in America, the second phase was beginning to take shape, calling for a fundamental realignment of the highest political institutions in England in terms of its relationship with its new colonies.[93]

The institution of the House of Lords, Burke argued, needed to be constituted as that liminal space, that narrow space of exteriority outside the state, where politics and the state itself would be brought under the gaze of justice, or what Burke called state morality. Burke defined the nature of this institution and its jurisdiction: "For this great end your lordships are invested with great and plenary powers: but you do not supersede, you do not annihilate, any subordinate jurisdiction; on the contrary, you are auxiliary and supplemental to them all."[94] This supplemental discourse was to be that of empire founded on the notion of state morality and located in the House of Lords in its judicial aspect.

The discursive and institutional status that Burke gave to the judiciary found its sharpest formulation in his observations on the Revolution in France. In the course of criticizing the revolutionary government in France for abolishing the French parlement, which was an autonomous institution functioning as the highest court of appeal, and for bringing the judicature under the direct control of the national assembly in accordance with Rousseau's idea of the supremacy of the legislative "general will," Burke

92. Burke, *Speeches,* 1:16.

93. Burke saw a clear connection between the loss of the American colonies and the need for preserving empire in the east. As early as 1777, criticizing the policies of the English government and the East India Company in India, he wrote, "Some people are great lovers of uniformity—they are not satisfied with a rebellion in the West. They must have one in the East: They are not satisfied with losing one Empire—they must lose another. . . ." See Marshall, *Writings and Speeches,* 5:40.

94. Ibid., 11.

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argued: "Whatever is supreme in a state ought to have, as much as possible, its judicial authority so constituted as not only not to depend upon it, but in some sort to balance it. It ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state."[95]

In sharp contrast to general political theory, that identified the judiciary as one of the three organs of the state, the legislature and the executive being the other two, Burke located the judicature not just exterior to the state, but as a balance against the power of the state.[96] What he brought out were two sets of antinomies—the conceptual antinomy between justice and power, and the institutional antinomy between the judicature and the state. In the Burkean scheme, justice and power were exclusive categories that had to be distinguished from contemporary political and constitutional phrases like judicial power. In Burkean discourse, power meant the power to dominate and was synonymous with political domination. Since the concept of justice and the institution of the judicature were deployed against political domination, they were exterior to the domain of power.[97] Justice thus was articulated in its critical difference from the power of the state.

By discursively situating the judicature exterior to the state, Burke's discourse sought to create a split between the idea of empire and England as a nation, where the empire would emerge as a supranational juridical formation, "a refuge of afflicted nations"[98] with its accompanying discourse of what he variously called "superintending,"[99] "supplemental,"[100] or "imperial justice."[101]

Conclusion

In discursively linking the idea of empire in India with a supranational deterritorialized theory of justice in the impeachment trial of Warren Hastings, Edmund Burke proposed a radical alternative both to the dominant

95. Edmund Burke, *Reflections on the Revolution in France,* ed. T. H. D. Mahoney (Indianapolis: The Bobbs-Merrill Company, 1955), 242.

96. Burke, *Speeches,* 1:58.

97. This explains why Burke refused to interpret the English Revolution of 1688 in political terms as a popular revolution that brought people to political power but rather in juridical terms as an attempt at the restoration of the constitution that had been violated by the Crown. Burke, *Reflections on the Revolution in France,* 35. Also see Stanlis, *Edmund Burke: The Enlightenment and Revolution,* 216–50.

98. Marshall, *Writings and Speeches,* 7:694.

99. Burke, *Speeches,* 1:58.

100. Ibid., 11.

101. Ibid., 17.

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discourse of colonial sovereignty in eighteenth-century England, based on notions of conquest and domination of the colonized, and the complementary discourse of the law of nations that had come to be predicated, after the Treaty of Westphalia, on the absolute sovereignty of individual states. While the discourse of natural law had attempted to set limits to colonial aggrandizement by emphasizing the universal and transcendent principles of justice and equity, it, too, came to be subordinated to the principle of national sovereignty and national interests of states. It was clear to Burke that the discourse of international law, grounded as it was on the discourse of national interests, was not only inadequate, but, in fact, fatal to the future of empire in the east. It had promoted the ruthless appropriation of property and wealth in the colonies, which was not only corrupting the political system in England and destabilizing the European balance of power but was also provoking widespread rebellions on the part of the colonized in India, threatening the very existence of empire. If empire was to be saved in the face of this growing resistance, it was imperative, in Burke's view, that the imperial authority recognize the rights of the colonized, particularly their rights of "just resistance" against the oppression and violence of the colonial regime. It should also take steps to prevent such oppression in the future. However, the crucial question that inevitably arose from such a recognition was, on what legal grounds could empire continue to be justified and legitimized, and what steps could be taken to preserve empire against the threat of civil war and the ultimate dissolution of all bonds between the rulers and the ruled?

Burke's proposal was that the empire become the site of a deterritorialized universal justice that would rise above the national interests of Britain and serve as an impartial arbiter between the English colonial state in India and the colonized Indian society. The construction of this triadic discourse of supranational imperial justice was predicated on the possibility that the imperial formation could split itself three ways into the enunciative personae of the plaintiff, the defendant, and the impartial judge. With the people of India as the plaintiff and the East India Company's government as the defendant, the House of Lords in its judicial capacity could take on the role of a supranational tribunal, a fair and impartial arbiter, that would address the grievances and complaints of the colonized society against the colonizing state. This triadic imperial juridical formation, grounded on these three institutional and enunciative personae, would be constructed in opposition to a dyadic colonial political formation, in which the East India Company's government saw itself locked in perpetual conflict with its other, the "rebellious population" of India. By deterritorializing the notions of law and justice from their national territorial moorings, the imperial discourse of justice would make possible the internalization of

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otherwise potentially violent conflicts, and even civil war, while transforming them into juridical discursive conflicts between the colonized society as plaintiff and the English colonial state in India as defendant. In this model, colonial state power in India would no longer be the sole source of its own legitimacy, but would have to accede to the ultimate juridical sovereignty of the imperial.

The House of Lords, however, eventually acquitted Hastings on all counts in April 1795, thus failing, in this case, to rise, as Burke had proposed, beyond partiality and national interests to the position of a deterritorialized, imperial tribunal. The question is, does this verdict diminish the historical significance of the trial and the Burkean discourse of juridical imperial sovereignty? Considering the nature of the case and its historical implications that unfolded over the next two centuries, I would argue that the question of Hastings's conviction or acquittal was of marginal importance to what the trial accomplished in a larger sense.

The crucial historical significance of Burke's efforts in the impeachment trial is that they were not aimed simply at seeking a judicial decision on the facts of Hastings's crimes in India. Indeed, Burke was aware, even as he prosecuted the case, that the ultimate verdict on the facts of the case could go in Hastings's favor, in part due to the corruption and weakness of the judges, and in part due to what some judges could perceive as a lack of sufficient evidence from the standards of common law.[102] Thus, even as he sought to create "a train of clear solid juridical Evidence, fit to establish the facts," what was at stake for Burke in the larger sense was to lay out in the event of the trial the legal and moral parameters of a new discourse of empire for the future.[103] In so far as there was no preexisting legal or political consensus, let alone a set of established laws, on the rights of an alien people in the colony against the arbitrary rule of the colonial state, the trial was much more than a regular judicial event. It was also a legislative moment in the history of British empire in India when, for the first time, an institutional framework and discourse of relevant laws and principles were articulated to make the colonial regime in India legally accountable for its policies and actions in the colony.

From this perspective, the very articulation of this discourse of imperial sovereignty and alien rights during the trial was an event of enormous historical significance for the future of empire. Indeed, so effective were Burke's speeches in the trial in delegitimizing the colonial state in India that it would take all the ingenuity of a James Mill and a John Stuart Mill,

102. Edmund Burke to Henry Addington (8 January 1795) in *The Correspondence of Edmund Burke,* ed. R. B. McDowell (Cambridge: Cambridge University Press, 1969), 8:110.
103. Ibid., 110.

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the founding and leading minds of British liberalism, to mount an intellectual campaign to rescue the colonial state in the nineteenth century and restore its legitimacy and supremacy.[104] It was in the process of contesting the Burkean discourse of empire, which was firmly anchored in legal and moral principles, that James Mill was to construct an alternative discourse of empire based on the notion of a hierarchy of civilizations. The Burkean argument granted the colonial state in India legitimacy on the basis of how it carried out its legal and moral responsibilities toward the colonized society as the other. By contrast, in Mill's discourse, the superiority of British civilization alone was to be established as a self-legitimating and self-evident principle that needed no further legal and moral arguments.

The continuing historical significance of Burke's discourse of juridical imperial sovereignty for India can also be seen in its frequent deployment by both colonial and anti-colonial proponents in the course of the nineteenth century. On the one hand, whenever the colonial state came under serious threat in India, for example, during the Indian Revolt of 1857, it inevitably fell back on the Burkean discourse of imperial justice as an assurance to Indians and as a way to tide itself over the crisis.[105] On the other hand, in so far as Burke's speeches in the trial had performatively

104. The major book in this regard was James Mill's *History of British India,* originally published in 1820. It became a textbook for British administrators in India in the nineteenth century and was to be the intellectual foundation of British colonialism. See James Mill, *The History of British India,* 10 vols. (London: J. Madden, 1858). It is one of the ironies of history that while Burke, who has been characterized as a leading conservative thinker, sought to defend the rights of Indians against the arbitrariness of the colonial state, it was leading liberal intellectuals like James Mill and John Stuart Mill, who resolutely defended the absolutist nature of the East India Company's government. This demonstrates how misleading a decontextualized and uncritical use of terms like "conservative" and "liberal" could be. For further discussion of the relationship between liberal thought and empire, see Bhikhu Parekh, "Decolonizing Liberalism," in *The End of "Isms"?: Reflections on the Fate of Ideological Politics after Communism's Collapse,* ed. Alexander Shtromas (Oxford: Blackwell, 1994), 85–103, and Mehta, *Liberalism and Empire,* 46–114.

105. The Queen's Proclamation of 1858 that followed the Indian Revolt of 1857, a national conflagration that had threatened the very foundation of British rule in India, sought to stabilize imperial control over India by resurrecting once again Burke's discourse of imperial justice. Declaring an end to the East India Company's rule in India, the Queen's Proclamation pledged justice and equity to the native population and promised to uphold the ancient rights, usages, and customs of India. See *Readings in the Constitutional History of India, 1757–1947,* ed. S. V. Desika Char (Delhi: Oxford University Press, 1983), 299–300. It is significant that the British government brought out an edition of Burke's impeachment speeches soon after the Indian Mutiny in 1857 to enable the public to understand the deeper causes of the conflict between the colonizers and the colonized. See *Speeches of the Managers and Counsel in the Trial of Warren Hastings,* ed. Edward Augustus Bond (London: Longman, 1859–61).

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creating an enunciative position for the colonized people as subjects rather than as simply the objects of the colonizer's speech, it was not surprising that the discourse of the Indian National Congress in its early years was articulated almost entirely within the discourse of justice originally offered by Burke. Indeed, by the early twentieth century, the strength of anti-colonial movements compelled imperial administrators to reconcile to a very Burkean claim on the part of nationalists in India and other parts of the empire that the only way in which the empire could be held together was if it reconstituted itself as a loose judicial union bound together by justice under the Crown and a supranational tribunal.[106]

Finally, in addition to its historical significance, the other question that could be pertinent here is, what significance does Burke's Indian involvement hold for an understanding of his political thinking in general? Burke's vision of a specific triadic political configuration for the British empire in India, combining the British colonial state in India, Indian society, and the deterritorialized imperial judicature, seems to have been grounded in a more general conceptual configuration of the state, the society, and the supreme judicature. In the light of the findings of this article, it appears that serious consideration needs to be given to the role that this complex triadic configuration may have played in overdetermining Burke's entire political vision.

106. See the debates over dominion status and the establishment of a commonwealth court in the first half of the twentieth century in Swinfen, *Imperial Appeal,* 88–218, and Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1956), 49–60.

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Codification and the Rule of Colonial Difference: Criminal Procedure in British India

ELIZABETH KOLSKY

On July 10, 1833, an aspiring young English lawyer named Thomas Babington Macaulay stood before the Parliament and presented an impassioned argument about the future role of British governance in India. Whereas in Europe, as Macaulay saw it, "The people are everywhere perfectly competent to hold some share, not in every country an equal share, but some share of political power," in India, Macaulay asserted, "you cannot have representative institutions." Thus the role of the British colonizers was "to give good government to a people to whom we cannot give a free government."[1] At the core of Macaulay's good but not free government stood what he saw as one of England's greatest gifts to the people of India: a rule of law.

Later that year, Macaulay set sail for the subcontinent charged with the momentous task of codifying the law of India, creating in his words "one great and entire work symmetrical in all its parts and pervaded by one

1. "A Speech Delivered in the House of Commons on the 10th of July 1833," in Lord Macaulay, *The Miscellaneous Writings and Speeches of Lord Macaulay* (London: Longmans, Green & Co., 1889).

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spirit."[2] Up until that point, the East India Company had administered a plurality of legal sources, including regional regulations, Acts of Parliament, Hindu and Muslim personal law, Islamic criminal law, and the widely interpreted Roman principle of "justice, equity and good conscience." It was Macaulay's aim to bring order to this unwieldy and confusing system. Around the same time that Macaulay set his hand to codify the Indian law, the Royal Commission on the Criminal Law also began its review of the English penal law. Although this is certainly not a historical coincidence, empire is a framework that has eluded the notice of most legal historians. Whereas codification is generally discussed in terms of modern nation-building, it was also an imperial and an international endeavor in which lawmakers in distant geographical locations routinely cited each other's work. Codifiers in colonial India, for example, worked with Livingston's Louisiana Code and Field's New York Code before them and they were acutely aware of the global relevance of their contributions. Whitley Stokes, who held the high post of Law Member of India, dedicated his book, *The Anglo-Indian Codes: Substantive Law,* "to all who take an interest in the efforts of English statesmen to confer on India the blessings of a wise, clear, and ascertainable law, and especially to those who are interested in what is still, in London and New York, the burning question of Codification."[3] So interrelated were the colonial and metropolitan efforts that in 1877, British India's most prolific codifier James Fitzjames Stephen was invited by the Parliament to bring his Indian experience to bear upon the ongoing efforts to codify the English law.[4]

Despite these connections, there is a dearth of scholarship on the history of codification and empire and even fewer "intertwined" histories that place codification in European metropoles and colonial locales in a unitary field of analysis.[5] The absence of the colonial experience in histories of English codification is particularly noteworthy given that England's most

2. Minute dated January 2, 1837, in C. D. Dharker, *Lord Macaulay's Legislative Minutes* (Oxford: Oxford University Press, 1946).

3. Whitley Stokes, *The Anglo-Indian Codes: Substantive Law* (Oxford: Clarendon Press, 1887), x.

4. Stephen's Criminal Code (Indictable Offenses) Bill was introduced into the House of Commons "as an experiment" but after prolonged and controversial discussions the Bill was dropped. *Hansard's Parliamentary Debates,* vol. 239 (1878), 1938 (hereafter *Hansard's*). James Fitzjames Stephen was also an aggressive self-promoter who actively courted the Parliament's invitation. I thank Lindsay Farmer for this insight and for the reference to K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988).

5. See Edward Said, "Chapter One: Overlapping Territories, Intertwined Histories," *Culture and Imperialism* (New York: Vintage Books, 1994).

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renowned advocate of codification, Jeremy Bentham—along with many of his followers, including Thomas Macaulay and James Mill—openly hoped that the codification of law in the colonies would have an impact on legal change at home.[6] Calcutta High Court Judge C. D. Field surmised: "The work that is thus being done in British India will hereafter form an important page in the history of Great Britain, and its effects will, in all human probability, re-act upon England herself."[7] What is interesting about the claim that modernity in the colony would "re-act" upon the metropole is that it inverted colonial claims about history. Whereas the British generally claimed that their mission was to bring ancient Indian civilization forward in time, here we find Calcutta developmentally ahead of London. In a telling analogy that reversed the political economy of colonialism (in which the essential role of the colony was to provide raw materials for metropolitan industry), Fitzjames Stephen wrote: "The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made."[8]

Macaulay's ideas about codification—creating "one great and entire work symmetrical in all its parts and pervaded by one spirit"—reflect the influence of Bentham.[9] Along with many of the Utilitarians in India who

6. For Bentham's musings on how to adapt his codes in Bengal, see the "Essay on the Influence of Time and Place in Matters of Legislation," *Works,* vol. 1 (1843). It should be noted that Macaulay, though he concurred with Mill on the applicability of codification to India, was strongly critical of Mill in other respects. See Jack Lively and John C. Rees, *Utilitarian Logic and Politics* (Oxford: Oxford University Press, 1978) and Stefan Collini, Donald Winch, and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983).

7. See the "Preface to the Second Edition," in C. D. Field, *The Law of Evidence in British India* (Calcutta: Thacker, Spink, 1873).

8. Quoted in George O. Trevelyan, *The Life and Letters of Lord Macaulay* (London: Lowe and Brydone, 1959), 387.

9. The literature on Bentham and English codification is vast. See C. J. W. Allan, "Bentham and the Abolition of Incompetency from Defect of Religious Principle," *Journal of Legal History* 12 (August 1985): 172–88; Helen Beynon, "Mighty Bentham," *Journal of Legal History* 2 (May 1981): 62–76; Markus Dirk Dubber, "The Historical Analysis of Criminal Codes," *Law and History Review* 18 (2000): 433–40; Lindsay Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners," *Law and History Review* 18 (2000): 397–426; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989); Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Oxford: Clarendon Press, 1991); Bhikhu Parekh, ed., Jeremy Bentham, *Ten Critical Essays* (London: Frank Cass, 1974); G. J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986); Philip Schofield, "Jeremy Bentham and Nineteenth-Century English Jurisprudence," *Journal of Legal History* 12 (May 1991): 58–88; Philip Schofield and Jonathan Harris, eds., *"Legislator of the World": Writings on Codification, Law and Education* (Oxford: Clarendon Press, 1998); Philip Schofield, "'Professing Liberal Opinions': The Common Law,

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molded colonial policy in the early to mid-nineteenth century,[10] Macaulay greatly admired Bentham whom he claimed had found "jurisprudence a gibberish and left it a science."[11] It is a well-known but little explored fact that whereas the English in England steadfastly opposed codification, the English in India radically transformed the legal landscape in a fashion that has largely outlasted the departure of the colonial masters.[12] By the late nineteenth century, the production of legal codes in India had become so prolific that many administrators questioned its expense and utility. In 1881, a colonial official in the Central Provinces remarked: "codes are like arithmetic books which no one is required to learn."[13]

The goal of this article is to explain why codification took root in India as facilely and quickly as it did. One obvious explanation is that colonial lawmakers did not face the political conditions that grounded legal reform at home, such as a growing civil society and realm of public opinion. As various scholars have noted, codification has historically found success in undemocratic environments.[14] Macaulay himself made this point quite explicitly when he proposed to Parliament why the colonial government, "an enlightened and paternal despotism," was best suited to codify the Indian law:

> A code is almost the only blessing—perhaps it is the only blessing which absolute governments are better fitted to confer on a nation than popular governments. The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed, and better performed, by few minds than by many. . . . A quiet knot of two or three veteran jurists is an

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Adjudication and Security in Recent Bentham Scholarship," *Journal of Legal History* 16 (December 1995): 350–67; William Twining, *Theories of Evidence* (London: Weidenfeld and Nicolson, 1985); William Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge, Mass.: Basil Blackwell, 1990); and Gunther A. Weiss, "The Enchantment of Codification in the Common-Law World," *The Yale Journal of International Law* 25 (2000): 435–532.

10. See the seminal work by Eric Stokes, *The English Utilitarians and India* (Oxford: Oxford University Press, 1959).

11. From the *Edinburgh Review,* vol. 55, 552, quoted in Maurice Lang, *Codification in the British Empire and America* (Amsterdam: H. J. Paris, 1924), 32.

12. As the British Empire extended its territorial reach, many of the Anglo-Indian Codes were also implemented in East and Central Africa, including in Zambia, Malawi, Kenya, Uganda, Tanzania, and Zanzibar. See J. J. R. Collingwood, *Criminal Law of East and Central Africa* (London: Sweet and Maxwell, 1967).

13. See Judicial Commissioner of the Central Provinces C. H. T. Crosthwaite's commentary in India Office Records (hereafter IOR) *Abstract of the Proceedings,* vols. 20–21, 1881–1882.

14. See Farmer, "Reconstructing the English Codification Debate"; Dubber, "The Historical Analysis of Criminal Codes"; and Weiss, "The Enchantment of Codification in the Common-Law World."

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> infinitely better machinery for such a purpose than a large popular assembly, divided, as such assemblies almost always are, into adverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a complete and written code of laws may most easily be conferred on India. It is a work, which cannot be well performed in an age of barbarism. It is a work which especially belongs to a government like that of India—to an enlightened and paternal despotism.[15]

However, while English codifiers in colonial India had more room to maneuver that alone does not entirely explain why they chose to do so. This article argues that while it is essential to relate codification in India to contemporary developments in England, it is also important to attend to local explanatory factors. What was it about the legal and political context that made codification such an indispensable part of Macaulay's vision of British governance? In seeking to extend the argument that the Indian colony provided a laboratory for metropolitan legislative experiments, this essay focuses on a peculiar set of local circumstances that caused colonial legislators in the early to mid-nineteenth century to view codification as a compelling and necessary project.[16] Here I will argue that codification was both necessitated and subverted by the presence of the non-official European community in India. Non-official Europeans were neither Company servants nor Indian subjects and without a uniform rule of law, they slipped through the cracks of the Company's dual system of laws and law courts.[17] Codification provided colonial authorities with a fundamentally necessary mechanism of control over this growing community of diverse and often times criminal Europeans who violated the existing law with impunity. It may seem odd to characterize the European presence as a "local concern," but that is only if we equate the "local" with the "indigenous" and adopt a monolithic vision of empire that divides colonizers from colonizeds, Europeans from "natives," citizens from subjects. In fact, it is precisely the unstable nature of these distinctions that led the East

15. *Hansard's,* 3d ser., vol. 19, 531. In his *History of the Criminal Law of England* (1883), former Law Member James Fitzjames Stephen made similar remarks about despotism and codification in India: "I admit, however, that I do not think that this method of legislative expressiveness could be advantageously employed in England. It is useful only where the legislative body can afford to speak its mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion."

16. The idea that the colony served as an experimental testing ground for ideas and institutions later implemented in the metropole is eloquently argued by Stokes, *The English Utilitarians and India.*

17. The term "non-official" refers to Europeans who did not work in an official capacity for the East India Company or, after 1857, for the Crown Government.

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India Company into the legal and political morass for which codification promised a ready resolution.

The Rule of Colonial Difference

In tracing the impact of the non-official European community on the codification of Indian law and in clarifying its specifically *colonial* nature, I will draw upon and extend the work of post-colonial theorist Partha Chatterjee. In his book *The Nation and Its Fragments,* Chatterjee argues that the "rule of colonial difference" distorted all attempts to establish modern regimes of governance in the colonies.[18] According to Chatterjee, the essentialized difference between colonizer and colonized justified colonial authoritarianism. Although liberal British administrators promised that colonialism would eventually eradicate difference by bringing colonized people forward into the fold of progress and history, once colonized "others" became modern subjects, colonial control would have lost its ideological foothold. Thus, as Chatterjee argues, colonial power continued to insist on difference even when making promises of universal ideas and institutions. The case of legal reform was no exception to this rule and the concept of "colonial difference" provides the theoretical framework of this article.

Jeremy Bentham conceptualized his "pannomion"—a complete code of laws founded on abstract, universal, and scientific principles—as a radical break from the burdensome weight of the historical common law tradition. By contrast, the codification of law in India (where there was no common law) was deeply marked by the culture of colonialism, by its ideology of difference, and by the opportunities provided to an authoritarian regime of power that did not depend on public opinion or popular support. Administrators in India invoked various forms of historical, cultural, and religious peculiarity to legitimize colonial governance, thereby undermining the universal nature of legal reform. Codification threatened to upend a number of colonial truths about India: a modernizing project, codification would have made the backward civilization of the colony more modern than the metropole itself. A democratizing project, codification would have forced an enlightened and paternal despotism to make legal rights more accessible to colonized peoples.[19] An equalizing project, codification would have transformed Indian subjects and British citizens into legal equals

18. Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

19. See Radhika Singha's rich historical monograph, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1999).

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on a common footing. To resolve this conflict, the purportedly universal character of legal codification in India was consistently molded by ideas about Indian difference, or as one administrator put it, by "Indian human nature."

In this article, I use Chatterjee's concept of colonial difference to explore the history of Indian codification. In addition, I suggest that this history leads us to conceptualize colonial difference as a multi-dimensional rather than a two-dimensional phenomenon.[20] As I will demonstrate, the logic of colonial difference not only polarized colonizers and colonizeds, it also framed the complex and fraught dynamic that linked European officials, European non-officials, and "natives" in a contested and uneasy set of power relations.[21] In hindsight it seems rather obvious that a uniform rule of law would have profoundly threatened the power dynamic that distinguished colonizer from colonized. As I will demonstrate, the project of codification, and the question of uniform criminal jurisdiction in particular, formed the ground upon which distinctions between colonial subjects were challenged and debated.

This article contributes to the theoretical literature on colonial difference and to legal histories of colonial India by emphasizing the ways in which Indian "difference" figured in the framing of a universal law. The conventional wisdom holds that the colonial distinction between public and private realms of law created a separate sphere for difference. According to this system, the British administered universal law in the public sphere while maintaining a separate sphere for the administration of Hindu and Muslim "personal law." As historian Thomas Metcalf explains: "The legal system of colonial India thus accommodated both the assimilative ideals of liberalism, which found a home in the codes of procedure, and the insistence upon Indian difference in a personal law defined by membership in a religious community."[22] This focus on the debates about codification and the Code of Criminal Procedure illustrates the hollowness of the public/private distinction by demonstrating how Indian difference was fundamental to the

20. I would like to thank an anonymous reviewer of this journal for pushing my thinking on the dilemmas of colonial difference. I regret that the proliferation of differences identified by the reviewer—class, religious, national, gender, caste—are beyond the scope of this piece.

21. More attention has been given to the role of white settler communities in colonial contexts other than South Asia, which was not broadly speaking a colony of white settlement. On the complex interplay of race, gender, and class hierarchies in Southeast Asia, see Ann Laura Stoler, "Rethinking Colonial Categories: European Communities and the Boundaries of Rule," *Comparative Studies in Society and History* 31 (1989): 134–61.

22. Thomas Metcalf, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1994), 38.

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formulation and enactment of the abstract procedural codes themselves. Given that codified laws are extremely vital and potent examples of the lasting power of colonial institutions—most of them remain on the books in South Asia today—the history of codification in colonial India holds critical contemporary relevance.[23]

This article begins by providing a general overview of various problems in the colonial legal system as it existed when Macaulay arrived. It then examines debates about white colonization in India and the relationship between the rise in European criminality and the colonial commitment to the codification of law. After describing the local European community's uproar over Macaulay's effort to extend local jurisdiction in civil matters, the second half of the article is devoted to a close reading of the debates over the Code of Criminal Procedure, which is taken as a case study to explore the rule of colonial difference.

Crises of Colonial Justice: "Vices of Vagueness" and the Dual System of Laws

On June 28, 1831, in the midst of debates about the impending renewal of the East India Company's royal charter, a motion was made before the House of Commons for a Select Committee to be appointed to inquire into the Company's operations in India.[24] Of particular concern were problems in the Company's administration of justice, specifically "defects in the laws themselves, in the authority for making them and in the manner of executing them."[25] In the minutes, evidence, and reports subsequently submitted by the Select Committee to the Parliament, and through ensuing discussion, a broad consensus emerged around the fact that the state and practice of the law in India required reform. Conflicting laws, untrained civil servants, and racialized jurisdiction characterized an awkward legal edifice that had been constructed by the East India Company in its short tenure on the subcontinent.[26]

The Company's new charter of 1833 completely transformed the Government of India's law-making structure.[27] In place of regional legislatures,

23. See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: The University of Michigan Press, 2003), especially the Conclusion, "A Postcolonial Postscript," 133–44.

24. The East India Company was a joint-stock company that operated in India from 1600 to 1857 under the aegis of a royal charter that was renewed at regular intervals.

25. *Hansard's,* 3d ser., vol. 18.

26. The East India Company, which received its first royal charter to trade in the "East Indies" in 1600, formally assumed sovereign duties in India in 1765.

27. 3 & 4 Will. 4, c. 85, s. 55.

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a centralized all-India Legislative Council was created with general and wide powers of legislation. Provincial governments were deprived of their law-making authority, ending the "Regulation period" in which the Bengal, Bombay, and Madras Presidencies passed separate rules and regulations that often conflicted with one and other. The new Legislative Council headed by the "Law Member" was formed to pass all-India laws and an Indian Law Commission was created to establish one set of laws and law courts suitable for all. In 1833, Thomas Macaulay was appointed as India's first Law Member and head of its first Law Commission. The legal system he inherited was complex, pluralistic, and in some respects unmanageable as it suffered from what James Fitzjames Stephen would later call "vices of vagueness."

Foremost among these troublesome "vices" was tremendous legal confusion and uncertainty. As mentioned earlier in this piece, the colonial courts in India administered a variety of laws, some of which overlapped. Local judicial officers struggled to ascertain what law to administer not only due to this plurality of sources but also because the regional governments did not consistently print complete digests of the existing statute law. Furthermore, until 1875 there was no formalized system of law reporting.[28] This not only put legal decisions in contradiction with each other but it also left judicial officers and judges with undefined and broad scope for citing precedent and making decisions. To further complicate matters, most of these judicial officers were quite young and had no previous legal training or experience. The prominent Indian reformer Ram Mohun Roy referred to these untrained judicial officers themselves as "the main causes of obstruction in the dispatch of the judicial business."[29]

From a Benthamite perspective, this complex maze of legal sources and principles was not only confusing, it also provided too much room for the exercise of the will of individual judges, resulting in heaps of what Macaulay disparagingly called "judge-made law." As Macaulay remarked, "What is administered is not law, but a kind of rude and capricious equity. . . . 'The whole thing is a mere matter of chance. Everything depends on the temper of the individual judge.'"[30] Due to these manifold deficiencies

28. Fourteen years after the passage of the Indian High Courts Act (1861), the government passed the Indian Law Reports Act (1875). Prior reporting of legal cases was performed by private individuals or selectively by legal publications. These tended to be rare, published in limited editions, and not available in the libraries of everyday lawyers. The Indian Law Reports Act created one centralized and official series of reports.

29. Ram Mohun Roy's Communication with the Board of Control on the Judicial System of India dated September 19, 1831, London, in *Parliamentary Papers* (1831) vol. 5, 734 (hereafter *PP)*.

30. *Hansard's,* 3d ser., vol. 19, 532. The internal remark refers to a comment made by a colonial civil servant to Macaulay.

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many colonial administrators, including Fitzjames Stephen, argued that codification in India was indisputably necessary:

> The helplessness of an English lawyer who has no law books to refer to, and, on the other, the hopeless impossibility of providing Indian District Officers either with law libraries or with the means of carrying them about, or with the time necessary to refer to them. . . . I believe that no one who knows anything of India will dispute the importance of reducing the law to as clear and explicit a shape as possible; but I think that even in India few persons are aware of the extreme degree in which both the unwritten and the written law were, and to a great extent still are, infected with the vices of vagueness, want of arrangement, redundancy, and prolixity.[31]

These failures of justice were important. But we must be cautious about accepting the government's self-aggrandizing claim that codification represented an official effort to provide India with a more efficient and streamlined system of legal administration. Overlapping legislation, untrained officers, and unclear legal sources did present a set of vexing institutional problems but even more critical to the case for codification were the actual abuses committed by non-official Europeans in India. The role of the non-official European community in India has received insufficient historical attention and therefore the notion that European criminals exerted a significant influence over colonial policy may seem surprising.[32] However, this small but growing community had a tremendous impact on the transformation of the Indian legal system and more specifically on the decision to codify the Indian law.[33] To understand why this was so, let us briefly review the evolution of the Company's court system and the shifting status of the non-official European population.

31. The quotation is from James Fitzjames Stephen's letter to the Earl of Mayo titled, "Legislation Under Lord Mayo," which appears in W. W. Hunter, *A Life of the Earl of Mayo* (London, 1875), vol. 2, chap. 8, 178.

32. A notable exception is Edwin Hirschmann's *"White Mutiny": The Ilbert Bill Crisis in India and Genesis of the Indian National Congress* (New Delhi: Heritage, 1980), which focuses on the role of the non-official European community during the Ilbert Bill crisis of the 1880s. On the politics of race and gender ideologies during this period, see Mrinalini Sinha, *Colonial Masculinity: The "Manly" Englishman and the "Effeminate Bengali" in the Late Nineteenth Century* (New Delhi: Kali for Women, 1995). Neither of these texts looks at the "pre-history" of the Ilbert Bill or connects the "white mutiny" of the 1880s to long-standing legal battles, as this article does.

33. In 1828, the number of British-born subjects in India was 2,016, most of whom lived at the Presidencies. By 1881, the total number of British-born adults in India was 81,680, of whom 1,189 were planters and land-holders (non-officials). Of these, 59,775 were in the army, navy, civil service, and the police. The first figure is from *History of the Changes in the Civil and Criminal Jurisdiction Exercised by the Courts in India over European British Subjects* (Simla, 1883); the second is from the *Statistics of the British-born Subjects recorded at the Census of India* (Calcutta, 1883).

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Under the East India Company's first royal charter, the Company was authorized to make laws to govern its official representatives in India. As the Company's power and influence spread, so did the sway of its judicial authority. By the early eighteenth century, in an effort to govern natives by native law and Englishmen by English law, the Company established parallel sets of laws and law courts in the Presidencies and in the *mofussil* (the country's interior), which was often far from the Company's coastal centers. The King's courts in the Presidencies were tribunals of English law presided over by English judges and barristers. The Company's courts in the *mofussil* administered Hindu and Muslim personal law, Islamic criminal law, and Company Regulations. The problematic nature of this arrangement did not become apparent until people who were neither Company men nor "natives" began to arrive on the subcontinent in substantial numbers following the abolition of the Company's trade monopoly in 1813.

Until 1793, Europeans in the *mofussil* could not be tried in the local courts in either civil or criminal matters. Although a European could sue an Indian in a *mofussil* court, an Indian had to take a grievance against a European to the Supreme Court at Calcutta. For financial and other logistical reasons, Indians in the interior were generally unable to bring their cases to Calcutta and were therefore extremely vulnerable to European violence and exploitation in both civil and criminal matters. (Macaulay estimated that the expense of litigation in the Calcutta Supreme Court was five times as great as the expense of litigation in Westminster.[34]) In 1793, the Bengal government sought to remedy this situation by prohibiting all European British subjects who were not servants of the King or the Company from living further than ten miles outside of Calcutta unless they agreed to make themselves amenable to the local civil courts.[35] Twenty years later, in anticipation of increasing numbers of non-Company Englishmen in the interior, British subjects settled in the *mofussil* were placed under the jurisdiction of all local courts higher than the *zillah* (district) level, which were courts of first instance with European judges. However, while Indians could appeal to the Sadr Dewani Adalat (the Company's high civil court of appeal), British-born subjects in cases against Indians were given a direct appeal to the Supreme Court at Calcutta.

The legal principle supporting this separate system was confirmed by the case of *The Indian Chief* (1800), in which it was decided that wherever Europeans settled or set up factories in India, the inhabitants of such areas were to be governed by the laws made by the British Crown and the East India Company. In his opinion, Lord Stowell wrote: "wherever

34. See Macaulay's undated Minute of 1836 in the Legislative Consultations of October 3, 1836, No. 5 (India Office Records [IOR] P/206/84).

35. Bengal Regulation XXVIII of 1793.

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even a mere factory is founded in the eastern part of the world, European persons trading under the shelter and protection of those establishments, are conceived to take their national character from that Association under which they live and carry on their commerce."[36] This meant that wherever the Company settled in India, those settlements were imagined as British territories governed by British law. Using what Edward Said has called an "imaginative geography," British officers in India consistently described Indians as "aliens" in their own land.

In 1829, Charles Metcalfe condemned the system of separate laws and law courts and the privileged immunity granted to European subjects in the *mofussil.* As Metcalfe argued, the Company's dual system not only smacked of racial privilege, it also contributed to the general uncertainty characterizing the judicial administration. Metcalfe recommended the improvement of the colonial legal system along lines that would provide true legal equality and justice for all: "The present system of judicature in India, by which the King's Court is rendered entirely separate from the local administration and institutions, and often practically subversive of their power and influence, is fraught with mischief. . . ." He went on to assert that the absence of "any clearly defined limitations by which our native subjects can know to what laws or courts they are or are not amenable, is replete with gross injustice and oppression and is an evil loudly demanding a remedy." Metcalfe recommended that the Company should consolidate the judicial system and codify the law through: "a strict local limitation of the powers of his Majesty's Court with regard to the persons and property of native subjects, or in an amalgamation of the King's Courts with the local judicial institutions, under a code of laws fitted for local purposes, and calculated to bestow real and equal justice on all classes of subjects under British dominion in India."[37]

The question of legal jurisdiction over "European British-born subjects" had long been and would long remain a prickly and contentious issue. It was not only the instigating cause of codification, it continued to be a major impediment to the establishment of a uniform rule of law throughout the colonial period. Debates over the procedures of administering law and legal jurisdiction brought to the fore questions about power and privilege and concerns over which courts of justice were suitable for which groups of people. The argument that the British in India should not be subject to the local courts in the interior put the colonial masters in the embarrassing position of having to explain what was so wrong with the lower courts that

36. 3 Rob. Ad. Rept. 12, 28, 29.

37. See Metcalfe's Minute dated February 19, 1829, quoted by Charles Grant before the House of Commons in *Hansard's,* 3d ser., vol. 18, 730.

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they were unable to administer justice to everyone. While the non-official community was a powerful and vociferous lobbying group, the problem of European criminality was perceived as a threat to the stability of government that had to be controlled. And although codification provided a solution to the injustice inherent in the dual system of laws and law courts, it also imperiled the ideology of difference upon which colonial power and the freeborn Englishman's identity rested.

Codification, Colonization, and European Criminality: "One Rule for the Black Man and Another for the White"

There is a substantial body of scholarship that has addressed British efforts to control the uses and abuses of official power in early colonial India.[38] Concerns about the potential tyranny of British rule are practically coterminous with the Company's formal assumption of sovereignty in 1765. The critique of official Company corruption peaked in the late eighteenth century during the infamous trial of Warren Hastings, which resulted in significant shifts in Company policy and ideology.[39] But little has been written about the government's legal dealings with the non-official European community in India, a troublesome and often tyrannical group.

From 1757 until 1808, the East India Company and the Board of Control were opposed to the colonization of India by British settlers. A series of regulations passed during this period restricted the ability of official and non-official Europeans to hold land or to reside in territories outside of the Presidencies without explicit permission from the Governor-General. This reluctance to colonize India in ways that other parts of the world had been settled by European "adventurers" was linked both to the Company's will to maintain exclusive control over its possessions in India and to a particular view of Indian civilization.

Late eighteenth-century British administrators regarded India as "a country rich, populous and powerful in itself," inhabited by settled agriculturalists with land rights and useful knowledge.[40] Ancient Indian civilization,

38. The quote above is from Legislative Council Member W. Bird's "Minute" of August 26, 1844, National Archives of India (hereafter NAI) Legislative Proceedings, October–December 1844, October 12, 1844, No. 4.

39. See Ranajit Guha, *A Rule of Property for Bengal* (Durham, N.C.: Duke University Press, 1996) and Sara Suleri, *The Rhetoric of English India* (Chicago: The University of Chicago Press, 1992).

40. See the letter from John Bebb and James Pattison to George Canning, dated February 27, 1818, and the Bengal Revenue Consultations of May 12, 1775, in *Papers Relating to the Settlement of Europeans in India* (1854) available at the IOR.

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its complex religions, languages, and laws were the objects of intense scholarly inquiry by Orientalists such as Sir William Jones. This discourse of "civilization" as it related to the cultivation and use of land and to differences between nomadic and settled peoples played a key part in determining the contours of colonial conquest in various world regions. Native Americans, for example, were viewed by European settlers as uncivilized hunter-gatherers who wandered in a state of nature, "fierce savages" who preferred war to the peaceful cultivation of and settlement on the soil.[41] Early nineteenth-century Americans linked together notions about civilization, land ownership, and settled agriculture in order to justify their "right" to expropriate Native American lands.[42] In an official "Paper on the Conduct of Europeans in India," the industrious "Hindoo" of India was explicitly contrasted with the hapless "Red Indian" of the Americas:

> The people ["Hindoos"] appear to be industrious, economical and intelligent, and to be kept down only by the absence of all security for the produce of their industry, and the poverty in which they are plunged by the oppressive conduct of the rich around them. Their situation is different from that of the Red Indians of such countries as Mexico, or of the population of many other nations. The Hindoo is kept down by a force which, being removed, would leave him with industry and enterprise capable of making rapid advances. The Red Indian requires not merely the removal of a weight, but the application of exciting causes. Industrious and enterprising habits must be inculcated by a tedious and slow process before any considerable progress can reasonably be expected from a people in such a situation.[43]

Until 1808, when a Parliamentary committee was appointed to inquire into the Company's financial straits, the common view held in London and in Calcutta was that "Europeans should be discouraged and prevented as much as possible from colonizing and settling in our possessions of India."[44] The Company feared that the presence of British settlers would threaten the stability of its power and profits in India: "That colonization, and even a large indiscriminate resort of British settlers to India, would, by gradually lessening the deference and respect in which Europeans are held, tend to shake the opinion entertained by the Natives of the superior-

41. See the landmark legal case of *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823).

42. See Eric Kades, "History and Interpretation of the Great Case of *Johnson v. M'Intosh,*" *Law and History Review* 19 (2001): 67–116; and Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

43. See the Report in *Papers Relating to the Settlement of Europeans in India* (1854).

44. See the letter from Governor General Cornwallis to Henry Dundas, dated November 7, 1794, in ibid.

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ity of our character, and might excite them to an effort for the subversion and utter extinction of our power."[45]

However, in 1813, the free trade lobby prevailed over long-held antipathies towards white settlement and colonization. This decision in favor of free trade was largely determined by the Company's revenue requirements, by changed conditions in the world market, and by shifts in the ideological terrain of empire.[46] The Charter Act of 1813 terminated the Company's trade monopoly and opened India's ports to British capitalists, planters, merchants, and other "adventurers." Some colonial administrators such as Macaulay, Charles Metcalfe, and William Bentinck extolled the benefits of the European presence in India. Contrary to earlier apprehensions about the drunkenness and unseemly behavior of the "lower orders" of European society compromising Indians' respect for (and obedience to) government, they maintained that the diffusion of European knowledge and morals was essential to the well being of India and Indians. India's economic development and the full exploitation of India's natural resources, it was argued, were dependent upon European capital and skill and a more extensive settlement of European British subjects in India. As Metcalfe wrote: "I am further convinced that our possession of India must always be precarious unless we take root by having an influential portion of the population attached to our Government by common interests and sympathies. Every measure, therefore, which is calculated to facilitate the settlement of our countrymen in India, and to remove the obstructions by which it is impeded, must, I conceive, conduce to the stability of our rule, and to the welfare of the people subject to our dominion."[47] White settlement was also supported by some Indians, including Ram Mohun Roy who argued that colonization would benefit India economically by stopping the flow of bullion back to England: "As a large sum of money is now annually

45. See the letter from John Bebb and James Pattison to George Canning, dated February 27, 1818 in ibid.

46. The American Revolution and the switch from indigo cultivation to sugar and coffee cultivation in the West Indies provided a huge boom to the market for indigo in India. In turn, the indigo planters and merchants of Lower Bengal—many of whom moved from the infamous Caribbean plantations to India—became extremely important players in the future shaping of colonial law and policy in India. See B. B. Chaudhuri, *Growth of Commercial Agriculture in Bengal, 1757–1900* (Calcutta: Indian Studies Past and Present, 1964); Ranajit Das Gupta, "Plantation Labour in Colonial India," *The Journal of Peasant Studies* 19 (1992): 173–98; Blair B. Kling, *The Blue Mutiny: The Indigo Disturbances in Bengal, 1859–1862* (Philadelphia: University of Pennsylvania Press, 1966); and Prabhat Kumar Shukla, *Indigo and the Raj* (Delhi: Pragati Publications, 1993).

47. See Metcalfe's "Memorandum of European Settlement," of February 19, 1829 and Bentinck's "Minute on European Settlement," of May 30, 1829, in *Papers Relating to the Settlement of Europeans in India* (1854).

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drawn from India by Europeans retiring from it with the fortunes realized there, a system which would encourage Europeans of capital to become permanent settlers with their families would necessarily greatly improve the resources of the country."[48]

Under the new opportunities provided by the Charter Act of 1813, all British subjects maintained their immunity from the criminal jurisdiction of the local Company Courts. This heightened pre-existing concerns about the vulnerability of Indians in the *mofussil* to European misbehavior. In 1832, the Court of Directors reminded the Government of Bengal, "that all Europeans who are permitted to remain in the interior must be taught, practically, that obedience to the law is an indispensable condition of their license to reside there."[49] A year later, Charles Grant spoke about the dangers of setting loose desperate "adventurers" on the people of India, stressing that the influx of Europeans would require the "ultimate assimilation" of the system of separate laws and judicatures. Thomas Macaulay also emphasized the importance of legal uniformity as it related to the "lower orders" of European society: "Unless, therefore, we mean to leave the natives exposed to the tyranny and insolence of every profligate adventurer who may visit the east, we must place the European under the same power which legislates for the Hindoo."[50]

The concern voiced by these high-level administrators was related to problems related to them by officials on the ground. Between 1813 and 1833, as the business of the non-official European planters grew, so did their violent and criminal behavior. Most of the early criminal cases involving European abuses of Indians were related to restrictions on land holding.[51] Because European planters were not permitted to hold long-term leases on land, they generally advanced money to Indian peasants to "encourage" them to cultivate. These contracts with the *ryots* (cultivators) were

48. See Ram Mohun Roy's communication to the Board of Control of August 1831, "On the Revenue System of India," dated August 19, 1831, in the Appendix to the *Report from the Select Committee on the Affairs of the East India Company,* vol. 2, 716–22.

49. See the "Despatch from the Court of Directors to the Governor General," dated April 10, 1832, in *Papers Relating to the Settlement of Europeans in India* (1854).

50. *Hansard's,* 3d ser., vol. 19, 527. For an argument about the class biases inherent in this position, see Harald Fischer-Tine, "Britain's Other Civilizing Mission: Class Prejudice, European 'Loaferism' and the Workhouse System in Colonial India," in *Low and Licentious Europeans: White Subalterns in British India, 1784–1914* (forthcoming).

51. See *Kala Anand against Pierre Aller and others, Reports of Cases Determined in the Court of Nizamut Adawlut,* vol. 4, 15–29; *Akbur Ali against Mohun Chunder Battoorjeah and Pocha Booeah, Reports of Cases Determined in the Court of Nizamut Adawlut,* vol. 3, 41–46.

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unwritten, insufficiently defined, and worked to the severe disadvantage of the *ryots,* who had little recourse to the law.[52] The planters' desire for greater control over land and labor put them into direct conflict with the Company's will to power. Claiming that there could be no capital improvements or investments in land if landlords did not own it, European planters and merchants in the *mofussil* pleaded with the government to extend their leases.[53] However, reports of brutal violence, assault, and affrays made the Court of Directors in London cautious about giving the planters any leases longer than those minimally required to cultivate their crops. It was not that the Company particularly abhorred violence—the Company at that point commandeered the largest standing army in the world and was in the process of expanding its Indian territories through military conquest—but rather no one was sure how (or if) European settlement should proceed.

Caught in the middle of a loosely regulated capitalism and a little controlled colonization were large numbers of physically brutalized Indian laborers. In 1824, Dacca Circuit Judge Steer informed the Court of Directors that: "There is a class of persons very common in this district, and who are emphatically designated *latteals,* or bludgeon-men. They have of late years become numerous, their conduct extremely violent, and subversive of the peace of the country; they hire themselves out on occasions of affrays; sets of them are attached to almost every indigo factory, for the purpose of protecting its property and cultivation, but more especially to enforce payment of outstanding balances from the ryots, to secure and hold in seisin their crops, but not unfrequently to lay hold of and carry of the produce of neighboring cultivators."[54] The Court of Directors consistently received similar reports about European brutality, affrays, and assaults. Sadr Diwani Adaulut Judge Turnbull implored that the "disorders" caused by the planters called for government intervention:

> From the moment of plowing the land and sowing the seed, to the season of reaping the crop, the whole district is thrown into a state of ferment. The most daring breaches of the peace are committed in the face of our police officers, and even the magistrate himself. In utter defiance of all law and authority, large bodies of armed men are avowedly entertained for the express

52. See Rana P. Behal and Prabhu P. Mohapatra, "'Tea and Money versus Human Life': The Rise and Fall of the Indenture System in the Assam Tea Plantations, 1840–1908," *The Journal of Peasant Studies* 19 (1992): 142–72.

53. See John Crawfurd, *Letters from British Settlers in the Interior of India descriptive of their own condition, and that of the Native inhabitants under the Government of the East India Company* (London: James Ridgway, 1831).

54. See excerpts from the report in the Court of Director's Judicial Despatch to Bengal, August 6, 1828, in *Papers Relating to the Settlement of Europeans in India* (1854).

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> purpose of taking or retaining forcible possession of lands or crops. Violent affrays, or rather regular pitched battles, ensue, attended with bloodshed and homicide. Our police establishments are corrupted, and the darogahs are notoriously to be in the pay of the planters to secure their good offices. . . . It is certainly high time that decisive measures should be adopted to put down evils of such magnitude.[55]

Indians were not the only victims of European crime. W. Dampier, superintendent of police in the Lower Provinces, pointed out that local authorities in the *mofussil* did not have the authority to decide in petty cases of assault in which both parties were European. Dampier referred to the "anomalous position" of the magistrate who either had to reject a case involving two Europeans, or subject the complainant to the enormous expense of committing the defendant in a simple assault case to the Supreme Court at Calcutta. Dampier wrote:

> In fact the whole of our Criminal Laws with regard to European British subjects appear strange; they can hold lands but cannot be compelled to perform the Public and other duties which are part of the conditions of holding land under this Government. They can be punished severely by the local Tribunals for an assault on a native but the slightest assault between two Europeans must be referred to the Supreme Court, the Country Courts having no jurisdiction. With an European and British population increasing, not only in the Suburbs but in all parts of these provinces, I think such anomalies should be remedied as soon as possible.[56]

Referring to the same problem, G. F. Cockburn, officiating magistrate in Howrah, argued that the absence of legislation regarding European on European crime in the interior was a source of great distress that amounted to "a total denial of justice":

> . . . no one being so foolish as willing to incur the expenses of the prosecution under the hope of getting an offender punished with a fine or imprisonment proportioned to the offense. The consequence of which is that in Howrah, European British subjects constantly have rows which I have not the power to prevent and am obliged to acquaint complainants that I can give them no redress. There is a considerable English society on this side of the river. There is also on an average I suppose not less than 6 ships constantly in dock the European crews of which give me no small trouble, and it may easily be conceived what difficulty there must be to maintain peace in the town while I have no power to inflict punishment for even the most trivial offense, if neither party happens to be native. . . . In conclusion I would only state that

55. See Turnbull's Minute of July 2, 1829, in ibid.

56. See Dampier's Letter No. 1366, dated May 23, 1844, in NAI Legislative Proceedings, October–December 1844, October 12, 1844, No. 1.

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> if it be thought advisable to give Mofussil Magistrates the jurisdiction over Europeans in petty cases I now complain I am not possessed of, I think the Chief Magistrates of Calcutta in whom Government probably have more confidence, should be empowered to take cognizance of those occurring in the suburbs.[57]

British criminality in India not only posed a potential political challenge to colonial authority—administrators in London were not keen on another American Revolution—it also contradicted the superior image and standing of the colonizers. In his "Notes on the Indian Penal Code," Macaulay spoke at great length about "how desirable it is that our national character should stand high in the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations, stigmatised by courts of justice. . . ." In calling for measures to control European criminality, Macaulay stressed the need for every Englishman to be the very representation of English government itself:

> As we are satisfied that nothing can add more strength to the Government, or can be more beneficial to the people, than the free admission of honest, industrious, and intelligent Englishmen, so we are satisfied that no greater calamity could befall either the Government or the people than the influx of Englishmen of lawless habits and blasted character. Such men are of the same race and colour with the rulers of the country, they speak the same language, they wear the same garb. In all these things they differ from the great body of the population. It is natural and inevitable that in the minds of a people accustomed to be governed by Englishmen, the idea of an Englishman should be associated with the idea of Government. Every Englishman participates in the power of Government, though he holds no office. His vices reflect disgrace on the Government, though the Government gives him no countenance.[58]

This anxiety about European criminality and the lack of jurisdiction over Englishmen in the interior was a major factor in the initial decision to institute uniform legal equality through legal codification. After years of debate, in the early 1830s, concern over Europeans on the legal, physical, and social fringes of empire converged with broader discussions about the future role of governance in India. The question was no longer how the law should function vis-à-vis British subjects in the *mofussil* but what was the function of law more generally? Macaulay clearly connected these issues of codification, colonization, and European criminality in his speech before the Parliament in 1833: "India has suffered enough already from

57. See Cockburn's Letter No. 322, dated May 23, 1844, in ibid.

58. From Lord Macaulay, *Speeches and Poems with the Report and Notes on the Indian Penal Code* (Boston: Houghton Mifflin, 1867).

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the distinctions of caste and from the deeply rooted prejudices which those distinctions have engendered. God forbid that we should inflict on her the curse of a new caste, that we should send her a new breed of Brahmins, authorized to treat all the native population as Parias."[59] A rule of law emerged as a significant instrument to exercise broadened authority over both Indians *and* Europeans. This is important to recognize for colonial law is generally understood as a mechanism to control subject populations.

On December 10, 1834, the Court of Directors sent a long letter to the Government of India with explicit instructions about how to proceed in accordance with the Charter Act's sweeping new legislative provisions. They stressed that while Macaulay and the Indian Law Commissioners were working on a complete code of laws for India, the impending entry of Englishmen in India required immediate legislation: "the local Government should have full means of dealing with them, not merely in extreme cases, and by a transcendental act of authority, but in the current and ordinary exercise of its functions, and through the medium of laws carefully made and promptly and impartially administered. On no other condition could the experiment of a free ingress of Europeans be safely tried." The Court of Directors urged the Government of India to frame laws according to "the just and humane design of protecting the Natives from ill treatment":

> The importance and indeed the absolute necessity of extending to the Natives such protection we need not demonstrate. Though English capitalists settling in the Country if they are governed by an enlightened sense of their own interests, will see the importance of acquiring the confidence of their Native neighbors by a just and conciliatory course of conduct, yet even some of this class may yield to the influence of worse motives. Eagerness for some temporary advantage, the consciousness of their power, the pride of a fancied superiority of race, the absence of any adequate check from public opinion, the absence also in many cases of the habitual check supplied by the stated and public recurrence of religious observances, these and other causes may occasionally lead even the settled resident to be less guarded in his treatment of the people, than would accord with a just view of his situation. Much more may acts of outrage or insolence be expected from casual adventures cut off possibly from Europe by the consequences of previous misconduct, at all events, released from the restraints which in this Country the overawing influence of society imposes on all men not totally abandoned. The greater necessity is there that such persons should be placed under others' check.[60]

The Court of Directors explicitly instructed that British subjects should come under the jurisdiction of the Company's civil and criminal courts in

59. See Macaulay's speech of July 10, 1833, in *Hansard's,* 3d ser., vol. 19, 503–35.

60. See Letter No. 44 from the Court of Directors to the Government of India in NAI, Home (Public), Letters from Court of Directors (1834), No. 98.

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all cases except those involving capital punishment: "we are decidedly of opinion that all British born subjects throughout India should forthwith be subjected to the same tribunals with the Natives. It is of course implied in this proposition that in the interior they shall be subjected to the Mofussil Courts." They emphasized the connection between European settlement and legal equality, reasoning that since Europeans in the interior "are to become inhabitants of India, they must share in the judicial liabilities as well as in the civil rights pertaining to that capacity." Their conclusion would echo in debates for years to come: "There can be no equality of protection where justice is not equally and on equal terms accessible to all."[61]

The Black Act of 1836: "Mr. Macaulay Ought to be Lynched at the Very Least"

Thomas Macaulay was an outspoken and committed advocate of this new policy of legal uniformity and the first colonial legislator to try his hand at codifying the Indian law.[62] Even before coming to India, Macaulay had warned about the prospect of Europeans in India forming "a new breed of Brahmins" and urged that "a privilege enjoyed by a few individuals in the midst of a vast population ought not to be called freedom. It is tyranny. . . ."[63] Macaulay was convinced that a code of laws was a critical instrument in the transformation of Indian society. In his speech before the Parliament, he boldly proclaimed: "I believe that no country ever stood so much in need of a code of laws as India."[64]

Whereas Macaulay envisioned the British Empire as "an enlightened and paternal despotism" morally obligated to the reform of Indian society, other members of the imperial establishment in England and in India maintained that natives were incapable of improvement.[65] In the House of Lords, Lord Ellenborough defended the system of separate laws by suggesting that inequality was the natural state to which Indians were attached and accustomed. He insisted that Indians were constitutionally unable to understand equality and that: "to place all persons in India under the same law . . . would be utterly impossible to do consistent with native usages

61. Ibid.

62. The quotation above is from the Legislative Proceedings of March 9, 1883, by Council Member Hunter.

63. See his speech of July 10, 1833, in *Hansard's,* 3d ser., vol. 19, 503–35.

64. Ibid., 531.

65. For more on the relationship between liberalism and empire and an elaboration of the concept of colonial tutelage, see Uday Singh Mehta, *Liberalism and Empire* (New Delhi: Oxford University Press, 1999).

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and prejudices. If they were to alter the laws there as to induce Europeans to live under them, they must, in doing so, violate all the prejudices and feelings of the natives; and, instead of producing satisfaction, they would excite abhorrence and disgust amongst the natives throughout the whole of India."[66] As I will demonstrate in this section and throughout this article, variations on Ellenborough's theme of Indian difference resonated with European figures who vehemently opposed the extension of legal equality for a variety of reasons outlined below.

Liberals in India argued that codification would bring order to subcontinental chaos by replacing the arbitrary and personal will of the Oriental despot with the rational and reliable objectivity of a universal law. Uncertainty and chaos, which were central tropes in the discourse of legal reform in England, were also dominant motifs in discussions in India. Here, the language of legal chaos and confusion held great currency because it echoed prevalent preconceptions about Oriental despotism and the infirm Mughal Empire.[67] In July 1833, when Macaulay claimed that the British "established order where we found confusion," he spoke in concert with a chorus of colonial figures who argued that the British had found India in a condition of decay, ravaged by the Oriental despot who governed by personal discretion rather than by rule of law. Discussions about the mismanaged administration of justice in India repeatedly turned to this image of pre-colonial turmoil in order to justify new forms of colonial intervention and to disguise the Company's own failures of justice. The rule of law was central to this narrative of benevolent rescue and the same language of chaos that had been used to criticize the tyranny of the common law in England was slightly reoriented to condemn the lawlessness of the Oriental despot in India.

What is intriguing about the colonial language of legal chaos and disorder as it applied to India is that it was a chaos defined by absence and lack rather than by the abundance and multitude criticized by reformers at home. Whereas Bentham had disparagingly called Blackstone's effort to consolidate the English common law an effort "to create one large pile of rubbish,"[68] Henry Maine declared that India was empty of laws before the British came: "Nobody who has inquired into the matter can doubt that, before the British Government began to legislate, India was, regard being to its moral and material needs, a country singularly empty of law."[69] In

66. *Hansard's,* 3d ser., vol. 19.

67. See Hussain, *The Jurisprudence of Emergency,* chap. 2, 35–68, for a lengthy discussion of the historical relationship between the ideology of Oriental despotism and the nature of colonial legal reform.

68. Quoted in Schofield, "'Professing Liberal Opinions,'" 365.

69. See Maine's "Minute on Codification in India," dated July 17, 1879, at the NAI, Home (Legislative) August 1879, 217–20.

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England, the radical nature of Bentham's codification schemes involved doing away with the historical dead weight of the common law tradition by replacing it with a complete set of knowable and understandable rules designed to guide conduct for all imaginable actions. In India, despite the many rhetorical consistencies, codification broke from the past not by dismissing an overabundance of law but by replacing the Oriental despot's lawless rule of personal discretion with the colonial rule of codification.

When it came to actually doing the laborious work of codification, colonial legislators faced a double challenge: first was the monumental task of creating "one great and entire work symmetrical in all its parts and pervaded by one spirit."[70] Second was the problem of convincing their fellow Englishmen in India to subject themselves to laws framed for a subject population, "for the conqueror to submit himself to the conquered."[71] The most intense phase of codification in India lasted for roughly fifty years—from the passage of the Charter Act of 1833 to the reenactment of the Code of Criminal Procedure in 1882.[72] Throughout this period, there were active debates and conflicts around how codification fit in with broader colonial priorities and practices. The assumption of the liberals and Utilitarians was that good government could be achieved through the implementation of good laws. As I have mentioned, however, India was no place for philosophical abstractions. Ruling exigencies and dominant notions about the peculiarities of Indian culture—Chatterjee's "rule of colonial difference"—repeatedly intervened to pervert and compromise the implementation of an impartial and uniform rule of law.

The first major confrontation between European settlers and the colonial government surrounded the attempt to extend local jurisdiction in civil matters. On February 1, 1836, Macaulay introduced a bill into the Legislative Council that proposed to divest Europeans in the *mofussil* of their exclusive appeal to the Supreme Court in civil matters.[73] The first of the so-called "Black Acts" sought to abolish this privilege by giving European British subjects an appeal to the Sadr Dewani Adalat—the Company's chief civil court—just as other subjects in the *mofussil* had. The Bill excited unprecedented controversy and protest, primarily at Calcutta where raucous meetings and hateful articles gave voice to a vicious sense of racial entitlement and privilege, an ominous harbinger of conflicts to come.[74]

70. Minute dated January 2, 1837, in Dharker, *Lord Macaulay's Legislative Minutes.*

71. See the Note by H. L. Johnson, Deputy Commissioner, Silhat, and other official memos in *Extra Supplement to the Gazette of India,* July–December 1883.

72. After 1882, the Legislative Department turned its attention to consolidating and amending existing laws, rather than passing new codes.

73. See the Legislative Consultations of February 1, 1836, No. 20 (IOR P/206/81).

74. See Macaulay's undated Minute in the Legislative Consultations of October 3, 1836, No. 5 (IOR P/206/84), and the many newspaper editorials and letters to the editor from February–October 1836 in *The Englishman and Military Chronicle* and the *Bengal Hurkaru.*

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Immediately after Macaulay introduced the Bill into the Legislative Council, the English newspapers at Calcutta—especially those supported by the indigo planters—began to attack the proposal by questioning the legislative authority of the Government of India.[75] Pitting the inviolable rights of freeborn Englishmen against the illegitimacy of a despotic colonial regime, the Editors of *The Englishman and Military Chronicle* asked: "How can a colonial legislature interfere with the rights of British subjects, those rights existing at common law and which the legislature here is prohibited to interfere with, and which interference is, therefore, in our estimation, a violation of the *constitutional right of the subject?*"[76] They called the Bill an "anti-colonizing" act aimed at discouraging white settlement and capital investment in India.[77]

Protesters actively mobilized in Calcutta, though not in the interior of the country where the proposed Bill would actually take effect. On March 12, 1836, T. E. M. Turton, a Supreme Court barrister, and Samuel Smith, a proprietor of an English newspaper, sent a petition signed by seventy-six British-born inhabitants of India (mostly residents at Calcutta) to Governor-General Lord Auckland.[78] In their letter, Turton and Smith argued that they were "entitled as their birth right to the enjoyment of the protection of British Laws and Institutions in whatsoever part of the British Territories they may be placed, in so far and to as great an extent as is compatible with the nature and circumstances of the country in which they reside." They insisted that until a uniform code of laws replaced the "anomalies and contradictions" characterizing the existing legal system, they should be left to "enjoy the right and privilege bestowed upon them by the British Legislature of appealing from the decisions of the Company's Country Courts of Justice to His Majesty's Supreme Courts of the several Presidencies of Bengal, Madras and Bombay wherein British Laws are administered." Like the Editors of *The Englishman,* the petitioners challenged the power of the Government of India to alter an Act of Parliament and questioned the authority of the government to legislate for them, "as Englishmen and as constituents of that representative form of Government under and subordinate to which the Government of India exists your Memorialists cannot by any constitutional or reasonable construction of the Law be

75. See the letter to the editor from "A Lawyer," *The Englishman and Military Chronicle,* February 6, 1836.

76. See *The Englishman and Military Chronicle,* February 6, 1836.

77. See the letter to the editor, February 14, 1836, in *The Englishman and Military Chronicle.*

78. See the petition in the Legislative Consultations of March 28, 1836, Nos. 8–9 (IOR P/206/81).

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deemed either foreigners in the British territories of India or subjects of the Honorable Company."

The challenge posed by these protesters would become a formidable obstacle forestalling uniform jurisdiction for the next one hundred years. Although very legalistic debates ensued over what "rights" Englishmen actually possessed in India, what is particularly compelling is that the protesters viewed imperial privilege as a legal *right.*[79] Macaulay was quick to point out the contradictions of a discourse of freedom and liberty located in a colonial context where "public opinion means the opinion of five hundred persons who have no interest, feeling, or taste in common with the fifty millions among whom they live, that the love of liberty means the strong objection which the five hundred feel to every measure which can prevent them from acting as they choose towards to fifty millions." He would later note that: "We were enemies of freedom, because we would not suffer a small white aristocracy to domineer over millions."[80]

In addition to invoking the rhetoric of rights, opponents of the Black Act resorted to sensationalist renderings of Indian culture to drum up popular support for their movement. Wild and menacing visions of Indian society, along with cynical charges about the venality and corruption permeating the ranks of local Indian law officers, were commonplace. At a public meeting in Calcutta, one speaker warned:

> I have seen at a Hindu festival, a naked disheveled figure, his face painted with grotesque colors, and his long hair besmeared with dirt and ashes. His tongue was pierced with an iron bar, and his breast was scorched by the fire from the burning altar which rested on his stomach. This revolting figure, covered with ashes, dirt, and bleeding voluntary wounds, may the next moment ascend the Sudder bench, and in a suit between a Hindu and an Englishman, think it an act of sanctity to decide against law in favor of a professor of the true faith.[81]

As a testimony to the many ideological contradictions that could emerge in the context of colonialism, Macaulay, whose unbridled sense of English cultural superiority was infamously expressed in his "Minute on Indian Education" here stood as a champion for racial equality.[82] In response to

79. See the Minutes of Legislative Council Members H. Shakespear and Macaulay in the Legislative Consultations of March 28, 1836 (IOR P/206/81).

80. See the Legislative Consultations of October 3, 1836, No. 5 (IOR P/206/84).

81. Quoted by former Law Member Arthur Hobhouse in his piece, "Native Indian Judges: Mr. Ilbert's Bill," printed in *Opinions in Favor of the Ilbert Bill* (Calcutta: Doorga Das Chatterjee, 1885), 12.

82. Thomas Babington Macaulay, "Minute of 2 February 1835 on Indian Education," *Macaulay, Prose and Poetry,* ed. G. M. Young (Cambridge: Harvard University Press, 1957).

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Turton and Smith's memorial, Macaulay loudly condemned their racialism writing: "All special exemptions carry with them an appearance of unfairness and the burden of proof lies on those who claim them. . . . Difference of race or birthplace will never be admitted as such as title by his Lordship in Council, by the Court of Directors, by the King's Government, by the British Parliament or by the British people." Macaulay insisted that the existing distinction "has the semblance of partiality and even of tyranny" and "ought therefore to be abolished."[83]

Essential inequalities based on race had no place in Macaulay's conception of a liberal imperialism modeled on change and a rule of law ultimately aimed at readying Indians for democracy. Macaulay invoked a then popular vision of Oriental despotism to remind the memorialists that they find themselves "in a land where the patience of the oppressed invites the oppressor to repeat his injuries." Rather than repeat the oppression, Macaulay urged the British to demonstrate to the Indian how to rise up against injustice so he, too, could eventually become free: "We know that India cannot have a free Government. But she may have the next best thing, a firm and impartial despotism. The worst state in which she can possibly be placed is that in which the memorialists would place her. They call on us to recognize them as a privileged order of freemen in the midst of slaves."[84]

Macaulay's Bill met with approval from many of the regional governments, as well as from civil servants and some English settlers in the *mofussil.*[85] On the strength of these opinions, Macaulay advised the Government of India to move forward and to boldly pass the Act: "The least flinching, the least wavering, at this crisis would give a serious, perhaps a fatal check to good legislation in India. It was always clear that this battle must sooner or later be fought. . . . The real question before us is whether from fear of the outcry of a small and noisy section of the society of Calcutta, we will abdicate all those high functions with which Parliament has entrusted us for the purpose of restraining the European Settler and of protecting the native population. . . . I think that the Act before us is in itself a good Act, I think that by passing it we shall give a signal proof of our determination to do justice to all races and classes."[86] The Legislative Council unanimously agreed with Macaulay and passed the Bill on May 9, 1836.[87]

83. See the Legislative Consultations of March 28, 1836 (IOR P/206/81).

84. See the undated Minute in ibid.

85. See the responses of the Madras and Bombay Governments in the Legislative Consultations of March 28, 1836, Nos. 3–7, and Macaulay's Minute of May 9, 1836, in the Legislative Consultations of the same date, No. 10 (IOR P/206/81–82).

86. See his undated Minute in the Legislative Consultations of March 28, 1836, No. 13 (IOR P/206/81).

87. See the letter from the Government of India (Legislative Department) to the Court of Directors, No. 6, dated May 30, 1836, in *Letters from India and Bengal to the Court of Directors* (IOR E/4/154).

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Members of the European community at Calcutta were incensed by the enactment and by Macaulay's uncompromising defense of a law that they thought violated their inherent rights and privileges.[88] William Tayler, a witness to the prolonged protests at Calcutta, wrote: "The Black Act was the cause of an agitation which may fairly be said to have convulsed Indian society for a time. Several barristers took the lead; public meetings were held; scurrilous articles filled the columns of the daily journals. One impassioned orator hinted that Mr. Macaulay ought to be lynched at the very least."[89] Even after the Act was passed, the protesters continued to voice their doubts about its legality, justice, and expediency. In mid-July, they held a public meeting at the Calcutta Town Hall to petition Parliament to disallow the Act.[90] Although the Parliament rejected their plea, the fierce protest against the "Black Act" served as the foundation and historical benchmark for all future opposition to uniform legal jurisdiction in India.[91]

The Code of Criminal Procedure: A Case Study of Colonial Difference

Although the Turton and Smith memorial opposed the "Black Act" on the grounds that the existing law contained too many "anomalies and contradictions," European resistance to local jurisdiction and legal equality would not subside once the Indian law was clarified and codified. The notion that freeborn Englishmen had certain inviolable rights was used to resist future codification efforts. This is illustrated most vividly in the debates over the Code of Criminal Procedure. The history of this code forms a remarkable case study of the rule of colonial difference. Although it constituted part of the larger project to create a uniform system of laws and law courts, it was explicitly designed and amended over the course of the nineteenth century to sustain a structure of legal inequality. Debates over the very long and complicated piece of legislation tended to be limited to the very few sections that fixed relations of imperial privilege. In 1857, when the Bill was first submitted to the Legislative Council, Calcutta Supreme Court Justice

88. See the memorial from Turton and Smith, dated May 2, 1836, in which they charged that the Government of India had exceeded its authority and threatened to take the matter to the House of Commons. Legislative Consultations of May 9, 1836, No. 6 (IOR P/206/82).

89. Quoted during the Legislative Proceedings of March 9, 1883, by Council Member Hunter.

90. The memorial is printed in the newspaper *Hurkaru,* July 28, 1836.

91. Act III of 1839 and Act VI of 1843, also known as "Black Acts," extended the jurisdiction of the lower civil courts over British subjects.

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Arthur Buller reminded the Council of the "excited" content of the legislation: "The Council has not yet had to deal with any question on which public feeling had been so much excited. Nor was it a sudden or transient excitement, lightly got up and easily to be allayed. These murmurs, these resentments that we now heard, were but the angry echoes of that old protest, which had systematically, resolutely, vehemently been repeated by successive generations of British subjects at every attempt to make them amenable to the Criminal Courts of the Mofussil."[92]

When it was first passed in 1861, the Code of Criminal Procedure secured the legal superiority of "European-born British subjects" by reserving to them special privileges such as the right to a jury trial with a majority of European jurors, amenability only to British judges and magistrates, and limited punishments. These fiercely guarded "privileges" or "rights" as they were alternatively described made the law both a symbolic and an actual marker of imperial power: actual in that European subjects were literally given special privileges that distinguished them from Indian subjects; symbolic in the work they did in maintaining and displaying European power and prestige. As Legislative Council Member Thomas said: "Whether the planter gets justice or not at the hand of the Native Magistrate is rather a secondary consideration; the mere fact of his having, on some trifling charge, had to appear before and be tried by a Native Magistrate, of the same caste and family, perhaps, as one of his own writers or contractors, will so lower him to their own level in the eyes of his two or three hundred coolies, that he will not be able to command their respect any more."[93]

The debates about uniform criminal jurisdiction poignantly illustrate how abstract universal theories ceded to the concept of "Indian human nature" and equal legal protections became embroiled in the European community's struggle to differentiate itself from the colonized subjects of India. Amended several times during the nineteenth century, the Code of Criminal Procedure continued to sustain a system of racial inequality according to the inverted logic of colonial difference. As one Member of the Legislative Council tellingly put it, "equality was a miserable sham" if it meant that Europeans and Indians would be set on an equal footing before the law. Various Indian inversions defined the arguments of those opposed to uniform criminal jurisdiction: equality became inequality; the "doctrine of equal laws for all" was compared with the "actual state of things"; and racial distinctions were renamed "safeguards," the removal of

92. Buller's remark of March 7, 1857, appears in the *Legislative Council Proceedings,* vol. 3 (1857).

93. See the *Legislative Council Proceedings* (1883 and 1884), located at the NAI and the IOR.

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which would purportedly increase existing inequalities rather than make all men equal before the law. Before tracing the historical twists and turns in the arguments for and against uniform criminal jurisdiction, I will place the Act in the larger context of the codification project set in motion by Macaulay.

Four Indian Law Commissions worked intermittently on the Anglo-Indian Codes from 1834 to 1879. One of the most important contributions of the first Law Commission was the Indian Penal Code, submitted by Macaulay in 1837 and passed into law in 1860. Given that the Royal Commission was simultaneously working on a criminal code for England, it is not surprising that Macaulay first set himself to drafting the Indian Penal Code. The English criminal law was a natural choice for codifiers in England because it had been undergoing a long process of reform.[94] In India, however, the codification of the criminal law did not stem from an ongoing reform process but from prevalent legal ideas about "native feelings and prejudices." Colonial lawmakers, such as Macaulay and Maine, believed that the reform of the criminal law would meet with the least social resistance.[95] Crime, they argued, was universally understood whereas the civil law touched upon what Maine called "the local peculiarities of the country."[96] Because it was assumed that natives did not have the same "feelings or prejudices" about criminal law as they did about civil law, the Indian Penal Code (1860), the Code of Civil Procedure (1859), and the Code of Criminal Procedure (1861) were the first three codes enacted by the Government of India.

Maine's assumption about two spheres of law—one attaching to native habits and feelings (the personal/private sphere), the other a universal realm devoid of cultural peculiarities (the public sphere)—had historical roots in the colonial past. In 1772, Bengal Governor-General Warren Hastings redefined secular and religious space by setting aside a private sphere of indigenous law and defining that body of "personal law" as religious law.[97] This private sphere was identified by Hastings and others as a space of non-interference. The colonial distinction between private and public was

94. See Leon Radzinowicz, *A History of English Criminal Law and Its Administration since 1750* (London: Stevens, 1948–86).

95. Another reason why the criminal law was first codified was that the Islamic law was perceived by colonial administrators to be inhumane and brutal. For a critical review of this argument about the inhumanity of the Islamic criminal law, see Jorg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769–1817* (Wiesbaden: Franz Steiner Verlag, 1983) and Singha, *A Despotism of Law.*

96. See Maine's Minute dated September 11, 1868, NAI Legislative (A), May 1872, no. 579.

97. Hastings's "Plan for the Administration of Justice" (1772).

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a clearly gendered distinction: public justice primarily applied to property and commerce whereas personal law pertained to the "private" realm of women, family, religion, and tradition.[98] So that Hindu law could be applied to Hindus and Muslim law to Muslims, Orientalist scholars worked with interpreters of religious scriptures to fix authoritative codes of Hindu and Muslim law that were held to be binding in deciding "personal" matters, such as succession, inheritance, and marriage.[99]

The instability of this distinction between the colonial public and the native private was clearly exposed during the long-running debates about uniform criminal procedure. Here we find both local Britons in India maintaining their right to exemption from the jurisdiction of the local courts as a matter of personal law as well as various claims about Indian otherness in the purportedly universal realm of public law. The government's repeated efforts to appease the non-official community by securing *inequality* under the law indicate that a rule of law, initially conceived of as a tool to control the influx of unwieldy elements of British society in India, became increasingly connected to the political stability and economic prosperity of the empire, and not to the abstract principles of equality and uniformity.[100]

"The Tender Mercies of a Moonsiff" and the Persistence of European Privilege

Scholars of South Asian history have exposed the economic and epistemological violence characteristic of the colonial period. However, it is also important for us to explore and acknowledge histories of physical violence. During the 1830s and 1840s, various cases of European violence against Indians were brought to the attention of the Court of Directors, strengthening their resolve to redress the law of criminal procedure. In 1834, the Directors were apprized of a serious case tried by Calicut Justice of the Peace Alexander Maclean. The case involved the violent assault of

98. See Gerald Larson, ed., *Religion and Personal Law in Secular India: A Call to Judgment* (Bloomington: Indiana University Press, 2001).

99. The two classic colonial works on Hindu and Muslim law are Nathaniel Halhed, *A Code of Gentoo Laws, or, Ordinations of the Pundits* (1776) and Charles Hamilton, *The Hedaya, or Guide: A Commentary on the Mussalman Laws* (1791).

100. The reluctance of the government to move ahead with legal reforms affecting the non-official European community was partly due to the booming indigo economy of the 1830s and 1840s and the growing influence of the planters over official policy. The indigo industry in Lower Bengal peaked between 1834 and 1847, precisely the period when Macaulay's Penal Code and other codification efforts were stalled. In 1842, indigo accounted for 46 percent of the total export market of Calcutta. See Kling, *The Blue Mutiny* and Shukla, *Indigo and the Raj.*

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George Bladen Taylor, an Indian master mariner, by three Europeans in Cochin. Although the three men were found to have bludgeoned Taylor's face and body so hard that he thought he was dying—witnesses found a bloodied Taylor screaming, "I am murdered, I am murdered"—the accused were fined only five hundred rupees for the commission of the crime.[101] Referring to this case, the Court of Directors reminded the Government of India that the Charter Act of 1833 "empowers and specially requires the Legislative Council for India to make provisions for cases similar to those here brought to our notice; in which the provisions of the law hitherto in force were found defective."[102]

By 1841, the Government of India had still not altered its system of criminal procedure when the Court of Directors was informed of another disturbing case, the murder of a Bengali man named Fuqueerah in the town of Bhugwanpore, Tirhoot district, a major plantation district in Bengal. According to N. J. Frotten, the local magistrate and justice of the peace, Fuqueerah was a *khidmatgar* (servant) of Mr. Wyatt. Fuqueerah's "accidental death," as it was termed, had been caused by "the discharge of a fowling piece by Mr. Wyatt." Wyatt claimed that he was shooting sheep on his property when he accidentally shot and killed Fuqueerah. However, more than thirty eyewitnesses to the incident testified that there were no sheep anywhere in the vicinity when Fuqueerah was shot. The case was sent by Frotten to Bengal Advocate General John Pearson who unilaterally determined that the case was not criminal and that no further steps should be taken to prosecute Wyatt.[103] The Court of Directors cited the Fuqueerah case when they reiterated their insistence on a system of uniform jurisdiction in 1841: "The unsatisfactory manner in which this case was disposed of affords an additional instance of the urgent want of Tribunals for the trials of British born subjects in the Mofussil charged with heinous offenses. We trust that at no distant period this defect may be supplied."[104]

Without a substantive criminal code as a guide, however, efforts to reform the law of criminal procedure were thwarted. Many Europeans argued that if they were placed under the jurisdiction of the *mofussil* courts, they would be subject to the Islamic criminal law, a law they considered to be "a barbarous and proselytizing law unsuited to Christian or civilized

101. See the Legislative Proceedings of October 10, 1836, Nos. 20–21 (IOR P/206/84).

102. See the judicial despatch from the Court of Directors, No. 6, dated September 30, 1835, in the Legislative Proceedings of October 10, 1836, Nos. 20–21 (IOR P/206/84).

103. See the letter from the Court of Directors, No. 9 of 1841, dated August 18, 1841 (NAI) and NAI Legislative Department, November 29, 1841, Nos. 14–18.

104. See the letter from the Court of Directors, No. 9 of 1841, dated August 18, 1841 (NAI).

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men."[105] The Earl of Ellenborough exclaimed that it was "the maximum of bad taste to make British-born subjects bow the knee to laws built upon the imposture of Mahomet, derived from so impure a source as the Koran, which is regarded by all Christians as a tissue of revolting lies and absurdities. Thus we . . . remove to a further distance than ever that grand scheme of philanthropists—the assimilation of the natives of India, in habits, institutions, and religion, to ourselves. The enactments of such laws is a gross libel on the enlightenment of the nineteenth century."[106]

In 1843, the Indian Law Commission submitted a draft Bill, which proposed that European British subjects charged with non-capital offenses outside of the Presidencies should be placed under the jurisdiction of the Company magistrates and the subordinate Criminal Courts. Providing both Indians and Europeans in the *mofussil* with protection from European criminals, the Commissioners wrote: "The principle is that the persons and properties of all the inhabitants of the country shall be under the same protection—that every one injured in his person or his property shall be equally able to obtain redress—that every one having a demand or complaint, civil or criminal, against another shall be equally able to bring it to a judicial determination."[107] But even as they sought to implement a broadened system of legal equality by extending local criminal jurisdiction, the Commissioners confirmed existing inequalities (such as the right of an Englishman charged with a capital crime to only be tried in the Calcutta Supreme Court) and proposed additional privileges (such as giving British subjects the choice to be tried by a judge alone or a judge aided by three assessors, one of which had to be a European).

Members of the Legislative Council responded favorably to the Law Commissioners' draft Act. Although some were surprised by its preservation and expansion of European privilege, even the sharpest critics continued to insist on Indian difference. Legislative Council Member Herbert Maddock, who did not believe true legal equality could be achieved if Europeans in the *mofussil* could not be tried for capital crimes, still proposed that certain differences had to be acknowledged when it came to matters of imprisonment. Maddock wrote:

105. See "The Memorial of the undersigned persons of English, Scottish and Irish birth or descent, inhabitants of the territories of the Crown of India at present under the Government of the East India Company," dated January 22, 1850, in the Legislative Consultations of May 10, 1850, No. 44 (IOR P/207/60).

106. See Earl of Ellenborough, *Tyranny in India! Englishmen Robbed of the Blessings of Trial by Jury and English Criminal Law. Christianity Insulted!* (London: James Ridway, 1850).

107. See the published *Law Commissioners' Report, 1843: Jurisdiction over European British Subjects and Draft Act* (available at the NAI Library).

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> For it would be even absurd to sentence an Englishman and an Indian to the same term of confinement in a jail. Such confinement is of itself a very slight evil to the native and the heat of a crowded building surrounded by high walls is not at all injurious to his health. In regard to Europeans the case is very different; deprived of exercise and exposed to all the heat of the climate within the walls of a jail his suffering must be great. But as we must in many cases resort to this mode of punishing European as well as Native there ought to be fixed some scale of proportion which may render a given period of confinement in one case equivalent in point of severity to another period in the other case.[108]

(Maddock did not explain why an Indian would not also suffer from being placed in a hot building with high walls and deprived of exercise.[109]) The Law Commissioners' draft Act, like the Indian Penal Code, was shelved. Six years later, in 1849, another "Jurisdiction Act" abolishing European immunity came before the Legislative Council.[110] After circulating the Bill to officials across India, the Council received a variety of interesting views. Those in favor, such as the judges of the Nizamut Adawlut, supported the extension of jurisdiction as an "inevitable step in the onward progress of our Indian legislation."[111] Nizamut Judge W. B. Jackson described the system of privileged immunity as an "intolerable evil":

> The intolerable evil of a privileged and dominant class living in the cast peninsula of India being held exempt from the operation of the criminal law of the country is too evident to require comment. In theory such a state of things is anomalous and opposed to all legal principle; in practice it has been found extremely inconvenient, and embarrassing and productive of many evils; and as a matter of policy, such distinction, in the eye of the law admits of no defense. . . . If it is good enough for the Native subjects of the Crown,

108. See Maddock's Minute of September 4, 1844, in NAI Legislative Proceedings, October–December 1844, October 12, 1844, No. 5.

109. For more about colonial conceptions of the Indian climate and its adverse effects on European constitutions, see Mark Harrison, *Climates and Constitutions: Health, Race, Environment and British Imperialism in India, 1600–1850* (New Delhi: Oxford University Press, 1999). In his *Notes on the Indian Penal Code* (1837), Thomas Macaulay had argued on political grounds, rather than anatomical grounds, that "Englishmen of lawless habits and blasted character" should be transported from India rather than imprisoned because he believed that: "our national character should stand high in the estimation of the inhabitants of India. . . . that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations, stigmatised by courts of justice." This argument that Europeans in India could not tolerate imprisonment persisted into the twentieth century.

110. See Law Member Drinkwater Bethune's Minutes in the Legislative Consultations of May 10, 1850, Nos. 25, 27, 30, 33–35 (IOR P/207/60).

111. See Judge J. R. Colvin's Minute of February 28, 1850, in the Legislative Consultations of May 10, 1850, No. 67 (IOR P/207/60).

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> it is good enough for their white brethren who are engaged with them jointly in all the pursuits of life, in commerce, and agriculture. If is it defective, the insistence of the Europeans will accelerate its amendment.[112]

His colleague on the bench, Judge J. Dunbar, invoked the illegitimate position of Southern slaveholders in the United States to dismiss the resistance of the non-official community to the proposed expansion of local criminal jurisdiction: "The obstinacy with which persons even of liberal education cling to the idea of an actual and indefeasible right to exemption appears to be little less surprising than that perversion of mind which leads the white race in the Southern States of America to claim a right of property in their unhappy slaves."[113]

Despite the forceful words of high-level officials such as the Nizamut judges, Governor-General Dalhousie withdrew his support of the Bill by reasoning that without a substantive criminal law in the *mofussil* a procedural law was useless.[114] Dalhousie decided that until the Government of India could positively ascertain the criminal law of the *mofussil,* it had "no right to deprive [a British subject] of the protection of his own native law, which has heretofore been carefully secured to him."[115] The Court of Directors supported the government's decision to put off the question of criminal jurisdiction until the Indian Penal Code had been ratified: "We entirely concur with Dalhousie's opinion that, before rendering British-born subjects amenable to the Company's Courts, it is essentially necessary to define the law which those Courts are to administer." Interestingly, an unidentified side note to the despatch reads: "Yet England has thriven under her undefined Common Law. Perhaps 'very desirable' would be better than 'essentially necessary.'" And a note in a different hand reads, "Our Criminal Law at present is the least exceptionable part of our system. The Courts themselves should be put on a proper footing."[116] The "Jurisdiction Act" was shelved.

In 1855, the second Indian Law Commission submitted draft codes of Civil and Criminal Procedure, in which they reaffirmed the principle that the special privileges enjoyed by British subjects should be abolished: "In the system which we propose, all classes of the community will be equally amenable to the Criminal Courts of the country." Once again, the expansion

112. See Judge W. B. Jackson's Minute of March 27, 1850, ibid.

113. See his Minute of March 8, 1850, ibid.

114. See the opinions of Chief Justice Lawrence Peel and Puisne Judge James W. Colvile of the Supreme Court at Calcutta, and Judge J. R. Colvin of the Nizamut Adawlut, in the Legislative Consultations of May 10, 1850, Nos. 57, 59, and 67 (IOR P/207/60).

115. See Dalhousie's Minute of April 19, 1850 in the Legislative Consultations of May 10, 1850, No. 73 (IOR P/207/60).

116. See Legislative Despatch No. 15 of November 27, 1850 (IOR E/4/804).

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of equality was accompanied by proposals committed to the persistence of difference. Three out of the seven Commissioners opposed the recommendation to create an amalgamated High Court on which Indian judges would be permitted to serve. In a lengthy Minute, J. M. Macleod argued that as alien rulers, the British colonizers were "free from the partial interests and passions by which they would otherwise of necessity be swayed." He claimed that placing a native on the highest appellate court would deprive Indians of what they have "always regarded" as a "great advantage," namely "the benefit of the integrity and intelligence of the gentlemen sent from England to rule over them." Macleod asserted the right of colonial rule not only in terms of racial superiority but also in terms of the benefits of British justice:

> What is the nature and condition of the British Empire in or rather over India? That empire is, and as long as it endures must continue to be, a domination of race over race, of a single European race over a number of Asiatic races. But it is nevertheless a blessing to the people of India. It is almost entirely free of the evils which in ordinary cases the political ascendancy of race over race infers. Under it India is governed wisely, strongly, justly, and mildly, to a degree far beyond what would otherwise be possible; . . . At the same time, to the unspeakable advantage of India, her rulers are of a race conspicuously gifted by nature and the qualities which fit men for the conduct of public affairs, and of a nation which is in the foremost rank of the most highly civilized and most enlightened nations upon the earth. They are men, too, from the Governor General down to the youngest member of the Civil Service, sent from that so far advanced nation for the express purpose of conducting the government of India. This circumstance is of immense importance.

Macleod's Minute provides an excellent example of the limits of a rule of law in a colonial context. For while Macleod theoretically supported the effort to construct a system of legal equality, he (and two of his colleagues) still held that Indians, steeped in their culture and prejudices, had not yet evolved to the position of universal man and could not be trusted to administer the law in the country's highest tribunal.[117] This code was also shelved.

In 1857, when Law Member Barnes Peacock introduced a new "Bill for extending the jurisdiction of the Courts of Criminal Judicature of the East India Company in Bengal, for simplifying the Procedure thereof, and for investing other Courts with Criminal jurisdiction," the controversy over

117. See *First Report of Her Majesty's Commissioners Appointed to Consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India, &c.* (1855), Appendix D: Minutes by Commissioners, Nos. 1 and 2, for the undated oppositional Minutes of Commissioners Macleod, Jervis and Ellis.

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uniform criminal jurisdiction was reopened yet again.[118] Memorials and petitions against the Bill poured into the government, with non-official Europeans and Indians both opposing the exception, though for very different reasons. On April 6, 1857, a public meeting was held at the Town Hall in Calcutta by Indian residents who believed that criminal jurisdiction should be extended over "all classes of Her Majesty's subjects without distinction." (Peacock's Bill exempted covenanted officers—most of whom were Britons—from the jurisdiction of the lower level *mofussil* courts.[119]) They argued that "no section of the community should, by reason of place of birth, descent or official position, possess any exclusive or peculiar privilege, distinguishing them in the eye of the law from the rest of their fellow-subjects."[120]

Members of the non-official European community took a different stand against the Act. Following a public meeting held in early 1857, a petition signed by eleven hundred British subjects from Calcutta and the *mofussil* districts of the Bengal Presidency expressed "deep anxiety and alarm" over the proposed Bill.[121] The petitioners argued that to place them under the jurisdiction of courts without the aid of juries violated their inalienable rights by "depriv[ing] them of that which, at all times and in all places under British rule, has been held to be the inalienable right and surest protection of every Englishman against injustice and error." They further charged that to do so in a country where "fabrication of evidence is a trade," was "an invasion of their constitutional rights." The memorialists brazenly asserted that "the proposed Judges of the three lower Criminal Courts, European and Native, are all alike unfit for the office," because they were appointed by the Government of India and were therefore, "wanting in that independence, and freedom from influence, which it is impossible to contend is not at least as necessary to a Judge in this country as in England." The petitioners singled out Indian judges as being particularly unfit to exercise criminal powers over Europeans due to the "antagonistic feeling, inveterate prejudice of caste and religion, utter want of independence of mind, and of freedom from improper influence of all kinds." In addi-

118. See *Legislative Council Proceedings,* vol. 3 (1857).

119. The Covenanted Civil Service consisted of officers placed in higher positions who served at the pleasure of the Crown, having passed a formal entrance examination in England. The Uncovenanted Civil Service consisted of lower administrative officers (European and Indian) appointed to their positions in India by the Viceroy.

120. See the memorial printed as Annexure 14 to C. Tindall's Note on "Inequalities in the letter of the law as applied to European British subjects and Indians when under trial before the Courts of India," dated July 29, 1921, in NAI, *Racial Distinctions: Main Correspondence,* vol. 1.

121. The memorial is printed as Annexure 15 to Tindall's Minute in ibid.

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tion to the "notorious problem" of false evidence in India, the petitioners suggested that Europeans in the *mofussil* would become victims to false charges that would "expose them in their property to utter ruin from error of judgment, incompetence, prejudice, corruption, and perjury, and in their persons to sentences of imprisonment, which, to Europeans in this country, are equivalent to sentences of lingering death."[122]

The petitioners also suggested that the exemption provided for covenanted officers was an implicit admission of the Company Courts' "unfitness to deal with charges against Europeans." Whereas the Indian residents of Calcutta had argued that the exemption was an insult to the uncovenanted judicial officers (many of whom were Indians), the British petitioners held that the exemption "treated as outcasts and outlaws" the "producing power and commercial wealth of this Presidency." They claimed that they should be treated to "equal justice" with the Company's servants, rejecting the Bill's plan for uniformity as a strategy of "leveling down." In their view, "uniformity in administration of law can only be desirable when it introduces tribunals all equally good, not when it places all alike in equal peril of suffering injustice."

This notion of "equal justice" as a relative rather than an absolute principle undergirded many of the claims about the "rights" of the Englishman in India. Opponents of legal uniformity held that through historical struggle, Englishmen had earned as their birthright an impartial and advanced administration of justice. In contrast, they suggested that Indians, beaten down by long subjection to corrupt Oriental despotisms, stagnated in historical time and were therefore accustomed to lower standards of justice. According to this relative equality argument, Indians would not be "equally" oppressed as Europeans would be by a mediocre legal system.

In March 1857, when the Bill was read for a second time in the Legislative Council, the attention of the Legislative Members was focused almost exclusively on the question of jurisdiction over European British subjects. Calcutta Supreme Court Justice Arthur Buller opened the session by proposing a compromise, "a middle course, he believed, calculated to do substantial justice to all, and to extricate the Legislature from a very serious difficulty." Buller suggested that jurisdiction over European British subjects should be extended to the Sessions Courts only, and not to the Magistrate's Courts or to the Subordinate Courts presided over by Indian officials. Buller based his proposal on the very frank admission that the

122. Also see the interesting "Petition of the Armenians of Dacca and Calcutta," in which the Armenians asked that they be entitled to the same legal privileges as those reserved to European British-born subjects, in *Legislative Council Proceedings,* vol. 3 (1857), July 25, 1857.

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future of the Company depended on the very British capitalists who opposed the Bill, a "deserving body of men" who "represented the life, the vigour, the best hopes of our Indian possessions." Rather than "place them in a worse position than had ever been contemplated by the blackest of previous Acts, and consign them to the tender mercies of a Moonsiff [Islamic law officer]," Buller urged the Council to concede to their demands, so as not to "discourage so valuable a subject [the British speculator in the *mofussil*] in the onward course of improvement along which it was his mission to lead the destinies of this country."

In defense of this political compromise, Buller contrasted "the doctrine of equal laws for all" with the "actual state of things around him." He suggested that "equality was a miserable sham," if it meant that Europeans and Indians would be set on an equal footing before the law. On the one hand, he pointed to the European community, "a small but highly civilized community long accustomed to good laws and to a good administration of them." On the other hand, he gestured to the "vast masses but lately emancipated from barbarism, and inspired with no traditionary reverence for equal laws or incorruptible justice." Buller held that if these two groups, one of which looked upon the *mofussil* courts "with horror," and the other which "found in these Courts a safeguard far better than any that their forefathers ever dreamed of," were placed under the jurisdiction of the same courts, an "equality in appearances" would in fact produce "the grossest inequality." Buller's argument that equality was an abstract theory with no practical applicability in a "caste saturated" and "peculiar" place like India is precisely the distinction upon which the colonial rule of law and difference rested.[123]

Other members of the judicial colonial establishment disagreed with Buller and his proposed compromise. Calcutta Supreme Court Chief Justice James Colvile opposed the immunity given to the Company's servants as well as the claims to immunity lodged by the "adventurer class" as their inalienable and indefeasible heritage and right. In fact, Colvile warned that the rapid technological advances in India, such as the railway and the electric telegraph, were increasing the number of Europeans in the interior, thereby making the expansion of criminal jurisdiction at the local level ever more pressing.

The Council's deliberations on the Bill were cut short by the Great Rebellion of 1857. Discussions of the Bill would not restart until 1859, amid distinct alterations in the political, social, and ideological practices

123. See Buller's speech of March 9, 1857, in *Legislative Council Proceedings,* vol. 3 (1857).

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of empire.[124] While the most obvious structural change was the Crown's assumption of direct control over the Government of India, interesting shifts also developed in the relations between the official and non-official European communities. Both groups now viewed themselves as a besieged racial minority precariously perched atop a population that despised them. Official and non-official Europeans in the post-1857 period rejected the idea of being subjected to a law administered by a subject population and feared that the full incorporation of Indian officers into the judicial system would challenge imperial stability by subverting the relations of power. Perceptions of essential Indian difference were central to their claims for European privilege: Indians, they held, were "a nation steeped in the tradition of the conquered," who could never fairly judge freedom-loving Englishmen. This conception of Indians as an essentially conquered people naturalized the assumption that the current conquerors were "entitled to some privileges and rights over those whom they ruled."

The Great Rebellion resulted not only in heightened racial animosities and substantial state restructuring, but also in a renewed commitment to institute a codified set of laws. In the aftermath of the revolt, the effort to establish a uniform system of laws and law courts was reinvigorated by the drive to strengthen central authority. However, the tension between liberal ideas and conservative practices in the post-1857 political climate precluded the possibility of any true legal equality coming to fruition. Many colonial administrators believed that the same "liberal sentimentalism" that had committed the government to a codified rule of law was itself responsible for the revolutionary activities of 1857–58.[125] Consequently, a more conservative vision of law emerged, one that emphasized its function as a weapon of force, in Fitzjames Stephen's words, "eminently well calculated to protect peaceable men and to beat down wrongdoers, to extort respect and to enforce obedience."[126]

124. See Thomas Metcalf, *The Aftermath of the Revolt: India 1857–1870* (Princeton: Princeton University Press, 1964); Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and the Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978) and Eric Stokes, *The Peasant Armed: The Indian Revolt of 1857* (Oxford: Clarendon Press, 1986).

125. See Metcalf, *Ideologies of the Raj,* especially "The Crisis of Liberalism."

126. James Fitzjames Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), 345.

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Act XXV of 1861: "A Retrograde Move in Legislation"

By the time the Legislative Council resumed its discussion of the Code of Criminal Procedure, the grounds for debate had altered considerably. The Indian Penal Code was near enactment, taking the wind out of the contention that the criminal law in the interior was unclear, uncivilized, and unsuitable for freedom-loving Englishmen. The transfer of power from the Company to the Crown had made all of the Courts in India Queen's Courts, thus nullifying the argument about an Englishman's "right" to be tried in the Crown's tribunals of English law. Lastly, with the assumption of Crown Raj, Indian "natives" had not only formally become British subjects, but Queen Victoria's Proclamation (1858) had offered yet another imperial promise of equality under law and governance without distinction of caste, creed or nationality.[127] Nonetheless, resistance to a system of legal equality was stronger and more entrenched than ever. Unsubstantiated fears about Indian racial animosity had been animated by real visions of mass anti-colonial resistance. Opponents of legal reform pointed to the potential danger of this seething racial hatred in order to lay claim to added protections for the vulnerable Englishman.

In July 1859, the attention of the Council returned to "that much agitated question, namely the trial of British subjects by Natives."[128] The 1857 debates in Council had separated those Members who insisted on fulfilling the promise of equality from those who claimed exemption as the inalienable birth right of the Englishman. Subsequently the "horror" of the Mutiny made a new starting point: the once conservative claim that Indian magistrates in the interior could not be trusted to exercise criminal jurisdiction over British subjects. The Select Committee's report on the draft Bill proposed that the jurisdiction possessed by Mofussil Courts over European British subjects should be continued but not enlarged, "leaving for future consideration the large question as to whether Europeans should or should not be amenable to the jurisdiction of those Courts in the same manner as other classes."[129] European British subjects were not to be tried for any felony in any Mofussil Court but instead were to be committed for trial to the Supreme Court.

In a complete *volte face,* Law Member Barnes Peacock, who only two years earlier had introduced a uniform jurisdiction bill based on the fact

127. The Queen's Proclamation is printed in the *Calcutta Gazette, Extraordinary,* Monday, November 1, 1858.

128. See the debates of July, August, and September 1859, in *Legislative Council Proceedings,* vol. 5 (1859).

129. For a summary of the Select Committee's proposals, see Harington's speech before the Council of July 30, 1859, ibid.

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that "he could not understand on what grounds it could be contended that any one class of persons should be exempt from the jurisdiction of any one of the courts of the country," now changed his mind as to what equality in India meant.[130] Peacock argued that the "occurrences of 1857 and 1858" had introduced new "facts and circumstances" in which only covenanted civil servants or European British subjects should be empowered to arrest, hold to bail, or commit any European British to the Sessions Court. The new Chief Justice of the Calcutta Supreme Court Charles Jackson proposed that Indian magistrates should not have "any jurisdiction whatever over British subjects." Jackson pointed to the "peculiar circumstances" in India, with a "small dominant and civilized class, and also a large native uncivilized population." Jackson further claimed that the natives now had a better judicial system than they had ever had before and that only the Europeans would suffer by the proposal to "level down":

> The Natives are not worse off, but on the contrary, are much better off as to Courts than they were under the Native Governments. The British subjects, on the other hand, are subject now to Laws and Courts to which they are, more or less, attached, and the real question was, whether European British subjects should be deprived of their own Laws and Courts, and be placed under other Laws and Courts which were deemed by themselves and generally admitted to be of an inferior kind. . . . No doubt the Laws and Courts of the country should be alike applicable and open to all classes; but the true solution of the difficulty was to raise the Native to the position of the British subject, and not to reduce the British subject to the level of the Native. Establish good Courts and, if possible, a good Jury, in the Mofussil, and you would at once destroy all pretence for the exemption of British subjects from their jurisdiction; but until this was done, he should oppose every proposition for placing British subjects under the criminal jurisdiction of the present Mofussil Courts.[131]

Peacock's retrogressive proposal shocked many Members of the Legislative Council who all agreed that jurisdiction over European British subjects in the *mofussil* could not now be extended but balked at the possibility of curtailing the criminal powers of local authorities so as to give total immunity to British subjects in the districts where the highest judicial officer was an Indian. However, the majority of the Council Members rallied behind their Law Member and the amendment was passed by a vote of four to three.

The British Indian Association (an elite proto-nationalist organization) registered a long and characteristically astute memorial denouncing Peacock's Bill. The petitioners reminded the Council about Queen Victoria's

130. Ibid.
131. Ibid.

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Proclamation and suggested that the aim of uniform legal equality was not to "level down" the rights of European British subjects but rather to protect those who suffered under the existing exemption:

> It is needless for your Petitioners to repeat what has been so often declared both in and out of your Honourable Council, that such exemption is alike opposed to justice and sound policy; that it establishes inequality in the eye of the law, detrimental to the best interests of society; that, in fact, it renders the administration of justice dependent on distinctions of country, colour and creed. . . . What is a privilege for a few thousands, is a source of incalculable injustice and hardship with the many millions. Indeed your Petitioners believe this distinction in favour of European British subjects has made justice so much a question of choice with them, has consequently placed so completely in their power their Native fellow-subjects, weak as these are in their dealings with them, has been both to the State and to individuals so much a source of trouble, expense, vexation, and in the end of not rarely ineffectual remedy, that however unwilling your Petitioners may be to interfere with the privileges of any class of Her Majesty's Indian subjects, they cannot look on with sympathy or approbation the perpetuation of one which is attended with such prejudicial results.[132]

However, the pleas of the British Indian Association and others fell on deaf ears. When the first Code of Criminal Procedure was passed into law (Act XXV of 1861), the special privileges that had been reserved to European British subjects were sustained and expanded. *Mofussil* Courts were given jurisdiction over European British subjects only in cases of assault, forcible entry, and injury accompanied by force, and Indian magistrates were prohibited from arresting, holding to bail, or committing European British subjects to the Supreme Court.[133] Members of the Indian community continued to voice their anger at what they renamed the "Exemption Law," calling it a "retrograde move in legislation" that withdrew existing powers from the Indian magistrates.[134] However, the Government stood by the Council's unanimous passage of the Act and on January 1, 1862 the

132. See the published Memorial from the British Indian Association dated December 31, 1860 (Calcutta, 1860), at the IOR.

133. Section 21 withdrew from the Native Magistracy the power to hold any preliminary inquiry into cases of European British subjects, or to arrest, hold to bail, or commit them for any case triable by the Supreme Court. Section 23 disallowed the trial of Europeans or Americans by Magisterial Officers other than Covenanted Civil Servants or European British subjects.

134. See the report of the Calcutta British Indian Association of September 21, 1859, in *Reports of Meetings of the British Indian Association Calcutta, June 1859–May 1862* (IOR).

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Code of Criminal Procedure came into effect in the regulation territories. From there it gradually extended to the rest of British India, except in the Presidency towns.

Act X of 1872: The Englishman's Personal Law

The first Code of Criminal Procedure only temporarily settled the long and contested question of uniform criminal jurisdiction for the problems presented by the Code were multiple. On the one hand, Indians began to take higher positions in the colonial administration in the 1860s. In 1864, the first Indian joined the Covenanted Civil Service and by 1879, one-fifth of all Covenanted Civil Service positions were reserved for Indians. These changes were significant because they threatened to place the colonial commitment to racial inequality in conflict with the growing representation of Indians as judges, magistrates, and high-ranking members of the administrative bureaucracy. On the other hand, the compromise struck in favor of the non-official European community had created very real political and legal problems. By the early 1860s, the growing presence of vagrant, unemployed, and criminal Europeans in India was viewed as a "serious stigma on the character of our Government."[135] This problem was greatly exacerbated by the fact that the Code of Criminal Procedure gave magistrates extremely circumscribed jurisdiction over European subjects in the *mofussil.* Henry Maine called the practice of sending European prisoners for trial to the Presidency towns "a violation of the fundamental principles of justice" and a great inconvenience to prosecutors and witnesses. Maine argued that: "No class of the community deserves less sympathy than the class from which the bulk of European offenders are taken, and no class suffers more acutely from their virtual impunity than their fellow-countrymen."[136]

After 1861, many of the local governments, some of which were working on vagrancy laws to deal with the growing problem of local European criminality,[137] complained to the Government of India about the inconvenience, costliness and injustice of sending European British subjects to the

135. See the letter from A. Money, Commissioner of Bhaugulpore in Henry Maine's "Minute on Vagrancy" of June 11, 1868, in NAI Home, Legislative (A), October 1868, Nos. 12–15.

136. See Maine's Minute in NAI Home, Legislative (A), August 1864, Nos. 31–33.

137. See Chapter Three of my unpublished dissertation, "'The Body Evidencing the Crime': Gender, Law and Medicine in Colonial India" (Columbia University, 2002) for a lengthy discussion of European vagrancy in the post-Mutiny period.

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High Courts for trial.[138] In 1870, the third Indian Law Commission submitted a report and draft Act that proposed that all subjects in India should be amenable to the same courts. The Commissioners wrote: "We concur with the Commission which framed the Code in thinking it desirable that a general and uniform system of Criminal Procedure should be applied to persons of all classes without distinction; and we regret to find that greater progress has not been made in giving effect to this principle."[139]

Although Law Member James Fitzjames Stephen rejected the Commissioners' draft Act, he submitted his own Bill to the Legislative Council that maintained the exemption of all European British subjects from the jurisdiction of the ordinary criminal courts.[140] Stephen's Bill was rejected by the local governments who almost unanimously insisted that local jurisdiction over European British born subjects had to be expanded. Punjab Chief Court Judge H. S. Cunningham suggested that the "lowest class of 'loafers'" should not clog up the country's highest courts with cases triable at the lower level.[141] The Government of Bengal wrote a long letter detailing both the principles and the problems demanding change:

> It is most necessary and reasonable that European British subjects should be made to a great degree amenable to the ordinary criminal courts of the country presided over as they are by British officers of a class at least equal, if not superior, to most of those who exercise jurisdiction over Her Majesty's European subjects in other places and in other parts of the world. . . . [A]s respects the whole position and relations of European settlers, the Lieutenant-Governor is strongly convinced that it would be very much better that they should not have extraordinary, anomalous and inconvenient privileges, but that for most purposes they should be made amenable to the tribunals of the country as are all men in the civilized countries of the world. Such a measure would put an end to the temptation to bear themselves as a superior and arrogant caste, which the present state of the law holds out to those who are ill-disposed; and it would put an end to a certain antagonism between the authorities of the country and foreigners claiming the privilege of extra territoriality, which must, more or less, prevail wherever such as system obtains.[142]

138. See the Minutes of the Madras and Calcutta High Court Judges, and the Punjab Chief Court Judges in NAI, Home, Judicial (A), February 4, 1871, Nos. 40–41 and NAI, Home, Judicial (A), February 25, 1871, No. 4.

139. See the third Indian Law Commission's *Seventh Report of Her Majesty's Commissioners Appointed to Prepare a Body of Substantive Law for India* (1870) available at the IOR.

140. See the December 9, 1870 proceedings in *Legislative Council Proceedings,* vol. 16 (1870).

141. NAI Legislative (A), June 1872, Nos. 141–346.

142. See the letter from S. C. Bayley, Officiating Secretary to the Government of Bengal in the Judicial Department, No. 5457, dated November 4, 1871, in NAI Home, Judicial (A), December 30, 1871, Nos. 35–37.

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The Bengal Government urged that local magistrates be given greater jurisdiction over Europeans in the interior and that the Code of Criminal Procedure be applied in both the Presidency Towns and in the *mofussil.*[143]

Bengal officials were particularly eager to have widened criminal authority because the Bengal Presidency was populated by the largest number of non-official Europeans in India, many of whom worked in the plantation economy. The Bengal Government continually heard reports about incidents of violence committed by European plantation managers and their henchmen against Assam tea plantation laborers. The tea plantations tended to be isolated and far from police stations, making it difficult for laborers to lodge their complaints at the local police station, much less travel to Calcutta for a trial before the High Court. Serious physical abuse on the tea plantations had become a major problem and the chance of detection and prosecution was small if not negligible where local officers had no criminal powers over Europeans.

In their response to the Bill, Bengal officials described the legal difficulties presented by several notoriously violent estate managers in Assam. One, a man named Mr. Smith, had blindfolded, tied up, and mercilessly flogged a coolie named Captan in front of his European dinner guests. Another man named Mr. Smith was under investigation in three cases of violent abuse and a Mr. Reade faced twenty-two allegations of violence. The charges against these men included beating laborers across tea boxes and wrongful confinement for anywhere between four and three months. Many of the laborers had multiple hideous scars from the beatings as their wounds tended to go untreated due to the lack of hospitals or medicines in the tea gardens. In one case, a man died from abuse, although no murder charge was proved since the examining doctor claimed the laborer had died due to a pre-existing health condition.[144]

In 1872, the Select Committee appointed to reconsider the Code of Criminal Procedure declared that the trial and punishment of European British-born subjects in the High Court had become "an expensive and troublesome procedure" that had weakened the government's control over the increasing number of non-official Europeans in India.[145] In their pro-

143. See letter No. 6629 from R. Thompson, Esq., Officiating Secretary to the Government of Bengal, Judicial Department, to W. Stokes, Esq., Secretary to the Government of India, Legislative Department, dated December 23, 1871, NAI Home, Judicial (A), February 1873, Nos. 131–32.

144. See the Assam Commissioner's letter and Officiating Secretary to the Government of Bengal Bayley's letter in NAI Legislative (A), June 1872, Nos. 141–346. Also see Behal and Mohapatra, "'Tea and Money versus Human Life.'"

145. See the Legislative Council Proceedings of January 30, 1872, in *Legislative Council Proceedings,* vol. 18 and the preliminary Report of the Select Committee published in the *Supplement to the Gazette of India,* January–June 1872 (February 3, 1872).

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posal to expand local criminal powers, they continued the tradition of racialized authority. The power to try European British subjects was confined to officers who were themselves European British subjects, and new racial privileges were carved out by the provision of appeal and *habeas corpus* for European-born British subjects.

In their responses to the report, few regional administrators even made mention of the long-promised goal of uniform legal equality. W. G. Pedder, Officiating Commissioner of Nagpur, stood amid a small official minority when he insisted that the stability of empire rested on public confidence in the non-discriminating English legal system: "The existence of a class, specially privileged in the eye of the law by reason of birth, appears to be a violation, in the interests of Englishmen, of English principles of justice and tends to cause the declared policy of Government to be distrusted, and constitutes a standing grievance." Pedder insisted that Englishmen in India should not carry with them their national rights any more than they carried those rights with them to other European countries: "No Englishman is forced to come or to remain in India. If his own interest or inclination leads him to do so, he should expect to forfeit the Briton's privilege of trial by a jury of his countrymen, just as he forfeits it during a residence in France or Germany."[146]

However, the majority of those consulted in the legislative process maintained that the time was "not ripe" for complete legal equality in India. While most colonial administrators were eager to give English magistrates criminal powers over European British subjects in the interior, few were prepared to expand such jurisdiction to local Indian magistrates. Novel arguments emerged to justify these long-standing exemptions. The most interesting came from the advocate general of Madras who claimed that Europeans had a right to exemption as a matter of personal law. The Madras official argued that unlike civil cases (in which Indian magistrates already had local jurisdiction over European British subjects), criminal cases involved the determination of *mens rea.* On "principle" he argued that, "an Englishman ought not to be tried by one who is wholly alien to him in thoughts and feelings, and who cannot understand his habits of mind or mode of conduct." Although a native magistrate might be an excellent judge where his fellow countrymen were concerned, "if he applied to the case of a European his own knowledge of Native character he would err most fatally." The advocate general gave as an example: "a Native adjudicating upon what would appear to him to be a blood-thirsty attempt to

146. See Pedder's letter No. 235, dated January 15, 1872, in NAI Legislative (A), June 1872, Nos. 141–346.

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murder, but which an Englishman would recognize as an unpremeditated fight between a couple of tipsy soldiers."[147]

This was an extremely interesting argument for the realm of personal law had previously applied only to the private sphere of native prejudices attaching to such culturally embedded matters as women, religion, and inheritance. By calling on jurisdictional exemption as the personal law of the Englishman, the Madras advocate general implied that Europeans in India had "gone native." In addition, by invoking the private in the realm of the public, he explicitly defied the logic of the separate spheres system. British administrators in India historically viewed criminal law as a universal sphere devoid of cultural specificity, a sphere in which legal interference would invite little resistance. However, what this Madras official was suggesting—and what one hundred years of controversy over uniform criminal procedure confirm—was that the border between the universal public sphere and the culturally specific private sphere was porous. From 1872 onward, the Englishman's "right" to certain legal privileges, previously defended as an inalienable birthright, was henceforth articulated in the language of personal law. This shift from an inalienable rights argument to a personal law argument also signaled a shift in how Europeans perceived their status in India. No longer challenging the authority of the Government of India to legislate for them, non-official Europeans now claimed rights as inhabitants of India entitled to the privileges meted out to other native groups (an oft-cited example of native exemption was the right of *purdah-nashin* women not to appear in court).

The second very interesting point suggested by the Madras advocate general was that a system of "separate but equal" tribunals best suited the circumstances of colonial India. However, this idea that the march towards equality was inhibited by the "peculiar circumstances of India," the caste and social prejudices of the "natives," and the racial antipathy of Indian judicial officers thinly veiled the fact that equality was not suited to colonial rule. The advocate general of Madras stated as much when he proposed that "theories and facts do not always harmonize." Although in theory, "the existence of any privilege, by which any special class of persons are exempted from the jurisdiction of the general tribunals of the country, is indefensible. . . . as a matter of fact, our position in India is that of alien intruders who have won and hold our rule solely by the sword." Colonial rule was defined by relations of inequality, and the fear that legal equality would subject the colonizer to the legal authority of his subjects often led officials to suggest that fairness and justice would best be secured by a

147. See the Madras Advocate General's letter of January 11, 1872, in NAI Home, Judicial (A), April 1872, No. 79.

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separate but equal system: "He [the Indian magistrate] might not designedly give an unfair judgment, but I believe that with many, the bias would be against the European, and that when placed in a position of momentary power over him, they would feel pleasure in asserting that power to his disadvantage."[148]

When the Select Committee submitted its final report on the amended Code of Criminal Procedure in March 1872, they presented another compromise solution. Unlike Buller's earlier compromise, this one was a pledge that had been worked out between the Government of India and the non-official European community in Bengal.[149] Acting through their informal representatives (the non-official Members of the Legislative Council), the non-official European community agreed to a Bill that extended limited jurisdiction over European British-born subjects in the *mofussil* only to European magistrates and Sessions Judges.

Opponents of the compromise Bill argued that the proposed distinction cast "a stigma on the whole educated Native population of India" by stripping the higher Indian judicial officers of powers that belonged to their offices. Pulling the personal law argument in a different direction, Council Member Barrow Ellis wondered why Indians "having been to Europe; having become acquainted with the European feelings, ideas, and customs; and having qualified themselves to take their places with the European members of the Civil Service," should not be given the same powers that European servants exercised.[150] The Governor-General pointed out the Bill's irrational implication that although an Indian Sessions judge was deemed incompetent to try a European British, once he became a judge of the High Court his powers were unlimited.[151]

Both defendants and opponents of the "compromise" Bill debated the exemption issue in terms of personal law and the capacity of Indian judges and magistrates who did not understand European manners, customs, and habits of thought to hold criminal powers over Europeans. Whereas Ellis suggested that Indians who traveled to England could understand the *mens rea* of a British accused, Fitzjames Stephen insisted that as residents of India, Englishman were entitled to certain privileges of personal law just as Hindus and Muslims were:

148. The introduction of the concept of "separate but equal" systems in late nineteenth-century India eerily resembles the U.S. Supreme Court decision in *Plessy v. Ferguson* (1896).

149. Unfortunately, there are no historical records detailing this compromise. The minutes of the Select Committee, potentially interesting and rich sources, were never recorded.

150. See Commander-in-Chief Barrow Ellis's speech in *Supplement to the Gazette of India,* May 4, 1872.

151. See the Governor-General's speech in *Supplement to the Gazette of India,* May 4, 1872.

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> The Muhammadan has his personal law. The Hindu has his personal law. . . . are English people to be told that, whilst it is their duty to respect all these laws scrupulously, they are to claim nothing for themselves? That whilst the English Courts are to respect, and even to enforce, a variety of laws which are thoroughly repugnant to all the strongest convictions of Englishmen, Englishmen who settle in this country are to surrender privileges to which, rightly or otherwise, they attach the highest possible importance?[152]

Fitzjames Stephen went further to assert that not only were Indian judges and magistrates unfamiliar with European "habits and customs," but Indians were themselves "passionately" attached to social inequalities and thereby unfit to administer a law of equality: "I think there is no country in the world, and no race of men in the world, from whom a claim for absolute identity of law for persons of all races and all habits comes with so bad a grace as from the Natives of this country, filled as it is with every distinction which race, caste, and religion can create, and passionately tenacious as are its inhabitants of such distinctions."[153]

The amended Code of Criminal Procedure, Act X of 1872, which was narrowly passed by a vote of 7–5, formally introduced the principle of racial disability into the interior courts by barring Indian judges and magistrates from trying European British-born subjects in the *mofussil.* Petitions poured into the Government condemning the now widened breach between Europeans and Indians. The British Indian Association asked that the Act be suspended on the grounds that it introduced major alterations to the existing law, including: "an invidious distinction . . . repugnant alike to justice and to political ethics; it is an infringement of the gracious proclamation of the Queen, which recognizes no difference of colour, race, or religion in the dispensation of justice; it is opposed to the principles of enlightened criminal jurisprudence, and to the spirit of civilized rule."[154] The Joyampore Projas Shoba (Ryots' Association) in the District of Nuddea observed that the "over-hasty legislation" had been "calculated to defeat the ends of justice and encroach upon the liberty of Her Majesty's Indian subjects."[155] The Jessore Association noted that the "already too inconveniently wide" breach between European and Indian subjects in India had been widened, which was "entirely opposed to the spirit of what they deem the principal

152. See Stephen's speech of April 16, 1872, in the *Legislative Council Proceedings,* vol. 18.

153. Ibid.

154. See the Memorial from the British Indian Association of Calcutta regarding the new Code of Criminal Procedure (Act X of 1872), dated July 11, 1872, in NAI Home, Judicial (A), August 1872, Nos. 61–64.

155. See their memorial of November 1, 1872, in NAI Home, Judicial (A), January 1873, Nos. 255–59.

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charter of the British India constitution—Her Majesty's proclamation upon assuming the government of the country," as well as being "foreign to the criminal jurisprudence of any civilized country."[156] The Government of India refused to honor the requests of the many petitioners to suspend the Act, promising only that "the working of the Act in detail will be carefully watched by Government."[157]

Conclusion: Prelude to a "White Mutiny"

The debates traced in this article form a prelude to the "white mutiny" of 1883 when the issues of criminal exemptions and racial distinctions exploded across India during the infamous Ilbert Bill controversy.[158] Law Member Courtenay Ilbert reignited a rankling European racism that had been resisting uniform criminal jurisdiction for fifty years when he introduced a Bill "to settle the question of jurisdiction over European British subjects in such a way as to remove from the Code, at once and completely, every judicial disqualification which is based merely on race distinctions."[159] Before the Bill had even been circulated to the local governments for suggestions, Europeans in Calcutta rallied in furious indignation. At a public meeting at the Town Hall of Calcutta on February 28, 1883, more than three thousand Europeans gathered to protest against "Mr. Ilbert's scandalous Bill."[160] By August 1883, petitions opposing the Bill had been signed by 15,000 people.

Indian supporters of the Bill, such as Kristodas Pal, called it "a legitimate and logical development of the progressive policy which characterizes British rule in this country."[161] His colleague on the Legislative Council Raja Siva Prasad commented upon the mismatch between progress and racial inequality: "The distinction of race in the Indian Criminal Procedure was one of the remaining mementos of the narrow policy of an honourable body of monopolist traders, though it might have suited or become a necessity at the time; but now it will be simply incongruous with advanced liberal

156. See the memorial, dated Kurrachee, November 9, 1872, ibid.

157. See Government of India Resolutions Nos. 92 to 97, dated Fort William, January 14, 1873, ibid.

158. Hirschmann, "White Mutiny."

159. See the "Statement of Objects and Reasons," dated January 30, 1883, in *Extra Supplement to the Gazette of India,* July–December 1883 and IOR L/P&J/5/40.

160. See the "Proceedings of a Public Meeting held in the Town Hall, Calcutta, on the 28th February 1883, in connection with the Criminal Procedure Code Amendment Bill," in *PP,* vol. 60 (1884), c. 3952.

161. See the debates of March 9, 1883, in *Legislative Council Proceedings* (1883).

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ideas and the progress of the age." Indian memorialists invoked the guiding principle of British rule in India, "equality in the eye of the law without the invidious distinctions of country, race or religion."[162]

But the Bill's opponents paraded a variety of familiar and well-rehearsed arguments about why Europeans in the interior should not be "leveled down" to the status of Indian subjects. The right of the Englishman to his own personal law and to be judged by those who "have an intimate knowledge of their inner life, habits and manners" was defended as a hereditary right and privilege amid a system that meted out privileges to many groups.[163] "The actual circumstances of the country" were compared to "the sentimental and theoretical views of persons devoid of experience." Equality was dubbed "an illusion . . . based on the assumption that political equality between the European and Native races is possible and desirable." As members of the Bengal Chamber of Commerce argued, "Those who have not penetrated beneath the plausible surface which the Oriental usually presents to European eyes may continue to cherish such an illusion; but it is impossible for those to do so who, like your memorialists, are brought into daily contact with the various classes of people in the ordinary transactions of life."[164]

Ideas about Indian history and culture were evoked to argue that "the principle of equality is not applicable in the present state of India," because "the principle of equality has no application among the Natives themselves, as their domestic and social institutions prove."[165] East is East they claimed: "our thoughts are not their thoughts, nor are their ways our ways."[166] Colonial justice was described as "immeasurably superior to anything they [Indians] had ever had before"[167] and as Council Member Miller colorfully remarked:

162. See the extract from the Joint Memorial of the British Indian Association, the Indian Association, the Mahomedan Literary Society, the National Mahommedan Association, the East Bengal Association and the Vakils' Association, High Court, Calcutta, IOR L/P&J/5/40. See also the memorial of the Kayastha Literary and National Association, dated November 10, 1883, in *PP,* c. 3952 (1884) as well as the many memorials printed in the *Extra Supplement to the Gazette of India,* July–December 1883 and IOR L/P&J/5/40.

163. See the "Memorial of the European British-born subjects of Her Majesty the Queen Empress and employees of the East Indian Railway Company," IOR L/P&J/5/40.

164. See the "Humble Memorial of the Bengal Chamber of Commerce," dated April 19, 1883, in *Extra Supplement to the Gazette of India,* July–December 1883.

165. See the "Humble Memorial of the Anglo-Indian and European British subjects residing at Mirzapur in Upper India," in *Extra Supplement to the Gazette of India,* July–December 1883.

166. See letter No. 1232 J-D. from F. B. Peacock, Secretary to the Government of Bengal, to the Government of India (Legislative Department), dated June 22, 1883, in *Extra Supplement to the Gazette of India,* July–December 1883.

167. See the speech of G. H. P. Evans, a non-official Member of Council and a Calcutta barrister, of March 9, 1883, in *Legislative Council Proceedings* (1883).

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> If it is right in theory for Europeans to try Natives, it is right also for Natives to try Europeans; and again I will say that, in my humble opinion, it is not so, because the case is not parallel. . . . When we came to this country, did we find equitable law courts in which Englishmen and Natives could alike obtain equal justice? Did we upset them and introduce this anomaly in favor of our countrymen? No. We found Suraja Dowla [sic], and the Black Hole, and the like of that. There was no such thing as law and justice. The land was a land of violence, of systematic and periodical marauding, of constant blackmail, of daily uncertainty of life and property, in short, of all the many forms of anarchy and misrule and lawlessness which I may not stay to dwell upon. It is a matter of history, and it still lives in proverbs, customs, castes, tenures, structures, which point to the then every-day existence of a state of things for which there was no remedy but to sweep it clean away. It was for us, a mere handful of strangers, to introduce law and order, and to import into this country as much justice as was possible under the circumstances.[168]

In the end, the Legislative Council struck another compromise in private consultation with the non-official European community. With their prior approval, the amended Code of Criminal Procedure provided Europeans in the *mofussil* with a right to trial by jury (composed of no less than half European or American jurors) before all District Magistrates and Sessions Judges. Kristodas Pal noted that the Council was giving with one hand what it was taking away with the other: "It cannot be denied that while race distinction is removed in one direction, that is to say, as regards a very small class of Native officers, it is deepened in another, that is to say, as regards the Native population at large. . . . Suffice it to say that the nation anxiously looks forward to the establishment of a complete equality in the eye of the law between all classes of Her Majesty's subjects without distinctions of race and religion . . . ."[169] Debates over uniform criminal procedure and jurisdiction persisted into the twentieth century and formed a central part of the platform of the Indian National Congress, India's prominent anti-colonial organization. While historians of modern India have situated the Ilbert Bill as a defining moment in the birth of the anti-colonial nationalist movement, the Bill must also be placed in the context of the longer fight for and against uniform legal equality and the contested project of codification.

In this article I have argued that the debates over the Code of Criminal Procedure provide telling insights into the working out of a colonial rule of law and difference. Although the rule of law was the ideological foundation upon which the British empire in India rested, complete fulfillment of its promises was staved off by the resistance of the non-official European

168. See Miller's speech on March 9, 1883, in *Legislative Council Proceedings* (1883).
169. See his speech of January 25, 1884, in *Legislative Council Proceedings* (1884).

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population and its appeals to Indian history, culture, and racial difference. The establishment of a uniform system of laws and tribunals, which had been the stated imperial policy since 1833, was repeatedly compromised by the government's repeated concessions to the demands of this small but influential constituency. By 1877, the project for simplifying an uncertain and complex law had ironically produced three separate codes of criminal procedure: the Code of Criminal Procedure Code for the *mofussil* courts, the High Courts' Criminal Procedure Act, and the Presidency Magistrates' Act.

Codification brought to the surface internal tensions in liberalism and empire. The paradox of attempting to create democratic legal institutions in the context of absolute authoritarianism manifested itself with striking clarity in the debates about the Code of Criminal Procedure. Good ideas in theory, legal equality and uniform criminal jurisdiction were proclaimed to have no place amid the peculiar circumstances of India where different histories and different cultural understandings made "equality" a relative rather than absolute principle. Rather than representing the abstract efforts of metropolitan legislators to create a "science of legislation," the work of codification in India was prompted by the growing and uncontrollable problem of European criminality and shaped by the colonial insistence on the peculiarities of Indian culture. Special legislation was produced to meet these special circumstances in a fashion that highlights the multi-dimensional nature of colonial difference.

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The Historiography of Difference

KUNAL M. PARKER

Part I. Within the truly prodigious outpouring of self-consciously "post-colonial" scholarship on colonial India since 1980, it is little exaggeration to state that the ontology of colonialism has been figured as *difference:* its production, its management, its transgression, and its obtrusion. This is the case whether the scholar's disciplinary affiliation has been anthropology, history, literary studies, politics, or sociology and whether or not the scholar has been formally associated with the now-famous Subaltern Studies series. This is also the case whether the specific subject at hand has been caste or gender, nationalism or communalism, peasants or workers, state or non-state practices, elite or non-elite discourses, formal or informal knowledges, histories or memories.[1]

To be sure, this focus on difference is hardly unique to the recent study of colonial India. It is a part of contemporary Western academic thought and practice generally and possesses a venerable lineage stretching back,

1. There are simply too many references to supply here. If beginners were to restrict themselves to historians alone, they might consult the work of various scholars explicitly associated with the Subaltern Studies project. These include—to name only the few best known in the Western academy—Shahid Amin, David Arnold, Dipesh Chakrabarty, Partha Chatterjee, Ranajit Guha, David Hardiman, Sudipta Kaviraj, Gyandendra Pandey, and Gyan Prakash. The reader could also consult the very widely received work (in certain cases the early work) of Arjun Appadurai, Homi Bhabha, Bernard Cohn, Nicholas Dirks, Gayatri Spivak, and Sara Suleri, some of whom have also been associated with Subaltern Studies.

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depending on how one plots it, at least to the reaction against the Enlightenment (something that is of immediate relevance here). Nevertheless, it remains true that the contemporary study of colonial India—precisely because it so strongly inflects "postcolonial studies" generally—has contributed significantly to the intensification of our apprehension of difference. In recent years, scholars across the disciplines who would ordinarily have no connection to India have found themselves reading work on colonial India to absorb and use its insights.

I identify the rendering of colonialism as difference within contemporary scholarship on colonial India to establish the larger historiographical context within which both the forum articles might be situated. For both Mithi Mukherjee's "Justice, War, and the Imperium" and Elizabeth Kolsky's "Codification and the Rule of Colonial Difference" fit squarely, it seems to me, within the scholarly tradition that writes the problem of colonialism as a problem of difference.[2] I invite both authors to respond to this characterization and to what follows.

At this intellectual juncture, I submit, one simply takes difference as a given. We *already* know that every historical object (a discourse, claim, etc.) is beset with difference—it either excludes something or is constituted by something it seeks to exclude. We also *already* have at our disposal techniques for making difference present. How should this sense of always already sensing the presence of difference—and always already knowing how to make it present—shape the way we talk about it? What remains compelling about difference?

One point of entry into this loose—and ultimately inexhaustible—conglomeration of questions might lie in a recent critique of the Subaltern Studies founder Ranajit Guha's celebrated book *Dominance without Hegemony.* The critic, Lauren Benton, is the author of the recently published and widely acclaimed book *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900.*[3]

2. The fact that Mukherjee's and Kolsky's articles fit so comfortably within this scholarly tradition reveals something, first and foremost, about the state of colonial Indian legal history (this is emphatically not intended as a criticism of either article). Unlike American legal history, which has been driven for many decades by the efforts of scholars who are legally trained and have appointments on law faculties, colonial Indian legal history remains the product of the efforts of historians. As such, it has been thematized in keeping with the broader thematizations of Indian history. Not surprisingly, in recent years, the result has been a legal history plotted along axes of difference—for example, race, religion, caste, gender, sexuality—that pays very little attention to the quiddity of law. To my knowledge, there are no systematic book-length scholarly studies of the history of core public and private legal ideas, let alone any attempt to link such ideas to the larger sweep of Indian history.

3. Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge: Harvard University Press, 1997); Lauren Benton, *Law and Colonial Cultures:*

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Benton is self-avowedly opposed to any claims of absolute difference or autonomy—her way of demonstrating her opposition is by showing the ubiquity of mutual constitution. She sees Guha as arguing for the absolute separateness of the subaltern in his famous "dominance without hegemony" formulation: "Guha holds fast to the autonomy of the subaltern; for him, the intricacies of colonial administration and indigenous bourgeois conciliation are reduced to historical epiphenomena, a pair of 'failed' agendas, precisely because the subaltern stands outside this relation, a not-very-attentive bystander to all the fuss."[4]

Benton argues that Guha is simply wrong because any claim about the autonomy of subaltern "consciousness" or "culture" is always already prefigured, contained, and constituted. "The autonomy that [Guha] ascribes to a realm of culture standing outside the colonial relation is illusory in the sense that it is, itself, a discursive product of colonial politics. Indigenous litigants at times assert and define their legal standing in the course of maneuvering through colonial legal institutions in ways that reinforce their authority. And the autonomy of indigenous legal authorities is a claim sometimes extended by colonial authorities themselves."[5] Instead, Benton offers us a model of legal pluralism, one in which colonizer and colonized engage in a centuries-long conversation about the patterning of legal orders that culminates in the emergence of a colonial state that supervises the boundaries between different legal/cultural systems. What we are given is difference figured as a process of mutual constitution.

We have here two models of writing difference: that of Guha and that of Benton. One can readily demonstrate an equivalence between them—each attempts to produce difference vis-à-vis a certain background claim through recourse to notions of distance. Guha's project was directed against then-existing claims about the autonomy and self-sufficiency of a sphere of politics constituted by colonists and indigenous bourgeois elites; he sought to produce difference by invoking distance between subaltern consciousness and elite politics. In his own words, "*Subaltern Studies* made its debut by arguing that there was no such unified and singular domain of politics and the latter was, to the contrary, structurally split between an elite and a subaltern part, each of which was autonomous in its own way."[6] Benton's project is directed in part against Guha's claims about the autonomy and self-sufficiency of subaltern consciousness. Where Guha produces difference by invoking distance, Benton produces difference *within* subaltern

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Legal Regimes in World History, 1400–1900 (Cambridge: Cambridge University Press, 2002).

4. Benton, *Law and Colonial Cultures,* 257.

5. Ibid., 258.

6. Guha, *Dominance without Hegemony,* ix.

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consciousness, as it were, by curtailing distance and invoking the proximity of mutual constitution.

But if one can show the equivalences between Guha and Benton, one can also show Guha and Benton to be quite different from each other—this would be Benton's own preference. Unlike Guha, Benton self-consciously denies herself the privilege of constructing any object—for example, subaltern consciousness—that she endows with autonomy. She might represent this refusal as an act of intellectual integrity or simply as evidence of the advance of poststructuralist knowledge over its predecessors.

The way that I have alternately joined and separated Guha and Benton in the preceding paragraphs is a readily available technique for producing difference. I will repeat this technique in what follows.

Part II. Overlapping ideas about history and race and law run through the British colonial project in India. It would not be incorrect to state that history and race and law in the colonial project are nothing other than alternative names for—or strategies for dealing with—difference.[7]

Read together, Mukherjee and Kolsky deal with the histories of two alternative approaches to the problem of difference in the British Empire, the anti-Enlightenment approach of Edmund Burke (Mukherjee) and the Enlightenment approach of Jeremy Bentham and his liberal utilitarian successors (Kolsky). While Burke's approach was expressed with passionate intensity in his late eighteenth-century writings on India, the liberal utilitarians' approach was picked up and instantiated in various nineteenth-century codification projects.

In the elegant prose of the political philosopher Uday Mehta, the difference between Burke and the liberal utilitarians inheres in their varying attitude toward the difference that colonized Indians increasingly came to represent in the British imagination. According to Mehta, for liberal utilitarians, "other people's experience must be viewed as lacking coherence—as being a singular, halting moment in time. . . ."[8] Liberal utilitarians' confidence in reason, progress, and the march of universal history made it possible to view Indians' present difference as merely provisional—something that should, could, and would be rewritten. Codes were confidently imagined as way of accomplishing a sharp break with an irrationality figured

7. The most sophisticated attempts to work out the relationship between history and difference in this context are Dipesh Chakrabarty, *Habitations of Modernity: Essays in the Wake of Subaltern Studies* (Chicago: University of Chicago Press, 2002) and *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

8. Uday Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 199), 212–13.

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as India's past and present. Bentham chillingly expressed this sense of the revisability of Indians' present affiliations in an essay on transferring English law to India: "The world has been a field of change: Egypt no longer worships the goddess Isis, and India may cast off its devotion to Bramah. . . ."[9]

For Burke, on the other hand, other people's present difference was not something to be erased in the forward march of universal history. According to Mehta, Burke "can and does view the unfamiliar from a perspective that does not a priori assume its provisionality. Instead, he thinks in terms of concepts through which the coherence of other people's lives can, in principle, become evident as a concrete and experienced reality and not as an abstract possibility that can stand out clearly only when projected onto the temporal canvas of the future. . . . From an experiential standpoint [other people's difference] does not acquire its density on account of being hitched to a more meaningful and rational teleology."[10] Burke freely equated the radicals of the French Revolution with rapacious Britons in India—he saw both as rending the fabric of other people's lives with reckless confidence. Not surprisingly, he was no partisan of codification that sought to effect a radical new beginning.

Mukherjee and Kolsky offer us rich accounts of the fates of these varying impulses. Mukherjee's major contribution is in showing that Burke did not restrict himself to exhorting his fellow Britons to approach Indians' difference with respect, but went further insofar as he sought to concretize his impulses in a vision of the politico-legal structure of the empire. By examining Burke's speeches in the Hastings impeachment trial, Mukherjee draws our attention to what she calls Burke's vision of a "deterritorialized juridical-imperial sovereignty that would be exercised not in the pursuit of the exclusive interest of the colonizing nation but, rather, in ensuring that colonial administrators in India remained firmly grounded in 'native' society and prevented from exercising absolute and arbitrary power over it."[11]

Mukherjee suggests that, ever sensitive to the variability of legal institutions among the different peoples of the empire, Burke preferred natural law or the law of nations over the common law as the structural law of the empire. Such a choice not only represented a historically unprecedented extension of natural law rights to non-Europeans but was also politically progressive in light of the abuses to which invocations of common law

9. Jeremy Bentham, "Essay on the Influence of Time and Place in Matters of Legislation," in *The Works of Jeremy Bentham,* ed. John Bowring (New York: Russell & Russell, 1962), 1:177.

10. Mehta, *Liberalism and Empire,* 214.

11. Mukherjee, "Justice, War, and the Imperium," *Law and History Review* 23 (2005): 591.

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rights were being put by Britons in India. In Burke's vision, according to Mukherjee, the institutional locus of this authority was to be the House of Lords. Although the House of Lords ended up acquitting Hastings, Mukherjee argues that Burke's vision of a politico-legal structure for the empire lived on into the twentieth century.

Kolsky seeks to examine the career "on the ground" of liberal utilitiarian ideas about codification. She locates herself squarely within a now familiar line of thinking associated with Partha Chatterjee, according to which all attempts to establish universalistic rational regimes of governance in the colonies—codification among them—foundered upon the "rule of colonial difference" (Chatterjee's phrase), which posited an unbridgeable (racial or civilizational) divide between the colonizers and the colonized.[12] In other words, even as liberal utilitarians claimed to bring Indians into the fold of progress and history, their insistence on Indians' essential difference meant that Indians were consigned to live in a kind of eternal time lag or state of tutelage.

Kolsky's contribution is to draw attention to the role of the community of non-official Britons (i.e., those not in the employ of the East India Company or the imperial administration) in the process of codification in India. She shows skillfully how concerns about the lawlessness of non-official Britons outside of the Presidency Towns of Bombay, Calcutta, and Madras played a major role in driving codification in India during the first half of the nineteenth century. From this point on, mapping a single set of laws onto British territory in India was seen as a way of bringing this unruly and recalcitrant population into check.

At the same time, Kolsky shows how the universalist impulses implicit in the drive to codify laws were repeatedly subverted, especially after 1857, by the refusal of Britons resident in India to submit to being judged in criminal courts presided over by Indian judges. Even more pointedly than Mukherjee, Kolsky gives us something of the flavor of the grotesque petty violence that was always part of British rule in India—servants and workers being flogged for insignificant infractions, contractual and property rights overridden through intimidation, and so forth. Kolsky shows how attempts to check such violence were systematically undermined over the course of the nineteenth century through invocations of Europeans' racial privilege against certain kinds of judicial process. Eventually, as Kolsky shows in a brilliant twist, Britons in India actually began to represent this racial privilege in the language of "personal laws"—the very term used by the British to designate the separate legal regimes governing Hindus

12. Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993).

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and Muslims in matters of marriage, inheritance, and adoption and long considered a mark of Indians' essential backwardness.

Having set up the difference between the traditions associated with Burke, on the one hand, and Bentham and the liberal utilitarians, on the other hand, I will now attempt to collapse this difference. The object is to raise some questions for Mukherjee and Kolsky—and ultimately to revisit in the concluding section the question about difference as figured in Benton's critique of Guha.

It is not hard to see why, given the obsession with difference that characterizes our intellectual moment, Burke should have emerged as the poster boy of British political thought. But we would do well to remind ourselves that Burke was neither an anti-colonial thinker nor an egalitarian one.

Burke's passionate repudiation of British rapacity in India had a great deal to do with his aristocratic loathing for returning *arriviste* colonials whose wealth gave them *carte blanche* into the highest echelons of British society and politics. From a thinker wont to characterize the "grand families" of Britain as the "great oaks" of society, this distaste could be read as an apprehension of the loss of a certain kind of racial privilege—a blight affecting the aristocratic family tree:

> Arrived in England, the destroyers of the nobility and gentry of a whole kingdom [India] will find the best company in this nation, at a board of elegance and hospitality. Here the manufacturer and the husbandman will bless the just and punctual hand, that in India has torn the cloth from the loom, or wrested the scanty portion of rice and salt from the peasants of Bengal. . . . They marry into your families; they enter into your senate; they ease your estates by loans; they cherish and protect your relations which lie heavy on your patronage; and there is scarcely a house in the kingdom that does not feel some concern and interest that makes all your reform of our Eastern government appear officious and disgusting. . . ."[13]

Burke's respect for Indians' present difference has a great deal to do with a sense of kinship with India's native ruling classes, a sense of kinship that Burke more famously extended to the French ruling classes displaced by the French Revolution. Burke's brand of respect for difference is inseparable, then, from his embrace of hierarchy.

Mukherjee correctly suggests that Burke's vision of a politico-legal structure for the empire did not by any means seek to subvert the empire itself. What would the empire have looked like had it been formally organized to take account of India's native ruling classes? Something of the sort did in fact happen in a limited way in the British co-optation of Indian princes

13. Quoted in Mehta, *Liberalism and Empire,* 175, 172.

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in the nineteenth and twentieth centuries. Is this one of the possibilities inherent in Burke's vision?

There is no reason to believe, as Mukherjee might be read as suggesting, that natural law or the law of nations would be any "better for," or any less culturally biased against, Indians than the common law was. Thanks to the efforts of Lord Mansfield, it should be observed, the increasing commercial orientation of the common law over the course of the eighteenth century had inched toward respecting the rights of Indians who were parties to commercial transactions with Britons.[14] Furthermore, if, as Kolsky's account informs us, even the most universalistic liberal projects could be subverted by arrogations of British racial privilege "on the ground," why would the same arrogations not equally subvert any Burkean project instantiated into law? Worse yet, why should those arrogations of racial privilege themselves not be figured as a tradition worthy of Burkean solicitude? Kolsky shows how, in representing racial privilege as a species of "personal law," Britons resident in India attempted to clothe themselves quite explicitly in *Indian* hierarchies and traditions. We have the advantage of an extant historical record when it comes to the failure of liberal utilitarian legal projects; we know very little about how a Burkean imperial legal project could have failed.

If Burke seems altogether too respectful of many differences we are today glad to be rid of, it is possible that liberal utilitarians might be read as being perhaps *more* respectful of Indian difference than we have given them credit for. This is admittedly a tough argument to make. Yet it is important to emphasize—something that Kolsky does not sufficiently do—that British codification projects in India consciously and specifically sought to take account of Indian difference so that there would be a good "fit" between law and the sentiments of the native population. This is especially true of the long history of the Indian Penal Code. This was not in any simple sense a project spun out of abstract propositions: local administrators all over British India were solicited for, and expressed, their views on problems in their districts that required criminal legislation. The historian Radhika Singha has gone so far as to suggest, perhaps tendentiously, that British administrators in India operated with a notion of an Indian "public."[15] How would Kolsky respond?

To be sure, the specific aspects of Indian difference that the codifiers (and

14. See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989) for an account of Mansfield.

15. See "Epilogue: Criminal Law and the Colonial Public," in Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998), 286–311.

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British jurists generally) often deemed especially worthy of solicitude—religious, caste, and patriarchal institutions—were highly problematic. They served to ossify Orientalist constructions of India and thereby to bolster British civilizing claims. And they wreaked havoc on those whose practices did not conform to the essentialized forms the British attributed to Indians (forms that westernizing Indian elites often made their own).[16]

Kolsky would be undoubtedly correct to respond that proponents of codification such as Bentham had a naïve and arrogant notion of difference—physical differences such as climate and vegetation were deemed insurmountable whereas "cultural" differences were deemed something that could be surmounted in the course of time. Uday Mehta is right to attribute to liberal utilitarians a sense of the provisionality of other people's difference. But for Bentham, as for Burke, change could only take place *in* time—and often slowly. Imagining other people's difference as provisional did not mean that it could be swept away overnight. As Bentham himself put it:

> The extraordinary extent, if one may so say, of the surface of [Hindus'] moral as well as religious sensibility, exposes them to a proportional variety of injuries: hence so many peculiar grounds of defense and provocation. . . . A prejudice so strong, though altogether unjust and ferocious, would require great forbearance on the part of the [British] legislator: it would require art to soften and to combat it. But it would be better to yield to it altogether for a time, than uselessly to compromise his authority, and expose his laws to hatred.[17]

Admittedly, Bentham is offering us a pragmatic method for dealing with difference, rather than a respectful stance toward difference. Can we say, in the larger context of British colonialism in India, that the results would differ dramatically from each other?

Part III. The extension or curtailment of distance between objects can produce the same quantum of difference. It depends what we are arguing against. Where the background claim is about oneness, we can produce difference by drawing things apart and showing mutual exclusion or separateness (Guha's notion of an autonomous subaltern consciousness); where the background claim is about separateness, we can produce difference

16. This was particularly true of peninsular India, but—one can surmise—not unique to it. See, e.g., G. Arunima, "A Vindication of the Rights of Women: Families and Legal Change in Nineteenth-Century Malabar," in *Changing Concepts of Rights and Justice in South Asia,* ed. Michael R. Anderson and Sumit Guha (1998); Kunal M. Parker, "'A Corporation of Superior Prostitutes': Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914," *Modern Asian Studies* 32 (1998): 55.

17. Bentham, "Essay on the Influence of Time," 174.

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within the separated object by bringing things together and showing mutual constitution (Benton's critique of the notion of an autonomous subaltern consciousness on the ground that colonized and colonizer mutually constituted each other).

In this comment, I have attempted to demonstrate that objects can be held apart just as easily as they can be brought together. I showed this briefly by collapsing and extending the distance between Guha and Benton (Part I) and then at greater length by extending and collapsing the distance between two distinct approaches to the question of colonial difference itself, namely the approach of Bentham and his liberal utilitarian successors and the approach of Burke (Part II).

In drawing attention to the ready availability of these techniques for producing difference, I do not question their usefulness. The establishment of difference through the manipulation of distance is a motor of knowledge in many disciplines, law and history among others. It is how we create new questions and answers. Alternately setting up and collapsing the distance between Burke and Bentham, for example, helped me both situate and then question Mukherjee's and Kolsky's articles.

The ready availability and utter familiarity of these techniques for the production of difference—the way we can and do switch between them at will—does suggest, however, that it is not necessarily useful to argue, as Benton does with respect to Guha, that the assertion of autonomy is "illusory." We should be wary of claiming intellectual integrity, or to have effected an advance, *merely* by producing *either* autonomy *or* connectedness. Assertions of autonomy and connectedness follow upon each other. As apprehensions and techniques, they are *always* available. Neither is more nor less illusory, more nor less an object of faith, more nor less real, than the other.

Historians, like others in the human sciences, have long had disciplinary norms for how one goes about producing a sense of "object" (autonomy) and "surrounding" (connectedness), even if they have not always been as reflexive about their norms as one might desire. Yet what distinguishes the best historical research from workmanlike historical research is, ultimately, whether or not those norms are transcended. This is what, in the end, constitutes the continuing appeal of difference.

I submit that what is truly compelling about difference—the difference of an "object" or of a "surrounding"—is the way in which it speaks to us *over* and *above* what we recognize to be the techniques of its production or representation. In this sense, what is compelling about difference is precisely what is compelling about violence or religion or art (to name just three heavily discussed themes in modern Western thinking). Already sensing their presence, or knowing the techniques for making them present,

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does not necessarily tarnish their power. Nobody recognized the importance of the aesthetic dimension of difference—the importance of aesthetics in the production of difference—better than Burke. The intertwining of difference and violence in colonial India has made it possible for its many students—from Burke down to Mukherjee and Kolsky—to continue to compel.

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FORUM: RESPONSE

A History of the Present

MITHI MUKHERJEE

In his comments Kunal Parker has framed my article within what he calls the "ontology of colonialism as difference." He argues that my article "fits squarely" within a "self-consciously postcolonial scholarship" that in recent decades has been centrally concerned with "the rendering of colonialism as difference." My research in this article, however, was neither inspired nor guided by the historiography of difference. Indeed Parker's framing of my article in these terms prevents him from seeing the most important claims in it. [1] If I were to characterize the nature of my essay in terms of a genre of historiography, I would place it in the genre of the history of the present. My aim in this article, which is part of a larger project, was to

1. See Mithi Mukherjee, "Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings," and Kunal M. Parker, "The Historiography of Difference," *Law and History Review* 23 (2005): 589–630 and 685–95. Parker's critique seems to be addressed more to Uday Mehta's reading of Burke in his *Liberalism and Empire* than to the specificities of my arguments. See Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago and London: University of Chicago Press, 1999). Although Parker seems to be aware of the difference between my arguments and Mehta's when he says, "Mukherjee's major contribution is in showing that Burke did not restrict himself to exhorting his fellow Britons to approach Indians' difference with respect, but went further insofar as he sought to concretize his impulses in a vision of the politico-legal structure of empire." However, when he comes to his critique, Parker lapses back into responding to Mehta's concern about liberalism and the question of difference. Our concerns are very different. My first encounter with Burke's speeches in the trial occurred in the process of pursuing the lineages of the Indian National Congress and its mode of politics while working on my M.Phil dissertation at Jawaharlal Nehru University. See Mithi Mukherjee, "From Pleader to Leader: Legal Practice and the Birth of Politics in India (1772–1920)," M. Phil. dissertation, Jawaharlal Nehru University, New Delhi, 1992.

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make the postcolonial political formation in India intelligible in the light of its pre-independence historical origins. While most historians of modern India terminate their research at 1947, the year of India's independence, assuming postcolonial political development to be inaccessible to historical research, most studies by political scientists have taken 1947 as their point of departure, as if the postcolonial political formation had emerged fully formed without any history. My larger project seeks to break through this historiographical barrier and make postcolonial India accessible to historical research.

Given the exclusive deployment of western categories to frame Indian history in the past, the historiography of difference has brought to light many neglected and marginalized aspects of Indian history.[2] However, to make difference the sole criterion for historical research (which is what Parker's use of the word "ontology" seems to suggest) is to leave important facets of the present impossible to problematize and unintelligible. There are several reasons for this. First, the discourse of difference focuses primarily on culture. Second, this discourse tends to take cultural differences to be a given—as always already there, thus reifying what are otherwise historically evolving differences. It is therefore not surprising that these studies often focus on (cultural) "perceptions," a term that carries a sense of the present without history. In much of this historiography difference is seen in spatial terms as distance separating two already given cultures, for example India and Britain. What is absent is the temporal dimension which would register difference as change. It is, therefore, only logical that this notion of difference rarely rises to the level of contradiction, conflict, and war, the major driving forces of history. As a result, one reduces historical research to an exercise in the enumeration of difference without change and, therefore, runs the risk of ultimately ending up with unchanging and essentialized identities, exactly the opposite of what one had set out to do.

Apart from the deployment of difference as a methodological tool, there is also a moral aspect to this historiography of difference in which difference takes on the meaning and weight of a moral value. Parker's comments, in my view, carry both these methodological and moral connotations. It is because of this moral inflection that this historiography pursues the subject as the origin of discourse and action, who then becomes the target of a moral judgment. This explains the need to focus on individuals and their

2. See Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993); Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge: Harvard University Press, 1997); Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton and Oxford: Princeton University Press, 2000).

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motivations, rather than larger historical formations. Hence Parker's use of phrases like "respect for difference," and "cultural bias" (implying a disregard of difference), and his misreading of my essay as a defense of Burke. What, however, this line of enquiry assumes is that the pre-given subject stands above history while determining its movement, thus forgetting that the subject itself is a historical construction. Moreover, such a reading puts morality above history, as if history follows the laws of universal morality. Indeed, as a historian, I would argue that any specific system of morality is in itself a historical construction and cannot be deployed to explain the workings of history.

The tendency to reify the cultural difference between England and India prevents one from seeing the internally differentiated nature of the British engagement with India. The purpose of my essay was to bring out the difference between what I call the "imperial" and the "colonial" as it came to be articulated in this trial and went on to characterize British rule in India. My essay was not concerned with exploring the origins of the personal motivations behind individual involvements in the trial, nor with passing a moral judgment on their appreciation, or lack thereof, of cultural difference. Instead, it focused on the historical construction of discursive-institutional frameworks on which the emerging empire in India was sought to be grounded and which subsequently determined the political history of British India. While the "imperial" was grounded in a discourse of supranational juridical sovereignty centered in the person of the monarch under the category of justice as equity, and a recognition of the a priori rights of the colonized, the "colonial" was based on ideas of power, conquest, and subjugation of the colonized in pursuit of the exclusive interests of the colonizer. The Burkean intervention under the category of justice as equity created a juridical representational space for India as a whole (not just for particular sections of the Indian population like the "native princes" as Parker argues) and launched a juridical representational politics in India. What Parker has missed in my article is that my focus is not on the person of Burke but on the persona of the lawyer in the equity court that Burke took on in the House of Lords to enunciate the Indian cause.

Parker wonders whether Burke's appreciation of difference may have made any difference to facts on the ground, in so far as colonial administration continued to operate in arbitrary, racial, and expropriative ways. What is crucial about Burkean discourse was that it articulated or launched a new teleology of justice as equity that did not seek to reflect reality but to alter that reality, thereby assuming the difference between what it envisioned as the ideal and the political conditions and the facts on the ground. I use the term "teleology" as a combination of the terms "telos"

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or goal and "logos" or discourse. Hence, the term teleology, in my use of it, is a discourse organized around a specific goal to be realized. In this use of the term teleology, the common understanding of discourse acquires a temporal dimension insofar as the goal remains to be realized in the future. Even as the colonial administration continued to function more or less in the same arbitrary mode as it had before Burke's intervention, the difference was that, now, for the first time, it was exposed to the critical discourse of the teleology of imperial justice and thus ran the risk of losing its legitimacy.

The difference between the colonial and the imperial and the emergence of the lawyer as an enunciative persona introduced a new dynamic within the political formation in British India, the significance of which could be gauged from the fact that this enunciative position or persona of the lawyer came to characterize the nature of the leadership of the Indian National Congress party and its mode of representational politics, a century after the Burkean intervention. Indeed, the dominant form of early anticolonial politics led by the Indian National Congress in the nineteenth century had its origin in this difference. This explains why the Indian National Congress was constrained to identify with the empire even as it opposed colonialism. Indeed it was in the Congress's faith in the inherent justice of the empire that their opposition to colonialism was grounded, as was the case with the Burkean articulation of the empire. This further explains why the discourse of justice as equity that had helped launch the Congress politics of anti-colonialism also emerged as its ultimate limit, in that it was unable to envision complete national independence outside the empire; the Congress failed to articulate a discourse of freedom.

It ought not to come as a surprise, then, that the movement for independence from British rule was led by Gandhi under a new teleology of freedom. What was unique about this was that it was grounded in Indian discourses of spiritual or renunciative freedom known in Indian languages as *moksha* and *nirvana,* with the renouncer (or the "Mahatma" as Gandhi was popularly known) as its enunciative persona. In contrast to the historically familiar discourse of political freedom based on national identity and individualism, it was in the renunciation of self and identity that the Gandhian discourse sought what it saw as the highest form of freedom. This is the reason that the Gandhian movement developed a critique of nationalism, even as it strove for India's independence. In the light of our discussion above of the historiography of difference, here we can see an Indian religious and cultural difference rising to the challenge of history by fashioning its own unique teleology of freedom and deploying it to achieve the immediate political goal of national independence.

The break that the Gandhian movement marked from the imperial dis-

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course of justice became dramatically evident in Gandhi's call in 1920, while launching the non-cooperation movement, for a boycott of British law courts and a ban on practicing lawyers from participating and leading the movement for national independence. Having suspended its own teleology of imperial justice along with the enunciative persona of the lawyer, the Congress as an organization now came to be hitched on to the Gandhian teleology of freedom with the renouncer as the new enunciative persona. It is important to note that in so far as it was grounded in the discourse of spiritual freedom, the Gandhian teleology of freedom exceeded the political goal of national independence in that it was only meant to be a temporary historical intervention. It is precisely for this reason that the Gandhian discourse did not emerge as a legislative discourse and did not envision running a government. Therefore, as soon as national independence was achieved, Gandhian discourse receded into the background, even as the reins of the government fell back into the hands of the Congress, which resurrected the hitherto suspended discourse of imperial justice as a discourse of governance.

Parker remarks that "we know very little about how a Burkean imperial legal project could have failed." However, before one enquires into the question of failure, one would have to find a historical instance when there was an attempt to implement the "Burkean project" as a discourse of governance. This is where the postcolonial political formation in India offers itself as a case in point. It was this very teleology of imperial justice as equity (rather than freedom, liberty, or individualism), which, until independence, had been deployed as a critical category of anti-colonialism, that now came to be instituted as the "sovereign" category in the constitution of independent India, and thereby overdetermined its political formation in the decades to follow.[3] For much of the history of postcolonial India, the category of justice remained the ground of India's national politics of social justice, as reflected in the reservation of jobs in government institutions on the basis of caste (justice as compensatory discrimination), a foreign policy of non-alignment (justice as neutrality/impartiality) in opposition to the cold war discourse of power, and economic policy of centralized state planning designed to control and regulate accumulation and distribution of wealth (justice as fair distribution). In the hierarchy of categories in the Constitution of India, all categories of representational politics such as liberty, equality, and individual rights were not only required to be subordinated to the sovereign category of justice, but also interpreted in its light.

3. D. D. Basu, *Shorter Constitution of India* (New Delhi: Prentice Hall of India, 1988), 272.

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Seen from this perspective, Indian political formation in the first forty years of independence, rather than marking a total break from the British past, remained firmly lodged within the juridico-epistemological framework of empire and was an exercise in continuing the teleology of imperial justice first articulated by Burke. India's reluctance in the post-independence period to articulate and engage in a discourse of national power, and the grounding of its foreign policy exclusively in the idea and institution of the United Nations as a supranational body that would render justice in cases of conflict between nations, reflected its continuing affiliation to the deterritorialized discourse of empire constructed by Burke in the late eighteenth century. The extent to which the postcolonial Indian political formation is grounded in its imperial legacy is most visible in the way that the imperial figure of the monarch has been reproduced in the continuing dynastic leadership of the Indian National Congress. To get back to Parker's query, the question of whether this Burkean teleology of justice has since failed or merely run into a crisis remains a subject to be addressed on another occasion.

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FORUM: RESPONSE

A Note on the Study of Indian Legal History

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In his commentary, "The Historiography of Difference," Kunal Parker hits on two crucial and interrelated themes that form the framework for debates in modern South Asian history: colonialism and subaltern agency. In this short response to Parker's comment, I address both of these issues and also offer some insights about methodological obstacles in the writing of Indian legal history.[1]

The first important point raised by Parker is the question of colonialism and its impact on modern South Asian states and societies. Beginning with the work of Bernard S. Cohn and continuing through two generations of historians, the study of India's colonial period has produced a tremendous body of scholarship, much of it emphasizing links between colonial knowledge, power, and the transformation of Indian society.[2] As Parker notes, a major theme within this field of study is the role of ideas about "difference" in the formation of liberal imperial states. While Parker is correct in noting the breadth and depth of recent work on colonial difference, he is off the mark when he analyzes this scholarship as writing "the problem of colonialism as a problem of difference." (I should also add that the problem of difference and colonial universalism described by Partha Chatterjee should not be conflated, as Parker suggests, with Ranajit

1. See Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," and Kunal M. Parker, "The Historiography of Difference, *Law and History Review* 23 (2005): 631–83 and 685–95.

2. See Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996) and Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

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Guha's notion of a domain of autonomous subaltern agency—more on this in a bit.[3]) The purpose of critical scholarship on colonial South Asia is not simply to reduce colonialism to the matter of difference but rather to explain, explore, and historicize the underlying logic of modernity itself.

Historians of the colonial world have convincingly argued that many modern ideas and institutions of law, education, medicine, science, criminal justice, and so forth were tested first in the colonies and subsequently implemented in the metropoles.[4] Liberal experimentation in the colonies was enabled by the absence of democracy and public accountability and defined by the preferential and unequal treatment given to citizens over subjects. In my article, I explored the mobilization of ideas about Indian difference in constructing a universal law, the Code of Criminal Procedure (1861), perforated by privilege and inequality. Although this Code was initially meant to provide one set of laws and law courts for all, various arguments about Indian difference—religious, racial, cultural, and civilizational—were marshaled over time to support the exemption of European British subjects from local criminal jurisdiction. As such, the rule of law in India must be understood from its inception as integrally linked to a principle of racial inequality and to a practice of legal exceptionalism. The larger purpose of my piece was not just to analyze colonial law qua colonial law but to highlight the salience of post-colonial legacies—the colonial codes remain on the books in the subcontinent today—and also to contribute to a global conversation about the historical linkages between today's liberal democracies and yesterday's colonial authoritarianisms. For if Partha Chatterjee's "rule of colonial difference" defined and distorted attempts to establish modern regimes of governance in the colonies, and if these attempts formed the experimental basis for metropolitan democracies, then it stands to reason that difference, exclusion, and exemption might still define how states and structures continue to behave. That is to say, it is worth considering the fact that the legal history and relevance of colonialism does not lie dormant in the archives.

In response to Parker's question, "What remains compelling about difference?" I cannot help but think about the treatment of the "unlawful combatants" detained at Guantanamo Bay.[5] As Lisa Hajjar notes in her

3. Partha Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* (Minneapolis: University of Minnesota Press, 1993) and Ranajit Guha, ed., *Writings on South Asian History and Society,* Subaltern Studies 3 (Delhi: Oxford University Press, 1994).

4. See Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959) and Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999).

5. See the Brief Amici Curae of Legal Historians submitted in support of the petitioners in the U.S. Supreme Court case of *Shafiq Rasul, et al., Petitioners v. George Bush, et al., Respondents*, available online at: http://www.law.uc.edu/archives/butlerdata/liberty/gitmo/legalhistorians.pdf

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piece "Torture and the Future," George W. Bush's "mantra of 'spreading freedom'" is sharply at odds with the images of torture at Abu Ghraib prison and the Bush administration's blatant violation of the Geneva Conventions.[6] The denial of all legal rights to the prisoners held at Guantanamo Bay is underscored by the logic that terrorists do not deserve legal protection. This is not a historically unprecendented concept. The idea that different groups of people can be legally differentiated and thereby granted greater and lesser legal privileges even by a liberal state founded on the rule of law closely resembles what we find in colonial India. As I demonstrated in my article, although some British administrators in India steadfastly defended the principle that "There can be no equality of protection where justice is not equally and on equal terms accessible to all," the prevailing wisdom held that "the doctrine of equal laws for all" had to be squared with the "actual state of things."[7] Placing Europeans and Indians on an equal footing before the law was seen by most British officials as the subversion of justice rather than the fulfillment of it and therefore the principle of equality was deemed to be unsuited to India. I certainly do not mean to equate the colonized subjects of British India with the suspected terrorists and detainees at Guantanamo Bay. Rather, I want to emphasize the ways in which modern states founded on the principle of a rule of law have historically laid claim to special conditions to establish exceptions to their own rules. U.S. Speaker of the House Dennis Hastert made this point quite clearly to the press when, in response to a question about the status of prisoners at Guantanamo Bay, he claimed, "There are exceptions to the universal and we are dealing with the exception here."[8]

In its emphasis on legislative debates, official correspondence, and governmental proceedings, my article reflects a "top-down" approach to legal history rather than a view from the ground. This leads us into the second historiographical issue highlighted by Parker, which is the question of how ordinary people experienced British colonialism and shaped the formation of the colonial state. Parker addresses this theme by examining the contrasting approaches of Ranajit Guha, the intellectual leader of the Subaltern Studies collective, and Lauren Benton, legal and world historian.

The study of Indian legal history through the examination of legislative debates, case law, and organs of public opinion provides us with a unique opportunity to simultaneously comprehend the workings of the colonial

6. Lisa Hajjar, "Torture and the Future," *Interventions: A Middle East Report Online Feature* (http://www.merip.org/mero/interventions/hajjar_interv.html).

7. Letter No. 44 (1834) from the Court of Directors to the Government of India in NAI, Home (Public).

8. Scott Michaelson and Scott Cutler Shershow, "The Guantanamo 'Black Hole': The Law of War 'and the Sovereign Exception,'" January 12, 2004 (http://usa.mediamonitors.net/layout/set/print/content/view/full/3849).

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state alongside the rhythms of everyday life. However, due to the unavailability of sources, Indian legal histories framed from the bottom up are few and far between and difficult to produce. The colonial court system was defined by a hierarchy of legal tribunals ranging from the local *panchayats* (village councils) up to the Privy Council. Until 1875, there was no official centralized system of law reporting and after 1875 the only courts of records were the High Courts. (Prior to 1875, mostly higher level Sadr court decisions and some *zillah,* or district, court decisions were sporadically and privately published.) Presently, many of the High Court record rooms are either very difficult to access and/or very poorly maintained. Therefore, from the perspective of doing legal history, the issue of sources presents a serious methodological obstacle: how can we investigate the ways in which everyday Indians negotiated with, subverted, and reinforced colonial laws and law courts when the remaining historical record is so spotty and inconsistent? Members of the Subaltern Studies collective such as Ranajit Guha have proposed creative ways to "read against the grain" of colonial records. As the field of Indian legal history expands its scope of vision, we as scholars will have to be vigilant and imaginative in the ways we approach the critical issues of law, power, and agency.

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