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).

Elizabeth Kolsky is an assistant professor of South Asian History at Villanova University <elizabeth.kolsky@villanova.edu>. This article is part of her forthcoming book titled, *Colonial Justice: Law and Difference in British India.* She would like to acknowledge the many helpful suggestions from the anonymous reviewers of this journal as well as the support and insight of Christopher Tomlins.

Law and History Review Fall 2005, Vol. 23, No. 3

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).

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,

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

---

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."

> 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.

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).

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.

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.

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.

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).

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.

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.

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.

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.

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).

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.

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).

> 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.

> 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).

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.

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).

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.

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.*

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).

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).

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).

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.

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.

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).

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.*

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).

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).

> 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).

> 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).

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.

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.

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.

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).

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.

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.

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.

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).

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.

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.

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).

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.

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.

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.

> 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.

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).

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).

> 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).

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.