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Gender and Sexuality in Colonial Law, India 1830-1862

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Have done with childish days-
The lightly proffered laurel,
The easy, ungrudged praise.
Comes now, to search your manhood
Through all the thankless years,
Cold-edged with dear bought wisdom,
The judgement of your peers!

- Rudyard Kipling, *The White Man's Burden*

Abstract

This is a cultural history of the Indian Penal Code: of how culturally and discursively constructed notions about gender and sexuality were embedded in the Code. An examination of the Code's legal definitions of rape and their ancestry in English law demonstrates that an early nineteenth-century philosophy of anti-sensualism and the gendered prescripts of a discourse of bourgeois respectability informed those definitions and were enforced by them. The laws were coded by particular notions about morality, proper feminine behaviour, and sexual restraint as conceived by the Code's author, Thomas Babington Macaulay, and elaborated through Evangelical moral philosophy. Applied in India, the criminal law of rape had to undergo processes of negotiation and accommodation to reconcile ideas about gender and sexuality produced in Britain with colonial constructions of Indian social identities such as gender, caste, race, age, and the appropriate expressions of sexuality in India.

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ABBREVIATIONS AND SHORT TITLES USED IN THE NOTES

Macaulay MSS	Macaulay MSS, Trinity College Library, Cambridge University.
PC	The Portland Collection. The Papers of Lord William Bentinck. Department of Manuscripts and Special Collections, Nottingham University Library.
BP	Broughton Papers, Vol. VI. Add MSS. 47227. Manuscript Collections, British Library, London.
Trinity Correspondence	Correspondence of Thomas Babington Macaulay, Trinity College Library, Cambridge University.
T.B.M.	Thomas Babington Macaulay
Works	The Works of Lord Macaulay Albany Edition, 12 vols. London: Longmans, Green and Co., 1898
O.I.O.C	Oriental and India Office Collections, British Library, London
PP	Parliamentary Papers
L/P&J/	Minutes and correspondence of the Judicial Branch of the Government of India, O.I.O.C., British Library, London
BSNAR	Law Reports of the Bengal Sadr Nizamat Adalat, 1827-1859. V/22/442-461, O.I.O.C., British Library, London.
BSFAR	Law Reports of the Bombay Sadr Foujdari Adalat, 1827-1861. V/22/558-571, O.I.O.C., British Library, London.
MSFAR	Law Reports of the Madras Sadr Foujdari Adalat, 1826-1861. V/22/610-615, O.I.O.C., British Library, London.

GLOSSARY OF TERMS

adalat	court of Law
fatwa	formal opinion by a *mufti* on Islamic law
faujdari adalat	criminal court
hadd	prescribed penalties for acts forbidden by the Koran
mufti	scholar in Islamic law
nizamat adalat	the superior criminal court
pandit	Hindu law officers
razinamah	deed of agreement or mutual satisfaction
Sadr Nizamat Adalat	chief criminal court of Bengal
Sadr Foujdari Adalat	chief criminal court of Bombay and Madras.
sati	refers to both the act of a widow self-immolation and to the widow herself
sharia	the religious law of Islam
thagi	deceiving for criminal purposes, colonial administrators used it to refer to ritualized murder and robbery
zina	prohibited sexual intercourse according to the *sharia*

INTRODUCTION: The Respectable and the Colonial

In October 1837, Thomas Babington Macaulay, head of the Indian Law Commission and the legislative member of the Council of India, submitted a draft penal code for all of India to Governor-General Lord Auckland for consideration. For nearly a quarter century the fate of that code remained uncertain. In London, Calcutta, Madras and Bombay, it was alternately considered and ignored, lauded and derided, and subjected to amendment, revision, and finally an almost complete reversion to its initial form. Ultimately, as a result of the 'greatest' threat to colonial authority, namely the Indian rebellion of 1857-58, (if only because it was perceived and described as such by the very people in whose hands that authority rested) the code was enacted as Act XLV of 1860 and came into effect on January 1, 1862. In the aftermath of the Indian rebellion of 1857-58, the colonial government, reconceived as a central body directly responsible to parliament and the crown, was buttressed through a series of legislative initiatives designed to consolidate and systematize authority. The Indian Penal Code was a component of a larger initiative to overhaul the legal system: codes of criminal and civil procedure were enacted and the judiciary was streamlined.[1]

Since 1862 the Indian Penal Code has become iconic of the 'benefits' of colonial rule to imperial apologists and idealized by legal scholars. Substantively the code was primarily composed of English law, that 'superior' and 'modern' system of jurisprudence. Theoretically and stylistically it owed to the influence of the penal codes of France and Louisiana and to Utilitarian theories of jurisprudence as elaborated by Jeremy Bentham.[2] Innovations in the code, including its form, the precision of definition,

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[1] Indian Penal Code, Act XLV of 1860. Code of Civil Procedure, Act VIII of 1859. Code of Criminal Procedure, Act XXV of 1861. The Sadr or East India Company Courts, which administered a mixture of Islamic law and Company Regulations and circular orders to Indian territories under British control, and the Supreme Courts, which administered English law in the Presidency towns of Calcutta, Madras, and Bombay, were abolished and replaced by a unified system of High Courts to administer law according to the above codes by English Statute 24&25 Victoria, chapter 104, 1861.

[2] The French Penal Code of 1810. Reprinted in The French Penal Code: The American Series of Foreign Penal Codes, Ed. Gerhard O.W. Mueller (London: Sweet & Maxwell Limited, 1960). Edward Livingstone, A Code of Crimes and Punishments. Reprinted in The Complete Works of Edward Livingstone on Criminal Jurisprudence, 2 Vols. (Montclair, New Jersey: Patterson Smith 1968). Jeremy Bentham,

and the consideration of mental and emotional states, were a result of this latter influence. On account of both its basis in English law and its marked rationality and utility, it has been the object of praise for more than a century. Sir James Fitzjames Stephen, the noted British legal historian, Indian administrator, judge and law reformer, endlessly praised the code as "a work of true genius."[3] He called the code "the most remarkable, as I think it bids fair to be the most lasting, monument of its principle author.... The Penal Code has triumphantly supported the test of experience for upwards of twenty-one years during which time it has met with a degree of success which can hardly be ascribed to any other statute of anything approaching to the same dimensions."[4] Whitley Stokes, Legislative Member of the Council of India (1877-82) and head of the Indian Law Commission (1879-1882), commended the code for having "familiarized the native mind with ideas of justice and humanity, the maintenance of public order and public morality, the rights of the individual to life, health, freedom, honour, and property."[5]

Praise for the code's form, substance, and modernizing influence remained present in historical and legal scholarship until the late twentieth century. In 1959 Eric Stokes remarked upon the originality of the "most justly famous" code in his analysis of the influence of British political ideologies, particularly Utilitarianism, in early nineteenth-century colonial India.[6] In 1966 M.C. Setalvad, in his work on the role of English Law in India, described "that admirable Penal Code" as the "most outstanding of the Indian Codes."[7] Primarily consisting of "English criminal law simplified and set in order, [it] has worked for more than a generation, among people of every degree of civilization."[8] John Clive, in his 1973 biography of Macaulay, cited James Fitzjames Stephen, Whitley Stokes and others to support his contention that Macaulay's code

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Codification Proposal. In The Works of Jeremy Bentham, 11 Vols. (New York: Russell & Russell, 1962), 4: 535-94.

[3] Quoted in John Clive, Macaulay: The Shaping of the Historian (Cambridge Mass: Harvard University Press, 1973), 465.

[4] Sir James Fitzjames Stephen, A History of the Criminal Law of England, 3 vols. (London: Macmillan and Co., 1883), 3: 299.

[5] Whitley Stokes, The Anglo-Indian Codes 2 Vols. (Oxford, 1887), 1:71. Quoted in Clive, Macaulay, 464-65.

[6] Eric Stokes, The English Utilitarians and India (Oxford: Oxford University Press, 1959), 219-34.

[7] M.C. Setalvad, Role of English Law in India (Jerusalem: The Hebrew University, 1966), 14.

"made a difference to India."[9] Macaulay gave "life to modern India as we know it. He was India's new Manu, the spirit of modern law incarnate."[10] The implied causal relationship between Macaulay's code, as it was enacted in 1860, and India's modernity was also a feature of the work of Marc Galanter. His study sought to explain the processes by which indigenous systems of law were replaced by modern ones. Modern, as defined by Galanter, referred to the features of legal systems in what were then industrialized countries: "uniform territorial rules, based on universalistic norms, which apportion rights and obligations as incidents of specific transactions, rather than of fixed statuses."[11] The historiography of Indian law praised the code as a symbol of the modern. It is a history of modernity; of celebrating the triumph of reason, science, and progress over scripture, tradition and custom.[12]

Despite this Whiggish historical teleology, the Indian Penal Code was not an indicator of "the modern," of enlightened English jurisprudence. David Skuy has recently offered a revisionist conception of the code. He has argued that Britain's own legal system was in no sense of the word modern before the late Victorian period. English common law relied precisely on custom and tradition - that of the judge - and was equally subject to the "whim and caprice" of which Indian Law was accused.[13] Considering this and the demand for legal reform in Britain, Skuy has reconceptualized the Indian Penal Code as, in part, an attempt to modify the defects in English law: in other words to modernize it. This study also seeks to re-establish links between the metropole and periphery, not in the development of legal institutions per se, but in the assumptions that informed institutions. Skuy's work raises an interesting question: If Indian legal reform was a product of pressure for reform, both legal and moral, from Britain, then how did

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[8] Ibid., 15.
[9] Clive, Macaulay, 474.
[10] K.M. Panikkar, A Survey of Indian History, 4th ed. (London, 1964), 210. Quoted in ibid., 466.
[11] Marc Galanter, "The Displacement of Traditional Law in Modern India," Journal of Social Issues 24 (1968), 65-6.
[12] Modernity as defined in Joyce Appleby, Lynn Hunt, Margaret Jacobs, Telling the Truth About History (New York: W.W. Norton & Company, 1994), 201.
[13] David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Penal System Compared to India's Legal System in the Nineteenth Century," Modern Asian Studies 32:3 (1998), 513-57.

that pressure affect the content of codified law? Modernity was not only marked by the rationalization of institutions but also was rooted in discourses of gender, race and class. What type of knowledge about these identities became embedded in colonial institutions and how? Utilitarian demands for legal reform, for a rationalization of law to provide the greatest utility and the optimization of pleasure for the greatest number, emerged from and were shaped by particular social changes and insecurities in Britain that accompanied the rise of industrial society and resulted in prescription for moral reform from members of the middle class. This prescription was elaborated through a discourse of bourgeois respectability. The form and content of this discourse mobilized assumptions about class, race and gender identities which affected the substance of the code. The production of knowledge about gender, race, respectability, sexuality and their relationship to modernity was essential in establishing the content of the code developed by Macaulay. The criminal law on rape and the nature of its enforcement between 1830 and 1862 provide the means to examine how assumptions about gender and sexuality informed the code. However, this knowledge was applied neither consistently nor uniformly by colonial officials and hence the implementation of the code was far from a hegemonic imposition. The period between the code's conception and enactment was marked by negotiation and accommodation. The debates and conversations about the code demonstrate that there was no grand design for the code among officials in the colonial and British governments. Furthermore, the code was not a conduit for imposing purely British ideals of gender, race, and class. It was rather a cultural production in which the subject population had to be considered for the law to be meaningful. Points of negotiation and accommodation with the colonial subject or the perception of the colonial subject further shaped the content and application of the code.

Gender is the knowledge of sexual difference. Similarly, knowledge about racial and class-based differences is culturally constructed. Knowledge, according to Michel Foucault, is the understanding produced by cultures and societies about human relationships. It exists and is produced by ideas, institutions, structures and everyday practices: its uses are contested and are the means by which relationships of power are

constructed. Foucault preferred to refer to the compound Power/Knowledge rather than separate terms because he thought they were inextricably linked: where power is enforced, knowledge is always produced and where knowledge is produced, power is exercised.[14] Geertz's conception of culture as "webs of significance" has been useful in directing new cultural histories to look for meaning, but it considered culture as a relatively unified system of values and beliefs and focused on single sources of identity. Consequently, it has left little room for the consideration of power within and between cultures nor for the consideration of the way in which the matrix of racial, class and gendered identities are constitutive of one another.[15]

James Clifford has provided a new paradigm for culture based in poststructuralist thought and literary criticism. Culture, according to Clifford, is a site within which competing groups struggle to control symbols and meaning. Much like poststructuralist thought and postcolonial criticism, Clifford has questioned the existence of metanarratives and denied claims to 'authentic' histories in favor of the relativist recognition that histories are themselves historically contingent and subject to reappropriation. Culture is not organically unified nor traditionally continuous but is a "negotiated, present process," and identity "must always be mixed, relational, and inventive."[16] His idea of culture is similar to Foucault's idea of discourse, and the two can be thought of as working in tandem. A discourse, in the tradition of Foucault, is a "linguistic unity or group of statements which constitutes and delimits a specific area of concern, governed by its own rules of formation with its own modes of distinguishing truth from falsity."[17] It is a domain in which the terms in which it is posited determine the entity itself. Discourse comprises the various rules, systems and procedures which delimit

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[14] This is perhaps most clearly elaborated in Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977, Ed. Colin Gordon (New York: Pantheon, 1977), 52. For an example of how he applied this concept in his writing see Michel Foucault, Discipline and Punish: The Birth of the Prison, trans. Alan Sheridan (New York: Vintage Books, 1979).

[15] Clifford Geertz, The Interpretation of Cultures (New York: Basic Books, 1973). This critique of Geertz has been elaborated by Peggy Pascoe, "Race, Gender and Intercultural Relations: The Case of Interracial Marriage," Frontiers 12 (1991), 12-15.

[16] James Clifford, The Predicament of Culture: Twentieth Century Ethnography, Literature, and Art (Cambridge Mass: Harvard University Press, 1988), 10.

[17] Jeffrey Weeks, Making Sexual History (Cambridge: Polity Press, 2000), 111.

categories of human identity – feminine, bourgeois, British, white, criminal, insane, deviant. Discourses are the conceptual territory on which language is used in particular ways to form and produce knowledge.[18]

So what is the difference between a discursive production and a cultural construction? It is useful to think of culture as an arena which can accommodate the interaction and contestation of discourses. Edward Said's 1992 work *Culture and Imperialism* addressed one of the criticisms of his earlier work *Orientalism*, which was the first attempt to apply Foucault systematically to colonialism and was perhaps the first postcolonial study.[19] His first work was criticized for failing to develop a "theory of culture as a differentiating and expressive ensemble rather than as simply hegemonic and disciplinary."[20] *Orientalism* reproduced the very essentiallizing trap that it claimed to attack: dichotomies of East and West, Orient and Occident. In *Culture and Imperialism* though, he defined culture as a "sort of theatre where various political and ideological causes engage one another.... Culture can even be a battleground on which causes ... contend with one another."[21] Further modified, though similarly constructed, this definition is useful for approaching an understanding of the relationship between culture and discourse. *Culture* is a sort of theatre where various sources of identity engage and are contested. It is the conceptual field upon which *discourses* compete for supremacy. However, when a discourse becomes the dominant system for delimiting categories of identity in a given culture, discourse and culture become nearly synonymous. In early nineteenth-century colonial India a discourse of bourgeois respectability, rooted in the Evangelicalism, Utilitarianism, environmental explanations of character, and Enlightenment progressivism and liberal ideologies which believed in the goodness of man and the capacity for improvement, competed with other discourses for supremacy within imperial culture.

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[18] Ania Loomba, Colonialism/Postcolonialism (London: Routledge, 1998), 38.
[19] Edward Said, Culture and Imperialism (New York: Vintage, 1994). Said, Orientalism (New York: Vintage, 1979).
[20] Clifford, The Predicament of Culture, 263.
[21] Said, Culture and Imperialism, xiii.

The terms "colonialism" and "imperialism" are used practically interchangeably in this study, though a clear distinction has been drawn between the two, most clearly, by postcolonial writers. Said has defined imperialism as "the practice, the theory and the attitudes of a dominating metropolitan center ruling a distant territory." Colonialism, said Said, "is almost always a consequence of imperialism, [it] is the implanting of settlements on distant territory."[22] Imperialism originates in the metropolis and is the process that leads to domination and control. Colonialism is the result. The line between the two becomes muddied in a study such as this one though, as a component of the implementation of settlements is the implementation of institutions which often embody the attitudes and theories of the dominating metropolitan centre. Thus, the imperial is infinitely inscribed onto the colonial, and so while recognizing the difference between the two terms I have found it less useful to distinguish between them in writing.

In the early 1830s the discourse of bourgeois respectability ascended to a position where its theories and attitudes were largely identified with imperial culture. The rhetoric of moral superiority, legislative initiatives designed to 'improve' India, and prescriptions for displays of refinement and gentility in colonial administrators and racial and sexual purity in the few British females who were in India in the early nineteenth century, were rooted in this discourse. Gender, class, and race were mutually constitutive elements of bourgeois respectability, which refers to statements, images, and institutions that prescribed decent and correct morals, manners, gender roles, and the proper attitude towards sexuality for men and women of the British middle class and distinguished them from the depraved classes or racial others.[23] The term "bourgeois" has been specifically employed for two reasons: to differentiate this code of respectability from working class codes of respectability which were marked by different signifiers;[24] and to refer to the discursively constructed characteristics of the middle class as distinguished from the

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[22] Ibid., 9. See also, Loomba, Colonialism/Postcolonialism, 6.

[23] Respectability as defined in George Mosse, Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe (New York: Howard Fertig, 1985),1.

[24] Shani D'Cruze, Crimes of Outrage: Sex, Violence and Victorian Working Women (London: UCL Press, 1998), 15-18. F.M.L. Thompson, The Rise of Respectable Society: A Social History of Victorian Britain 1830-1900 (Cambridge Mass.: Harvard University Press, 1988), 192-95. Michael Mason, The Making of Victorian Sexual Attitudes (Oxford: Oxford University Press, 1994), 117-32.

tangible realities in which class is based, such as profession or economic status. This allows a recognition of both the reality of and the constructedness of class. Analyses of class that define it purely as an economic reality often overlook its discursive production. A reference to middle class respectability is problematic, as "middle class" refers to diverse groups of the population. But the concept of the "bourgeois" integrates these groups with reference to the notion of respectability.[25] The discourse of bourgeois respectability was constitutive of middle class self-definition and developed in opposition to the extravagance and decadence of the aristocracy and to the perceived debauchery of the labouring people. The respectable elements of the propertied classes defined themselves with reference to a new sexual and moral earnestness that differentiated them from those who did not fit bourgeois society's norms. In the early nineteenth century, to be bourgeois was to aspire to a particular code of respectability. Narratives of class, race, gender and sexuality were implicated in the discourse of bourgeois respectability.

The discourse defined bourgeois respectability largely upon the basis of gender roles.[26] Gender, according to Joan Scott, is the understanding of sexual difference produced by cultures.[27] It refers not to sexual difference itself, but to the meanings ascribed to the differences. In this way it is based in the discursive realm. Similarly, Judith Butler adds that the knowledge of sexual difference is formed by discursive practices. It is culturally constructed and the body assumes cultural meaning.[28] Central to the construction of bourgeois respectability was a family structure based on separate sphere ideology and particularly the cult of feminine domesticity, characterized by the concepts of submission, piety, modesty, and chastity. Many working class spaces were deemed unrespectable: the participation of women in factories subverted the social order and compromised their role as the pious centre of the family; the one room house did not allow for the spatial sexual segregation characteristic of respectable homes and were

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[25] Mosse, Nationalism and Sexuality, viii.
[26] For a lucid analysis of the relationship between gender and class see, Leonore Davidoff and Catherine Hall, Family Fortunes: Men and Women of the English Middle Class, 1780-1850 (Chicago: University of Chicago Press, 1987).
[27] Joan Scott, Gender and the Politics of History (New York: Columbia University Press, 1988), 2.
[28] Judith Butler, Gender Trouble: Feminism and the Subversion of Identity, 2nd ed. (New York: Routledge, 1999), 9-11.

rumored to be sites for the destruction of chastity and modesty through incestuous relations;[29] and public establishments in which people pursued pleasure, such as pubs, halls, gambling establishments, and the streets were characterized as breeding grounds for vice, sin and promiscuity. Respectable society was suspicious of the pursuit of pleasure, of which promiscuous sexual pleasure was the most sinful. Unrestrained sexuality therefore became the antonym of respectability.[30]

Bourgeois respectability prescribed a strict philosophy of sexual restraint, or anti-sensualism, which has been confused with Victorian sexual prudery. Recent scholarship has done much to revise this stereotype and to reconsider the nature of discourses of respectability. Michel Foucault has argued that the notion of Victorian sexual repression is disproved by the mere proliferation of discussion about sex and "a visible explosion of unorthodox sexualities."[31] Evidence of an increased literature on sexuality in the period, as considered by Lesley Hall and Roy Porter, attests to the proliferation of discussion.[32] However, Foucault's reappraisal of the period must be tempered. The mere presence of discourses does not signal the absence of power.[33] It instead suggests that certain segments of society felt compelled to exert ideological power by prescribing a circumscribed sexual philosophy. This also implies that sexual behaviour may have been far from prudish as, often, prescriptive literature implies the presence of an opposite reality to which it is reacting. More useful is Michael Mason's recent two volume study on Victorian sexual behavior and sexual attitudes in which he is able to reconcile the proliferation of discourses of sexuality with the content and implications of those discourses. Mason contends that Victorian sexual *behaviour* was no more prudish than that of other societies, but that in common with other contemporary societies and cultures it possessed an overall *philosophy* of sexual restraint, which he has termed anti-

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[29] Thompson, The Rise of Respectable Society, 87-8.
[30] Mason, The Making of Victorian Sexual Attitudes, 63-8.
[31] Foucault, The History of Sexuality, Vol. 1. Trans. Robert Hurley (New York: Vintage Books, 1978), 49.
[32] Roy Porter and Lesley Hall, The Facts of Life: The Creation of Sexual Knowledge in Britain, 1650-1950 (New Haven: Yale University Press, 1995).
[33] Porter, "Is Foucault Useful for Understanding Eighteenth and Nineteenth Century Sexuality?," Contention I (1991), 67.

sensualism. This philosophy of sexual restraint did not repress sexuality, but it did subdue and manage it through acceptable outlets for sexual activity, primarily within marriage.[34]

This message was distributed primarily through Evangelical prescriptive literature written by people such as Hannah More and Thomas Gisborne. Evangelicalism was a creed and code for the conduct of family life: propagating the ideal of a Christian home, ordered by a morality that enshrined piety, chastity, sobriety, charity, and modesty, and one that shunned transgressions and diversions, sexual or otherwise, that were not uplifting or improving.[35] The morality of the Evangelical message was easily separated from the religious message and was both readily accommodated into and formative of the genuine commitment to a fineness and purity of tone with respect to sexual matters within the bourgeoisie.[36] Sexual restraint was an important aspect of the ideal of domestic respectability. Mason has argued that "Victorian anti-sensualism was chiefly a matter of Evangelical moral attitudes, shorn of their doctrinal setting, finding their way into the thinking of men and women situated well beyond the boundaries of formal Evangelicalism."[37] It could be adopted without necessarily accepting the religious foundations of the movement. Middle and upper class educated opinion, even that cultivated by Thomas Babington Macaulay during his youth amongst the resolutely Evangelical Clapham Sect of wealthy London professional and commercial men, often stripped Evangelicalism of specifically religious principles and incorporated it into their own moral codes.

In addition to gender and class, race must be considered as a constitutive element of bourgeois respectability. As with class, an analysis of race must recognize both the reality of race and the constructedness of the concept. Any study which privileges analysis of the construction of racial difference, which this does, must, if only tacitly, recognize that the knowledge produced about racial difference was transformed into real inequalities by colonial regimes and hierarchies. In her "colonial reading" of Foucault's

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[34] Mason, The Making of Victorian Sexuality (Oxford: Oxford University Press, 1994). Mason, The Making of Victorian Sexual Attitudes.
[35] Thompson, The Rise of Respectable Society, 250.
[36] Mason, The Making of Victorian Sexual Attitudes, 64.
[37] Ibid., 63.

History of Sexuality in *Race and the Education of Desire*, Ann Laura Stoler argues that the discourse of respectability, in addition to being entrenched in the politics of bourgeois gender identity, was "situated on an imperial landscape where the cultural accoutrements of bourgeois distinction were partially shaped through contrasts forged in the politics and language of race."[38] Discourses of sexual restraint and bourgeois respectability did (could) not exist without reference to a racially erotic counterpart: the savage, the primitive, and the colonized. These reference points of difference served as examples of what might happen if there was a decline in morality. Foucault's theory, Stoler argued, missed the contrasts of what a "healthy vigorous body" was all about. Bourgeois identity, both at home and in the colonies, was distinctly coded by race, and as such staked out claims to more than just the bourgeois; it marked the nation. In colonial contexts, symbols of bourgeois respectability, especially the feminine virtues of domesticity, modesty, and chastity, signified modernity.

George Mosse, in his work *Nationalism and Sexuality*, has examined the discursive links between respectability, sexuality, and nationalism. He found that prescribed bourgeois respectability was generalized so as to assign attributes to the whole of the nation, however that imagined community may have been defined.[39] Outward signifiers of respectability marked out claims to British citizenship. "Imperial discourses designated cultural competencies and cultivated habits that defined fault lines along which gendered assessments of both class and race were drawn."[40] The meaning of "white" in colonial contexts was inextricably bound to bourgeois definitions of gender, sexuality and respectability. Mosse identified racism as a heightened form of nationalism because of its emphasis on inferiorities and superiorities. As such, it referred to the signifiers of bourgeois respectability as designations of racial superiority, even though a majority of the British colonials in India were of either working class or aristocratic background.[41] Concern for degeneration in the colonies produced a vast prescriptive

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[38] Ann Laura Stoler, Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things (Durham: Duke University Press, 1995), 5.
[39] Mosse, Nationalism and Respectability, 9.
[40] Stoler, Race and the Education of Desire, 8.
[41] Mosse, Nationalism and Respectability, 133. Stoler, Race and the Education of Desire, 102-3.

literature – health manuals and housekeeping guides – that warned of physical and financial misfortune should the bounds of respectability have been transgressed.[42] Sexual restraint and the protection of feminine chastity and modesty signified a paramount society and legitimated colonial rule. Native sexuality, especially indigenous female sexuality, was deemed out of control. Bourgeois civility was defined through a language of difference that drew on images of racial purity and sexual virtue.

The discourse of bourgeois respectability was the product of the intersection of knowledge about race, class, gender, and the proper expression of sexuality. It was first mobilized to define a class identity and then a racial/national identity. Once elaborated, it was capable of being exported, applied, and employed to form the basis for systems of knowledge in colonial settings. In the mid nineteenth century, the ideal of respectability was employed in the design of Indian railway colonies as European enclaves for the protection of 'white' employees from the 'temptations' of India, and to provide domestic space to cultivate bourgeois respectability. These colonies, Laura Gabh Bear has argued, were key sites for the demarcation, construction and contestation of identity, and as such the boundaries were defined in terms of gender identity. The construction of the domestic realm marked the difference between British and Indian along an axis of distinction defined by modernity and tradition. Modernity, marked by respectability, was a racial trait as well as a class trait. Bourgeois habits of life marked European identity.[43] The confused equation of whiteness with middle class sensibilities, Ann Laura Stoler has argued with respect to Dutch colonialism, legitimated state intervention into how the Dutch in the colonies raised their children and managed their domestic and sexual arrangements.[44] Institutional innovations and government policies made claims to racial superiority and moral superiority dependant on reference to bourgeois respectability for the entire European population. Legal and educational reforms in India were similarly

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[42] Stoler, Race and the Education of Desire, 102.
[43] L.G. Bear, "Miscegenations of Modernity: Constructing European Respectability and Race in the Indian Railway Colony, 1857-1931," Women's History Review 3 (1994), 531-548.
[44] Stoler, Race and the Education of Desire, 106.

justified.[45] White womanhood and its attendant virtues were employed as symbols of civilization and the embodiment of respectability.[46] Antithetically, those who transgressed the norms of bourgeois respectability were seen to undermine colonial authority and hence were in need of control. Uncontrolled sex could undermine colonial authority. Administrators segregated prostitutes from respectable women because they were carriers of moral and, with the proliferation of venereal disease, physiological disorder.[47] Late nineteenth-century debates concerning the age of consent and child marriage revolved around questions of sexual respectability.[48] One 1884 case in particular, involving the child bride Rukhmabai, has received considerable scholarly attention.[49] Antoinette Burton has examined this case to demonstrate how constructions of gender were mobilized in the late Victorian press to legitimate imperial rule. She writes: "that Rukhmabai's trial was transformed into a story about female sexual virtue suggests that contests over morality in the Victorian public realm ... were threaded through the complex domains of imperial culture and the middle-class imperial

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[45] Radhika Singha, A Despotism of Law: Crime and Justice in Early Colonial India (Delhi: Oxford University Press), xv. Gauri Viswanathan, Masks of Conquest: Literary Study and British Rule in India (New York: Columbia University Press, 1989).

[46] Vron Ware, Beyond the Pale: White Women, Racism and History (London: Verso, 1992), 11.

[47] On prostitution, venereal disease and the Contagious Disease Acts in Britain and India see: Kenneth Ballhatchet, Race, Sex and Class Under the Raj: Imperial Attitudes and Policies and Their Critics (London: 1980).Philippa Levine, "Venereal Disease, Prostitution and the Politics of Empire; the Case of British India" Journal of the History of Sexuality 4 (1994), 579-602. Levine, "Rereading the 1890's: Venereal Disease as 'Constitutional Crisis' in Britain and British India," Journal of Asian Studies 55 (1996), 585-612. Judy Whitehead, "Bodies Clean and Unclean: Prostitution, Sanitary Legislation, and Respectable Femininity in Colonial North India" Gender and History 7 (1995), 41-63. Judith R. Walkowitz, Prostitution and Victorian Society: Women, Class and the State (Cambridge: University of Cambridge Press, 1980). Sumanta Banerjee, "The 'Beshya' and the 'Babu': The Prostitute and her clientele in Nineteenth Century Bengal," Economic and Political Weekly 28:45 (1993), 2461-72.

[48] Padma Anagol-McGinn, "The Age of Consent Act (1891) Reconsidered: Women's Perspectives and Participation in the Child-Marriage Controversy in India," South Asia Research 12:2 (November, 1992), 100-118. Jim Masselos, "Sexual Property/Sexual Violence: Wives in Nineteenth Century Bombay," South Asia Research 12:2 (November 1992), 81-99. Mrinalini Sinha, Colonial Masculinity: the 'Englishman' and the 'Effeminite Bengali' in the Late Nineteenth Century (Manchester: Manchester University Press, 1995), 138-180. Dagmar Engels, "The Age of Consent Act of 1891:Colonial Ideology in Bengal" South Asia Research 3 (1983), 107-133.

[49] Sudhir Chandra, Enslaved Daughters: Colonialism, Law and Women's Rights (New Delhi: Oxford University Press, 1998).Antoinette Burton, "From Child Bride to 'Hindoo lady': Rukhmabai and the Debate on Sexual Respectability in Imperial Britain" American Historical Review 103 (1998), 1119-46.

imagination as well."[50] The issue of respectability that was central to the formation of the railway colonies in the mid nineteenth century and to debates in the late nineteenth century was also central to discussions about rape in the early and mid nineteenth century. Trials for the crime of rape were always transformed into stories about female virtue and respectability, both in the metropole and in the periphery. This suggests that control over morality extended into the legal realm and was based upon a discourse of bourgeois respectability that was threaded through those complex imperial domains and imaginations too which Burton referred. That discourse, constructed by the intersections of knowledge produced about class, gender, race and sexuality, was exported to India in the criminal law where it first negotiated and accommodated existing colonial identities and then was stabilized in the code drafted by Macaulay and enacted as the Indian Penal Code in 1860. Criminal law in India between 1830 and 1862, speaking here of both the processes of codification and administration, was a gendered institution.

The law pertaining to rape, as codified and applied in India between 1830 and 1862, offers a sexually and politically charged site upon which to focus an analysis of how notions of gender and sexuality informed the legal function of the colonial state. In early nineteenth-century England, narratives of sexual danger were mobilized to define public spaces as masculine and to relegate the 'respectable' woman to the safety of the home. Anna Clark has noted that legal officials and journalists dealing with rape cases began to introduce the idea that "rape emperilled women's safety in the evening streets.... Reformers portrayed factory work as fraught with the perils of seduction and violation. These notions helped enforce the burgeoning ideology of separate spheres: that women belonged in the domestic sphere of the home, nurturant but sheltered ..."[51] This study is concerned with the ways in which this ideology was embedded in and enforced by the law. It is necessarily an analysis of the discursive – of narratives of the dangers of transgressing the ideology of separate spheres and compromising the philosophy of sexual restraint elaborated within the discourse of bourgeois respectability. Roy Porter

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[50] Burton. "From Child Bride to 'Hindoo lady': Rukhmabai and the Debate on Sexual Respectability in Imperial Britain," 1122.

[51] Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845 (London:

once asked: "Rape – Does it Have a Historical Meaning?"[52] Over the last fifteen years historians have answered that it has a multiplicity of meanings. In fact, one of the perils of writing a history that addresses rape is getting lost in the sprawling and diverse literature on the subject and losing one's focus. It is necessary, therefore, to bluntly delimit this analysis from other historical approaches to the subject. This is a cultural history of a nineteenth-century colonial institution: an institution encoded with constructions of gender and sexuality produced within a discourse of bourgeois respectability peculiar to the culture of nineteenth-century Britain. The narratives of rape which were produced by that culture, and subsequently embedded in and reproduced by colonial legal institutions, form the basis for accessing legal constructions of gender and sexuality.

This is not a social history of rape. I will not be processing data about the names, status, class, race, or ages of the historical actors that appeared before the courts. I will not offer any analysis of the relations between the litigants to arrive at an historical hypothesis that explains the act in terms of racial oppression, patriarchy, class dynamics, or colonialism.[53] Historical actors and their social identities will only appear in this study as they are referred to and categorized by colonial officials: they are categories, discursively produced representations of social identities available to the historian only through the colonial gaze, at the point where the historical person meets the colonial institution. I am not interested in the act of rape, nor in the power dynamics of patriarchy, class, slavery, race, age, or colonialism that produce the violent act. This is not a history of causation, explanation, or motivation: social (as I've alluded to above), psychological,

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Pandora, 1987), 3.

[52] Porter, "Rape: Does it Have a Historical Meaning?," in Rape. Eds. S. Tomaselli and R. Porter (Oxford: Basil Blackwell,1986), 216-236.

[53] Karen Dubinsky, Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929 (Chicago: University of Chicago Press, 1993). Clark, "Rape or Seduction? A Feminist Controversy over Sexual Violence in the Nineteenth Century," in The Sexual Dynamics of History: Men's Power, Women's Resistance, ed. London Feminist History Group (London: Pluto Press, 1983), 13-27. Carolyn Conley, "Rape and Justice in Victorian England," Victorian Studies 29:4 (1986), 519-36. C. Conley, The Unwritten Law: Criminal Justice in Victorian Kent (New York: Oxford University Press, 1991). Pam Scully, "Rape, Race and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa," American Historical Review 100:2 (1995), 335-59.

anthropological, sociological, nor socio-biological.[54] This is also not a cultural history of rape, as much as it is a cultural history of the institutionalization of ideas about gender and sexuality in rape laws. I am not looking for meaning in the act itself, but for how an institution conceives of those culturally and discursively constructed social identities, normalizes them through the act of codification, and then applies them to evaluate members of society on a specific legal and moral terrain. This is the power which this study implicitly addresses. It is a colonial power built upon a discursively produced knowledge of social identities.

The association of colonialism with rape has a long and varied history. In 1772 Edmund Burke described the relationship between Britain and India as that of a suitor taking a lady into his "tender, grasping arms, pretending all the while that it meant nothing but what was fair and honourable; that no rape or violence was intended."[55] Then, in 1787 he charged Governor-General Warren Hastings (1772-85) with the economic rape of India and the literal rape of Indian women. More recently, postcolonial and literary theorists have used rape as a metaphor for colonial domination or as an index of tension in colonial societies. Literary studies by Jenny Sharpe and Nancy Paxton have examined how the violation of the Victorian ideal of womanhood was used as a metaphor for the violation of colonial authority in mid-Victorian literature.[56] Paxton has identified a shift in literary narratives of rape after the 1857 Indian rebellion from that of white men raping brown women to white women being raped by brown men. She attributes this shift to the rebellion's challenge to colonial power. The myth of the rapacious Indian male was used as justification for severe repression of the revolt and to perpetuate the empire in the name of protecting women – white and brown. Similarly, Sandra Gunning has argued that the myth of the black rapist, prevalent in late nineteenth and early twentieth-century

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[54] Socio-biological explanations of rape are making a renewed push. For an example see chapter 4 of Michael P. Ghiglieri, The Dark Side of Man: Tracing the Origins of Male Violence (Reading Mass: Perseus Books, 1999). And also, Randy Thornhill and Craig Palmer, A Natural History of Rape: Biological Bases of Sexual Coercion (Cambridge Mass.: MIT Press, 2000.

[55] Edmund Burke quoted in Nancy Paxton, Writing Under the Raj: Gender, Race and Rape in the British Colonial Imagination, 1830-1947 (New Jersey: Rutgers University Press, 1999), 1.

[56] Paxton, Writing Under the Raj. Jenny Sharpe, Allegories of Empire: The Figure of Woman in the Colonial Text (Minneapolis: University of Minnesota Press, 1993).

literature of American South, was one of a number of responses enacted by white Americans in a period of social upheaval, and in response to a perceived threat to the social order. The black woman, seemingly absent from these narratives, is symbolically present in them since "the construction of white femininity as a masculine prize is predicated on black femininity's sexual and social devaluation."[57] The construction of white femininity enables the lynching since it is the white female that is the 'cause' of the struggle. The myth of the black rapist emerges in response to perceived or constructed threats to the social hierarchy or colonial authority. Other scholars have examined these myths and their usages in the rhetoric of official responses and generalized fears. Norman Etherington, in his study of rape in Cape Colony South Africa, has examined the white fear of black rape in the 1870s and correlated it with colonial anxiety over the ability to, and desire to, maintain control.[58] Europeans, he argued, were aware that their power and safety depended on the maintenance of strict standards of black behaviour, and therefore, they insisted upon the licentious character of blacks and the vulnerability of white women in order to justify their civilizing mission in Africa. These and other studies[59] demonstrate the important position of rape in colonial discourse, yet fail to examine the legal context which is critical when attempting to relate that discourse to the daily impact of colonial rule.

A few imperial histories have made use of archival legal materials to examine how the knowledge of gender, sexuality and race affected the administration of colonial law. No such study exists for India. Pam Scully, in her study of rape in nineteenth-century Cape Colony, South Africa, has argued that the death sentence was reserved for

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[57] Sandra Gunning, Race, Rape and Lynching: the Red Record of American Literature 1890-1912 (New York: Oxford University Press, 1996), 10.

[58] Norman Etherington, "Natal's Black Rape Scare of the 1870's," Journal of South African Studies 15:1 (1988), 6-53.

[59] Stoler, "Carnal Knowledge and Imperial Power: Gender, Race, and Morality in Colonial Asia," in Gender at the Crossroads of Knowledge: Feminist Anthropology in the Postmodern Era, ed. Micaela di Leonardo (Berkeley: University of California Press, 1991), 51-101. Vron Ware, Beyond the Pale: White Women, Racism and History. Amirah Inglis The White Women's Protection Ordinance: Sexual Anxiety and Politics and Papua (New York, 1975). Catherine Hall, "Competing Masculinities: Thomas Carlyle, John Stuart Mill and the Case of Governor Eyre," in White, Male and Middle Class: Explorations in Feminism and History (New York: Routledge, 1992).

cases of the rape of white women by black men.[60] Scully used a case study of an instance in which a capital conviction was overturned because it was determined that the victim was not white and that she was of 'poor' character. Her social positioning as a woman and a non-white disadvantaged her in the legal system. David Philips' draws similar conclusions in his analysis of a rape case in colonial Victoria, Australia in 1888.[61] He has argued that rape trials are informative of societal attitudes especially to women and, in the case he examines, to race because the victim was an aboriginal woman. The judge found two white men guilty but did not impose the death penalty based on the existence of "circumstances...which require consideration." Philips suggested that this 'consideration' was the race and character of the defendant. The identification of the prosecutrix as a black woman of poor character brought her credibility as a witness into question. The guilt of the first man had been established by a white male witness. However, the guilt of the second man was unascertainable because the only witness was the prosecutrix herself. The 'poor' character and the race of the victims in the studies presented by both Philips and Scully suggest that considerations of race and gender influenced the findings of the courts.

Historical studies of rape, race, and gender in the early nineteenth-century American South have reached similar conclusions. This historical context possessed similar dynamics of race, gender and authority to that of early-nineteenth-century colonial India. Peter Bardaglio has argued that "rape laws in the south demonstrated the preoccupation of legislators and judges with preventing sexual relations between white women and black men, as well as keeping those two groups in their appropriate places in the social order." [62] His work, along with that of Diane Miller Sommerville, has demonstrated that the construction of gender and adherence to prescribed norms of sexual conduct established the criteria for credibility. Deviant conduct on the part of the victim, whether immediately or distantly preceding the crime, undercut a white woman's demand

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[60] Scully, "Rape, Race and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa."

[61] David Phillips, "Sex, Race, Violence, and the Criminal Law in Colonial Victoria: Anatomy of a Rape Case in 1888," Labour History [Australia] 52 (1987), 30-49.

for protection in the Old South.[63] More importantly though, Bardaglio has drawn connections between the law and societal attitudes about behaviour. "Statutes," he wrote, "provide a general indication of how society thinks its members ought to behave, and they offer specific insights into the social values and attitudes of the elites who shape the law."[64] Bardaglio's work bridges the gap between a cultural history of rape and a cultural history of the institutions that define rape according to the values of those who have shaped the law.

Feminist theory posits that every aspect of history, not just women's history, is gendered: political, economic, colonial, and legal history. Colonial law, as represented by the Indian Penal Code and judges' reports for rape cases, does not present itself as an obviously gendered institution; gendered meanings were not the intent of their production. The code was created and intended to simplify and unify the administration of law for all of India, to eliminate 'irrational' forms of private justice and consolidate control over law and order in public (read colonial) authorities, and to improve the moral environment in India through rational institutions and infrastructure. Judges' reports were produced to summarize the facts, the evidence, the ruling, and the judges' rationalization of his ruling of the case for easy referral by other judges, especially in cases that were referred to a higher court. However, a poststructuralist approach, in which all aspects of life are viewed as text, postulates that the text never says just what the author intended, but creates multiple meanings. A text is no more than a product of discourses of its era. Historical processes are textual because they can only be recovered through representation and these representations involve discursive strategies much as do fictional texts. Gananath Obeyeskere, in his study of James Cook, wrote that "discourse is not just speech, it is embedded in an historical and cultural context and expressed often in the frame of a scenario or cultural performance. It is about practice ... insofar as the

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[62] Peter Bardaglio, "Rape and the Law in the Old South: Calculated to Excite Indignation in Every Heart," Journal of Southern History 60:4 (1994), 750.
[63] Diane Miller Sommerville, "The Rape Myth in the Old South Reconsidered," Journal of Southern History 61:3 (1995), 514.
[64] Bardaglio, "Rape and the Law in the Old South: Calculated to Excite Indignation in Every Heart," 751.

discourse evolves it begins to affect the practice."[65] The law, like other texts, is a product of the discourses of its era and produces meanings beyond what it intended. The discourse of bourgeois respectability was embedded within the criminal law of India, and is especially evident in the laws pertaining to rape. That discourse had the ability to affect practice through legal institutions, – courts and codes – which were agents of rule directly applied to governed people.

Postcolonial scholars have found the poststructural tool of discourse analysis to be a valuable strategy for addressing how cultural, intellectual, economic, and political processes work together in the formation, perpetuation, and dismantling of colonialism. Postcolonialism is probably best considered as the contestation of colonial domination and its legacies through poststructuralist recognition of multiple histories and the discrediting of master narratives. It is better linked, not to the colonial condition, but to poststructuralist thought.[66] Colonial discourse analysis examines the intersection of institutions, knowledge, and power; it is a reading strategy for examining how power works through language, literature, stereotypes, images, culture and institutions to regulate daily lives.[67] An examination of the legal institutions is critical when attempting to relate knowledge to the daily impact of colonial rule. It is an instrument through which power is exerted.

With the exception of Lata Mani's recent study of sati (widow burning), sections of Radhika Singha's work on colonial law up to 1837, and Indrani Chatterjee's work on slavery, little research has focused on how gender and sexuality impinged on the legal framework of colonial rule in India.[68] Indian legal history has tended to focus on:

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[65] Gananath Obeyeskere, "'British Cannibals', Contemplation of an Event in the Death and Resurrection of James Cook, Explorer," Critical Inquiry 18 (1992), 650.
[66] Loomba, Colonialism/Postcolonialism, 13.
[67] Lata Mani, Contentious Traditions: The Debate on sati in Colonial India (Berkeley: University of California Press, 1998). David Arnold, Colonizing the Body: State Medicine and Epidemic Disease in Nineteenth-Century India (Berkeley: University of California Press, 1993). Viswanathan, Masks of Conquest: Literary Study and British Rule in India.
[68] Lata Mani, Contentious Traditions: The Debate on sati in Colonial India. Radhika Singha, A Despotism of Law. Indrani Chatterjee, Gender, Slavery and Law in Colonial India (New York: Oxford University Press, 1999).

narratives of administrative changes and legislative enactments;[69] the legislative interaction of English law and Hindu, more often than Muslim, law;[70] civil law, colonial perceptions and understandings of ownership, and legal reform that was motivated by the desire to increase revenues;[71] and single incidences or narrow topics approachable from a number of perspectives, such as sati, prostitution, and the late nineteenth-century age of consent controversy.[72] This is so because this is what the colonial archive has offered. Especially in the period prior to the 1830s the East India Company, a for profit company and the governing body of India, was largely interested in return on its investment and therefore with revenues. The basis of corporate and civil law in India was Hindu not Muslim, and therefore Indian law was largely recognized as Hindu. Indeed the majority of legal treatises, texts, and translations produced by colonial officials dealt with the Indian civil law and the law of rents and tenures: Hindu law. Even early translations of Indian texts on criminal law privileged Hindu law, though Muslim criminal law had been administered in India since at least the early seventeenth century under Mughal rule. When Indian criminal law has been addressed historically the focus has tended towards studying the policing and punishing of criminals rather than the law per se.[73] One prominent example from the literature is the proliferation of studies concerned with a topic that colonial authorities themselves had been preoccupied with: criminal tribes, dacoity, and thagi.[74] Only the recent work by Radhika Singha has considered the ways in

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[69] B.B. Misra, The Judicial Administration of the East India Company, 1765-1781, (Delhi: Motilal Banarsidass, 1961). B.L.Verma, Development of the Indian Legal System (New Delhi: Deep & Deep Publications , 1987). Ramesh Chandra Srivastava, Development of Judicial System in India Under the East India Company, 1833-1858 (Lucknow, 1971).

[70] A.C. Banerjee, English Law in India (New Delhi: Shakti Malik, 1984). Masaji Chiba, Asian Indigenous Law: In Interaction With Received Law (New York: KPI, 1986). Richard Lariviere, "Justices and Pandits: Some Ironies in Contemporary Readings of the Hindu Legal Past," The Journal of Asian Studies 48:4 (November 1989), 757-769. J.D.M. Derrett, Religion, Law and the State in India (New York: The Free Press, 1968). The exception is Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," in Islamic Family Law eds. Chibli Mallat and J. Connors (London: Graham and Trottman, 1990), 205-23.

[71] D.A. Washbrook, "Law, State, and Agrarian Society in Colonial India," Modern Asian Studies 15:3 (1981), 649-721.

[72] See notes 45, 46, 47 above.

[73] David Arnold, Police Power and Colonial Rule, Madras 1859-1947 (Delhi: Oxford University Press 1986).

[74] Sanjay Nigam, "Disciplining and Policing the 'Criminals by Birth', Part 1: The Making of a Colonial Stereotype - the Criminal Tribes and Castes of North India," The Indian Economic and Social History

which knowledge of these groups was connected to wider colonial legal debates and the initiative to elaborate a position of racial and moral paramountcy which, as I have alluded to, were rooted in a discourse of respectability.[75]

Singha's work is also useful for moderating trends in recent Indian historiography to see everything in terms of hegemonic discourses and legal institutions as "an imposition of a law based on European legal thought and tradition upon an Asian country."[76] Her work conceived of criminal law prior to 1837 as a product of a cultural dialogue between British notions of jurisprudence, and notions of rule, rank, status and gender in Indian society. She examined the tensions that existed in trying to accommodate indigenous and English ideas of law. Studies that privilege the hegemony of colonial discourse and English law in India fail to account for the debates among colonial administrators and the complex interactions among the discursive, the individual, and the subject. Said's definition of Orientalism as a corporate institution for dealing with the orient, in this case India, which wields the power of dominating, restructuring, and having authority over the orient, reaffirms the occident as a hegemony. The characterization of colonial rule as a corporation, however appropriate in the case of the East India Company, is too systematic a characterization: it ignores divisions within the Occident, and debates among British administrators. A hegemonic corporation certainly would have been capable of implementing a penal code that was written in 1837 sooner than 1860. The period between the code's conception and enactment was a period of negotiation and accommodation The debates and conversations about the code, preserved in Official Reports of the Indian Law Commission, private correspondence, and evaluations of it by judges and administrators, demonstrate that the project lacked a grand design and a complicity among officials between and within the colonial and British

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Review 27:2 (1990), 131-64. Nigam, "Disciplining and Policing the 'Criminals by Birth', Part 2: The Development of a Disciplinary System, 1871-1900 ," The Indian Economic and Social History Review, 27:3 (1990): 257-87. Singha, "'Providential' Circumstances: The Thuggee Campaign of the 1830's and Legal Innovation," Modern Asian Studies 27:1 (1993), 83-146. Sandria Freitag, "Crime in the Social Order of Colonial North India." Modern Asian Studies 25:2 (1991), 227-261.

[75] Singha, A Despotism of Law, xv.

[76] Jorg Fisch, Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769-1817 (Wiesbaden: Franz Steiner Verlag, 1983), v.

governments. Furthermore, the code was not a conduit for imposing purely bourgeois constructions of gender, race, and class. Dialogue recorded in the Reports of the Indian Law Commission and the comments contained in the judges' reports indicate that the law was cultural production; it had to seek discursive bridges with the subject population, with a different social structure than existed in Britain, in order to render the law meaningful. Points of negotiation and accommodation with the colonial subject and colonial identities further shaped the content of the code.

In an approach that conceives of all of human knowledge as structured and determined by discourses, no subject is free, every utterance is predetermined, and no individual is the sole source of any utterance. This rigid conception of the hegemony of discourses leaves no space to consider the author of any work, including that of a code of law. The author must be considered though, for without him there is no mediation between the discursive and the material. Discourses exist in multiplicities. The author has available to him several choices of discourse based on his background, his racial, gendered, class identities, and his understanding of them according to time, place, and culture, and the availability of alternate discourses. In the life of Thomas Babington Macaulay there are examples of such choices. He was raised by an Evangelical father who maintained a strict allegiance to the Tory party and Macaulay's own youth seemed to indicate his leanings in that direction. However, his experience at Cambridge, the influence of new acquaintances, and exposure to emerging political ideologies associated with liberalism and radicalism shaped Macaulay into a Whig politician and an Evangelically moral, though not religious, individual. The influence of Macaulay in inculcating the Penal Code with certain assumptions regarding gender and sexuality is essential. The debate and years of consideration that followed the completion of Macaulay's draft penal code indicate that like-minded people, attuned to the same discourses, produce utterances independent of one another. The discourse of bourgeois respectability remained key, but the means by which Macaulay was made familiar with it, the ways in which he (subconsciously) understood its implications for gender and sexual identity, and the way in which he employed those ideas were particular to him. It is

through his public proclamations and private correspondences that more explicit connections can be made between the discourse of bourgeois respectability and the assumptions about gender and sexuality as they exist in the Indian Penal Code.

No one study of Macaulay, or one that addresses Macaulay as part of a larger study, has attempted systematically to reconcile the obvious influence of moral Evangelicalism on Macaulay and its influence on his writings, including the Indian Penal Code, though they tacitly and variously acknowledge or deny it. Literary scholar Margaret Cruickshank claimed that Macaulay outright rejected the stern moralism of his Evangelical rearing.[77] Gauri Viswanathan, in her analysis of the dynamics between literary study and British rule, contends that Macaulay's advocacy of English education was devoid of moral justifications.[78] Alternatively, a point made by John Clive, and later reiterated by Michael Mason, was that it was solely the Evangelical morality and not the metaphysics which stuck with Macaulay.[79] Clive argued that though Macaulay's religious views continuously drifted away from Evangelical orthodoxy, the "moral and ethical imperatives of the Evangelical creed had not lost their hold over him. He expressed shock and surprise, for example, at the coarseness of the conversation that passed between men and women in society..."[80] Clive's ability to make this observation resides in his close reading of the personal correspondence of Macaulay, especially those letters written to his sisters Hannah and Margaret. The historiography on Macaulay has tended to focus on three particular identities of Macaulay: Macaulay the writer;[81] the political Macaulay;[82] and Macaulay the historian.[83] These studies are almost always based on published

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[77] Margaret Cruikshank, Thomas Babington Macaulay (Boston: G.K. Hall & Co., 1978), 18.
[78] Viswanathan, Masks of Conquest, 145.
[79] Mason, The Making of Victorian Sexual Attitudes, 64.
[80] Clive, Macaulay, 248-9.
[81] Cruickshank, Thomas Babington Macaulay . G.S. Fraser, "Macaulay's Style as an Essayist," A Review of English Literature 1:4 (1960), 9-18.
[82] Joseph Hamburger, Macaulay and the Whig Tradition (Chicago: The University of Chicago Press, 1976). Javed Majeed, Ungoverned Imaginings: James Mill's History of British India and Orientalism (Oxford: Clarendon Press, 1992). Eric Stokes, The English Utilitarians in India (Oxford: Oxford University Press, 1959). James Mill and Thomas Babington Macaulay. Utilitarian Logic and Politics: James Mill's 'Essay on Government', and Macaulay's critique and the ensuing debate Edited and Introduced by Jack Lively and John Rees. (Oxford: Clarendon Press, 1978).
[83] Clive, Macaulay. Clive, "Macaulay's Historical Imagination," A Review of English Literature 1:4 (1960), 20-7. Owen Dudley Edwards, Macaulay, (New York: St. Martin's Press, 1988).

sources and official documents. Consequently, they have not considered how Macaulay's letters may be employed.

Those who have worked closely with Macaulay's letters have remarked how critical an understanding of his relationships with his sisters is to appreciating both the public and the private Macaulay. Clive implicitly recognized the importance of these relationships in a chapter entirely dedicated to them, in which he stated that the "search for the women in Macaulay's life must begin and end with [Margaret] and her sister Hannah ... who supplied for him on demand that element of secure domesticity so essential to his piece of mind."[84] Thomas Pinney, in the introduction to his six-volume edition of Macaulay's letters, drew special attention to these letters in which, he remarked, Macaulay "is without any constraint, free to range through all subjects and all tones." He found them to be most striking and curious "for their amorous language and their evidence of Macaulay's almost complete dependence for emotional satisfaction upon his relation to these two young girls."[85] And Eric Stokes employed these letters to explain the transformation of Macaulay from socialite to scholarly recluse that occurred while in India. The reason: it was during these years that he, in a sense, lost both of his sisters: Margaret to death and Hannah to marriage. His spirit was so invested in them, that these catastrophes forever altered the public Macaulay. "To prevent some sort of breakdown [in the year after Hannah's marriage and Margaret's death] he felt it imperative to keep his mind constantly employed on some intellectual pursuit, whether legislative drafting or scribbling marginal comments in his books."[86] The importance of these relationships and the correspondences through which they survive to my analysis is in the advice he gave to his sisters concerning morally correct expressions of femininity, the anecdotal stories he provided about transgressions of those norms amongst people in his social circles, and the manner with which he spoke about his love for his sisters and the domestic void they filled in his life.

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[84] Clive, Macaualy, 257-8

[85] Thomas Pinney in the introduction of The Letters of Thomas Babington Macaulay 6 vols. Ed. Thomas Pinney (Cambridge: Cambridge University Press, 1974), I: xi.

[86] Stokes, "Macaulay: The Indian Years 1834-38," A Review of English Literature 1:4 (1960), 47. See also, Clive, Macaulay, 477.

Chapter one sets the context for Macaulay's arrival in India. It considers the justification for codifying a set of laws as part of the larger colonial elaboration of moral and racial paramountcy in India. This justification was also elaborated through other measures during the late 1820s and 1830s Age of Reforming Spirit, such as legislation for the improvement of the status of women and the institution of English as the primary language of education. The elaboration of moral paramountcy was fueled by emergent liberal ideologies at home and the need to reconcile those with a colonial Indian autocracy. Evangelical and Utilitarian strands of liberal thought emphasized that the morality of the Indian character could be transformed through reform of the moral environment. To achieve this, Evangelicals emphasized educational reform and Utilitarians institutional reform. However, not only were these increasingly prominent ideologies exerting influence on the government of India under Governor-General William Cavendish Bentinck and on the East India Company's direction of that government through men such as James Mill and Charles Grant, they also were leaving an impression upon a young lawyer and politician named Thomas Babington Macaulay. Macaulay, raised under the influence of the Evangelical Clapham Sect and educated at Cambridge, where he became familiar with Utilitarian politics and philosophy, combined their imperatives for moral and institutional reform to elaborate a program of moral improvement through the civilizing influence of English education and a rational code of laws.

The last section of the first chapter explores, in some detail, the influence of Utilitarian theories of jurisprudence on the initiative and form of the draft penal code. Chapter two addresses Macaulay's relationship to Evangelical moral philosophy; especially to the way in which his conception of proper feminine behaviour and adherence to a code of sexual restraint was influenced by the anti-sensualism of bourgeois respectability as elaborated by moral Evangelicals. Macaulay's personal correspondence, primarily with his sisters, forms the basis for understanding how he understood gender identities and roles. A consideration of prescriptive and fictive literature written by Evangelical authors with the purpose of providing moral guidance

and advice on the fulfillment of respectable femininity provides further insights into Macaulay's ideas about gender and sexuality. The authors and the works considered here are not arbitrary: Macaulay spent his summer vacations at the house of Evangelical mother-figure Hannah More, to whom he referred as his second mother; Thomas Gisborne was a prominent member of the Clapham Sect and Macaulay had recommended to his sister Hannah that she read Gisborne before accompanying him to India; he also recommended works by Frances Elizabeth King, James Fordyce, and Henry Moore. An examination of the substantive section on the law of rape in Macaulay's draft penal code and its ancestry in English common law treatises demonstrates that the philosophy of anti-sensualism and the gendered prescripts of the discourse of bourgeois respectability informed that law and were enforced by it.

Chapter three is an examination of the processes of negotiation and accommodation that the criminal law of rape in India had to undergo to reconcile the discourse of bourgeois respectability with social identities, or perceptions of social identities, in India. Over twenty years of official and unofficial reports on Macaulay's draft penal code produced an extended conversation on a number of subjects in the code, including rape. These conversations provide an opportunity to see how officials constructed notions of gender and sexuality in India and negotiated with those perceptions to be able to apply the law, as informed by bourgeois respectability, to them. For example, respectability had initially been elaborated in Britain along divisions of class. In India, the colonial government believed that caste, the fluid ideas and practices which named, grouped, and ranked people by order, function, and region, was the primary organizing function through which Indians interacted. Markers of status had to be reconciled with a law that addressed behavior and character based on the discourse of respectability. Caste and respectability became entwined in the colonial imagination much as class and respectability had at home. The high caste female was assigned the virtues of bourgeois respectability – chastity, modesty, and submission – though, because of her status as a racial 'other', these virtues were of a different nature. Indian women, for instance, were believed to mature sexually at a younger age than British women. The

comparatively lower age of consent assigned in the Indian Penal Code is one indication of this belief. Ideas about age and sexuality also had to be reconciled with the discourse of respectability. Judges' reports on cases of rape are useful for examining how the law in practice negotiated with constructed Indian identities of gender, caste, race, and age and the appropriate expressions of sexuality in India. Though the Indian Penal Code did not officially come into effect until the end of the period with which this study is concerned, law was primarily administered substantively according to, or by way of comparison with, law based on bourgeois notions of respectability: primarily English law, though there were also suggestions that judges in the Bombay Sadr Foujdari Adalat, the chief criminal court of Bombay, were using Macaulay's draft code. These processes indicate that the codified and administered law were products of a cultural dialogue, albeit a lopsided one.

CHAPTER ONE: Colonizing Morality: Macaulay's Draft Penal Code and the Elaboration of Paramountcy.

The paradox between a language of liberalism[1] and the possession of an autocratically ruled and continually expanding Indian empire increasingly needed to be addressed and reconciled.[2] Reconciliation was elaborated through the rhetoric of moral and racial paramountcy,[3] under the guise of which administrators, missionaries, and other reformers expressed a moral obligation to civilize a degenerate Indian 'other' that was incapable of self-reform.[4] Campaigns were spearheaded, first at home and then within the empire, by members of 'respectable' society who identified themselves as the protagonists in a battle against moral degeneracy. The object of this campaign was the improvement of others: usually defined in terms of class in the metropole, and race in peripheral India.[5] A liberal ideology, often mobilized under the rubrics of Evangelicalism and Utilitarianism, was developing precisely as members of the middle class were defining their own respectable identity in opposition to both the corrupt aristocracy and

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[1] I understand the term 'liberalism' to refer to the movement embracing and emphasizing intellectual liberty (within western traditions), free-trade economics, and political philosophies based on a belief in progress, the essential goodness of man, and the autonomy of the individual.

[2] Thomas Metcalf, Ideologies of the Raj: The New Cambridge History of India, III.4 (Cambridge: Cambridge University Press, 1994), x.

[3] Radhika Singha, A Despotism of Law: Crime and Justice in Early Colonial India (Delhi: Oxford University Press, 1998), 172.

[4] Though 'civilization' was the indicated objective of this program, it maintained the necessity of the imperial government to impart civilization through authoritarian reform and perpetuated discourses of oppression. For example, a number of reforms were passed for the apparent benefit of women in the nineteenth century, but the rhetoric of these caricatured women, especially Indian women, as weak and defenceless against the savage Indian male. British governance, therefore, was necessary to protect these women. In the case of sati see Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India (Berkeley: University of California Press, 1998). Other measures continued to subjugate women more directly, such as the Contagious Diseases Acts and legislation regulating slavery. In addition to Mani's work, Joanna Liddle and Rama Joshi, "Gender and Imperialism in British India," Economic and Political Weekly 10:43 (October 26, 1985) and Indrani Chaterjee, Gender, Slavery and Law in Colonial India (New York: Oxford University Press, 1999), have problematized these reforms by demonstrating that the humanitarian rhetoric fronting them merely served to perpetuate discourses that oppressed women, and retained the necessity of the British to civilize

[5] The boundaries between race, gender, and class were blurred in the rhetoric of 'othering', so that a member of the English working class may have been referred to in racialized terminology and Indian males were often described in feminine terms. An insightful analysis of the latter is offered in Mrinalini Sinha, Colonial Masculinity: The 'Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century (Manchester: Manchester University Press, 1995).

the degenerate lower orders in Britain, and the morally depraved Indian. One initiative of this civilizing mission was Thomas Babington Macaulay's 1837 draft penal code, which claimed to have identified and codified a set of laws based on superior English jurisprudence.[6]

The period between 1828 and 1838 in India has been labeled an 'Age of Reform'. Historians have pointed to economic, political, judicial, social, and educational reforms as proof of what is perhaps better labeled an "Age of Reforming Spirit'. Together, the ideologies and initiatives associated with Utilitarianism and Evangelicalism are indicative of the spirit of liberalism emanating from respectable society in the early nineteenth century. Utilitarians sought immediate and often radical institutional reform; Evangelicals sought the moral improvement of society through prescriptions of bourgeois respectability; and Whigs and liberal Tories sought gradual reform through progressive legislation. Though liberalism was not a homogenous ethos, liberal reforms had two things in common: they were based on the core assumptions that human nature could be transformed to produce autonomous rational beings through laws, education, and free trade;[7] and they largely depended on western forms of knowledge for guidance owing to their assumed moral superiority and inherent rationality.[8] Recent scholarship has problematized this period by questioning the practical effects of reform; by calling into question motivations for reform; and by pointing to disagreements over what and how to reform.[9] These studies, however, recognize that reforms were conceived in a context permeated by a spirit of liberalism.

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[6] I will use "Britain" to refer to features of society, such as class, and also "British" to refer to people and ideas emanating from the metropole to the periphery. This is obviously problematic and in many ways insurmountable. "British" society was deeply fractured along lines of race, class, gender, and region. Illustrative of this problem is the case of Ireland. It was governed much like a colony yet it was part of the British Isles. The empire, however, was a truly "British" endeavor as it included (predominantly) men from all levels of society and from Scotland, Ireland, and Wales in addition to England. The "English" legal system to which I refer, however, was a system and tradition of law distinct from that of Scotland or Ireland and as such I will refer to it as "English."

[7] Metcalf, Ideologies of the Raj, 29.

[8] Bearce, British Attitudes Towards India, 156.

[9] There has been much written on reconceptualizing the 'Age of Reform'. See C.H. Phillips and M.D. Wainwright eds., Indian Society and the Beginnings of Modernisation, c. 1830-1850 (London: School of Oriental and African Studies, 1976). Gauri Viswanathan, Masks of Conquest: Literary Study and British Rule in India (New York: Columbia University Press, 1989). Chatterjee, Gender, Slavery and Law in

The debates within this Age of Reforming Spirit are often captured in terms of a debate between Orientalists and Anglicists. Orientalists were interested in Indian society as a whole - primarily in recovering its ancient glory through ancient texts. Their policy of nonintervention stemmed from their belief that Indian society would westernize and assimilate gradually over time. Anglicists were less patient for the reform of Indian society. They saw it as degraded and morally vile due to years of corrupt despotic rule and believed that their task was not only to provide examples of 'civilization', but also to initiate change through British forms of legislation and knowledge. The 'civilizing' initiative relied on an assumption that human nature could be transformed and morality elevated. This was only possible once an explanation of character rooted in environment rather than innate traits was developed within the framework of Enlightenment progressivism. Enlightenment thinkers argued that rational natural laws governed politics, economics, law, and history in much the same way as they governed the universe. Edmund Burke described India as a society of ancient institutions and traditions that had been framed according to the tenets of natural law.

> We are all born in subjection – all born equally, high and low, governors and governed, in subjection to one great, immutable, pre-existing law, prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we cannot stir.[10]

Burke identified an ancient Indian civilization that was subject to the same natural laws that applied to late eighteenth-century Europe. However, the Enlightenment notion of progress also contributed to the production of a hierarchy of civilizations that ranked India near the bottom and England at the top. India's low ranking on this hierarchy was attributable to the despotic institutions of government, religion, and education that had upset the order of natural laws and created a moral environment hostile to the

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Colonial India, 181. Singha, "'No Needles Pains or Unintended Pleasures': Penal Reform in the Colony, 1825-45," Studies in History 11:1 (1995), 29-30. Lata Mani, Contentious Traditions, 15.

development of respectable citizens. The way to develop a 'respectable' Indian society was to remold the institutions that marked India as a land of Oriental Despotism in the likeness of western institutions. Progress was identifiable only by western cultural, political and economic developments and therefore defined only western institutions as enlightened and modern, and more precisely English institutions that, according to the Whig school of historical interpretation of the early nineteenth century, defined England's history as the history of progress. "We said that the history of England is the history of progress; and, when we take a comprehensive view of it, it is so."[11] Environmental explanations of character developed within Enlightenment progressivism were critical to the Utilitarian program for criminal and institutional reform and the Evangelical program for moral reform. Moreover, the idea of progress was crucial to a society that continually needed to justify its domination over another: it provided the foundation for the elaboration of paramountcy and for the justification of an authoritative colonial government.

An authoritative yet enlightened colonial state, it was argued, was the only means possible to ensure the reform of institutions and the implementation of 'civilization' necessary to improve the moral environment in India. India provided a testing ground for various legal, social and educational theories because they could be authoritatively implemented, unlike at home.[12] Nineteenth-century British society was changing rapidly due in part to industrialization and urbanization. Attempts to address the new social and moral problems that arose in this period took the form of new economic theories and advocacy for political, social, and legal changes. However, these reforms often faced resistance from both the aristocracy and the lower classes in Britain. Alternatively, Anglicists such as Macaulay perceived Indian society to offer little in the way of insurmountable resistance and as a "laboratory of modernity."[13] Adam Smith elaborated laissez-faire economics using the East India Company as the embodiment of the hated

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[10] Edmund Burke, Works, 12 vols. (Boston, 1865) IX:455. Quoted in Bearce, British Attitudes Towards India, 16.
[11] T.B.M., "Sir James Mackintosh," Works, VIII: 444-5.
[12] Metcalf, Ideologies of the Raj, 28. Viswanathan, Masks of Conquest, 8.

mercantilist system; administrators such as Charles Grant and James Mill applied their Evangelical and Utilitarian doctrines to India through the East India Company and Board of Control;[14] Macaulay demonstrated his humanitarian concern by speaking against slavery in India; English literary education was institutionalized in India prior to England; Jeremy Bentham's 1793 essay *On the Influence of Time and Place in matters of Legislation* was composed with idea of transplanting a codified law into India;[15] and Macaulay's 1837 draft penal code was, in part, an attempt to modernize England's own system of laws.[16] Macaulay said that the enterprise to draft a penal code for India, which encompassed the essence of universal jurisprudence and utility "specially belongs to a government like that of India: to an enlightened and paternal despotism."[17]

In June 1834, Thomas Babington Macaulay, the English lawyer and Whig politician, arrived in India as the newly appointed legislative member of the Council of India.[18] He later assumed direction of the Indian Law Commission to draft a code of criminal law for India. It has been said that he peculiarly blended the practical aims and spirit of Free Trade, Evangelicalism, and Utilitarianism, and purged them of dogma to voice an empirical liberalism.[19] He was raised in Evangelical circles; his father, Zachary Macaulay, was a prominent member of the Clapham Sect, a pressure group for humanitarian and philanthropic reform. Their presence was most notable in the anti-slavery movement and for their leading role in the effort to open up India to missionaries

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[13] Ann Laura Stoler, Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things (Durham: Duke University Press, 1995), 15.

[14] Charles Grant was the President of the Board of Control and James Mill was the Chief Examiner for the East India Company. The Board of Control was Parliament's representative in the system of 'Dual Control' established for the government of India in 1784. The Court of Directors represented the proprietors of the East India Company.

[15] Stokes, The English Utilitarians and India (Oxford: Oxford University Press 1959), 51.

[16] David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," Modern Asian Studies 32:3 (1998), 514.

[17] Hansard Debates Third Series, Vol. XIX, 531-33. Quoted in Janaki Nair, Women and Law in Colonial India: A Social History (New Delhi: Kali for Women, 1996), 29.

[18] The Governor-General in Council or the Council of India, by proclamation of the 1833 Charter Act, composed the Government of India. It consisted of the Governor-General, two other officials and the fourth or legislative member. See, A.B. Keith, A Constitutional History of India, 1600-1935 (Allahabad: Central Book Depot, 1961), 131-36.

[19] Stokes, The English Utilitarians and India, xiv.

through the 1813 Charter Act. The group took its name from the predominantly middle class and lower gentry area on the outskirts of London where many of the 'members' lived. Zachary Macaulay was a ship owner and merchant trading with Africa and the East Indies. He brought considerable practical experience to this group. He had worked both as a bookkeeper on a Jamaican sugar plantation that used slave labour and as the Governor-General of a freed slave settlement established by Evangelicals in Sierra Leone. Zachary Macaulay demonstrated a vital component of Evangelical attitudes to social problems: they were essentially moral. His involvement with the Religious Tract Society, Church Missionary Society, and the Society for the Suppression of Vice indicate his efforts to root out immorality. The humanitarian fervor that surrounded Macaulay in his youth remained prominent in his later career as a politician, writer, and law commissioner. His first public oration was at a meeting of the Society for the Mitigation and Abolition of Slavery in 1823, and his first article published in the *Edinburgh Review*, "The West Indies," was on slavery.[20] Thomas Macaulay, though educated at a private school with strong Evangelical connections, later distanced himself from extreme Evangelicalism, though he shared their humanitarian spirit, upheld Christian values, and continued the process of deploying bourgeois morality through education and legislation.

Anglican Evangelicalism had its roots in gentry families of declining wealth and status and found popular support in the middle class during the religious revival of the late eighteenth century alongside Methodism, Unitarianism, and other Dissenting religious movements.[21] Evangelicals generally despised the vice and sloth of the aristocracy, but also the moral depravity of the working class. The social problems and the generalized disreputable character of the working class were often attributed to a depraved moral environment. This allowed for a focus on moral reform rather than on poor working conditions, causes of disease, the general poor health of the poor caused by malnutrition, inadequate housing, and other deplorable physical conditions.[22] In India,

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[20] Clive, Macaulay, 71. T.B.M., "The West Indies," Edinburgh Review XLI (1825), 464-88.
[21] Leonore Davidoff and Catherine Hall, Family Fortunes: Men and Women of the English Working Class, 1780-1850 (Chicago: University of Chicago Press, 1987), 73.
[22] For example, Edwin Chadwick, poor law administrator and public health 'visionary', developed the ideas of sanitation and filth, both moral and physical, to justify the Poor Laws which focused on eradicating

Evangelicals believed that the despotic moral forces of religion, Hindu Law, and the tyranny of the Brahmins, extinguished any signs of virtue.[23] Morality and respectability could only be imparted and superstition cleared through English education. It fulfilled the moralizing function that in England was fulfilled by the religious curriculum in parish and charity schools, but was not available in India due to the policy of religious nonintervention.[24] The innately depraved Indian 'other' could hope for sudden transformation through the moral action of instruction in English literature.[25]

Macaulay's infamous Indian Education Minute of February 1835 outlined an Anglicist program for implementing civilization and moral improvement.[26] "The great question[s]," as Macaulay outlined them, "English or Sanskrit – Newton or Ptolemy, - the Vedas or Adam Smith, - the Mahabharas or Milton, - the sun round the earth or the earth round the sun, - the medicine of the middle ages or the medicine of the nineteenth century."[27] were about the status of knowledge itself. British knowledge was, in Macaulay's estimation, superior. He wrote: "I have never found one of them [Orientalists] who could deny that a single shelf of a good European library was worth the whole native literature of India and Arabia."[28] Western knowledge was perceived to be superior, in part, because of its civilizing value. Recent studies have suggested that Evangelicalism was not critical in Macaulay's opinions on education and that he never urged "the study of English on purely humanistic or moral grounds."[29] While this may be born out in the details, it certainly is not true of the spirit. Gauri Viswanathan's

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insolence and vice through jobs in workhouses rather than on the deplorable physical conditions of working class domestic and working environments. See Christopher Hamlin, Public Health and Social Justice in the Age of Chadwick: Britain, 1800-1854: Cambridge History of Medicine (Cambridge: Cambridge University Press, 1998).

[23] E. T. Stokes, The English Utilitarians in India, 31-2.

[24] Ibid., 7.

[25] Viswanathan, Masks of Conquest, 19.

[26] T.B.M., "Minute by the honourable T.B. Macaulay Esquire dated 2nd of Feb. 1835," Macaulay MSS. 0.15.73. #1. Macaulay's minute was written after a course of action had been decided upon by Governor-General William Cavendish Bentinck. It echoed Bentinck's program for moral reform. Bentinck's written response to the minute was: "I give my entire concurrence to the sentiments expressed in this minute." Clive, Macaulay: The Shaping of the Historian (Cambridge Mass.: Harvard University Press, 1973), 376.

[27] T.B.M. to Sir John Hobhouse, 15 September, 1835. BP/47227/#175.

[28] T.B.M., "Minute by the honourable T.B. Macaulay Esquire dated 2nd of Feb. 1835," Macaulay MSS. 0.15.73. #1.

[29] Viswanathan, Masks of Conquest, 145. See also Clive, Macaulay, 59.

contention that Macaulay separated the cultural value of English literature from the moral value ignores the fact that there was an immensely important moral component inherent within the cultural. Filtration Theory, first enunciated by Holt Mackenzie (Secretary to the Bengal Government in the Territorial Department, 1817-31) in 1823 and later elaborated by Macaulay, required an educated elite who, like the British middle class, were expected to be the agents for a widespread diffusion of western ideas and *morality*. A process of downward filtration was necessary for this knowledge to impact upon people for whom formal education was often unattainable for economic and cultural reasons.[30] The British bourgeoisie, guardians of culture, civilization, individual rights, and morality, employed education as an agent of improvement – socially, economically and morally. Macaulay's 1835 minute on education owes much to the Evangelicalism of Charles Grant.[31] He wrote that it was important to encourage the development of an English-educated middle class "who may be interpreters between us and the millions whom we govern – a class of persons Indian in colour and blood, but English in tastes, in opinions, in *morals*, and in intellect."[32] The moral was inseparable from the cultural. This is also evident in Governor-General Bentinck's 1835 Indian Education Act. The most revolutionary aspect of the act was not the institutionalization of English as a medium of instruction in India as this had been available as an option for some time; it was in its endorsement of English as a vehicle for spreading moral and religious values.[33] Bentinck believed education was a necessary measure to civilize Indian society. "General education is my panacea for the regeneration of India. The ground must be prepared and the jungle cleared away before the human mind can receive, with any prospect of *real* benefit, the seeds of improvement."[34]

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[30] J.F. Hilliker, "The Creation of a Middle Class as a Goal of Educational Policy in Bengal 1833-54," in Indian Society and the Beginnings of Modernisation c. 1830-1850, eds. C.H. Phillips and M.D. Wainwright (London: School of Oriental and African Studies, 1976), 31.
[31] Stokes, The English Utilitarians and India, 57.
[32] T.B.M. "Minute by the honourable T.B. Macaulay Esquire dated 2nd of Feb. 1835," Macaulay MSS. 0.15.73. #1. Italics added for emphasis.
[33] Viswanathan, Masks of Conquest, 44.
[34] Bentinck to Money, 1 June, 1834. PC/PwJf/2643/i.

The Age of Reform is most associated with the Governor-Generalship of William Cavendish Bentinck (1828-1835). His social and institutional reforms bore the influence of Evangelicalism and Utilitarianism, both of which shared a social origin in bourgeois dissent. Together Utilitarianism and Evangelicalism were integral to the elaboration of a program to reconcile the paradox of liberalism and autocratic imperial rule. The new imperial imperative was to civilize, not subdue; to create a wealthy orderly society, of which the measure was the respectable bourgeoisie. Radhika Singha has called this program the elaboration of paramountcy.[35] The British, as the paramount presence in India, both politically and morally, were obliged to present themselves as the reference point for the most enlightened and civilized legislation. Macaulay wrote:

> What is power worth if it is founded on vice, on ignorance, and on misery; if we can hold it only by violating the most sacred duties which as governors we owe to the governed, and which, as a people blessed with far more than an ordinary measure of political liberty and of intellectual light, we owe to a race debased by three thousand years of despotism and priestcraft? We are free, we are civilized, to little purpose, if we grudge any portion of the human race an equal measure of freedom and civilization.[36]

The reform of government was central to the Utilitarian effort in India. In his *History of British India*, which helped to secure him a job as Chief Examiner in the East India Company, James Mill concluded that India had never realized a high state of civilization, which he defined in terms of rational government, English art, and literature. In his estimation, the existing institutions of government in India did not fulfill the principle of utility: that the measure of an action or institution is its usefulness, and that the aim of an action should be the happiness of the greatest number. Mill ascertained that India, by the very nature of its despotic institutions, resided near the bottom of the scale of civilization. However, the pinnacle of this hierarchy, representative democracy, could only be half applied to India for although India needed good government, it was not ready for

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[35] Singha, A Despotism of Law, 172.
[36] T.B.M., "Government of India," Works, XI: 585.

representative government. The despotic nature of Indian governance rested on the depredation of the many by the few and the absence of individual rights. The resulting poverty brought about the problem of moral vices, which could only be alleviated by revolutionizing the government through law and legislation. India most clearly exposed the paradox between the principle of liberty and that of authority resident within Utilitarian doctrine.[37] Their vision for civilizing India and liberating it from the clutches of despotic institutions was dependent on legislating through an authoritarian imperial state. The principle of utility is apparent in Bentinck's reforms concerning government and the judiciary. Though not strictly a Utilitarian,[38] he held both James Mill and Jeremy Bentham in high esteem.[39] He concurred that India was not ready for representative government, but that it needed good government: a simple, inexpensive, conscientious administration and a simple, humane, uniform, and enforceable legal system. His judicial reforms simplified and streamlined the judicial administration by imposing control and uniformity upon revenue and judicial officers who had been hitherto complicit in a system that was 'miserably inefficient, ... in every branch ... revenue, judicial and police, it has sadly failed."[40]

The influence of Evangelicalism on Bentinck was both familial and professional. The deep Evangelical connections of his niece and her family were critical, as was his relationship with Charles Grant, a leading member of the influential Evangelical Clapham Sect and the President of the Board of Control. Though Bentinck's Evangelicalism was moderate in tone, its emphasis on salvation for every human soul led him to act on behalf of other human souls – to provide them with the opportunity to attain the highest good. Bentinck was concerned with the souls of his Indian subjects. This concern led him to topics of reform that were "repugnant to the best feelings that Providence has planted in

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[37] Stokes, The English Utilitarians and India, viii.

[38] John Rosselli, Lord William Bentinck: The Making of a Liberal Imperialist, 1774-1839 (Berkeley: University of California Press, 1974), 321-2.

[39] Prior to leaving for India Bentinck reportedly stated to James Mill that "I am going to British India, but I shall not be Governor-General. It is you that will be Governor-General." Quoted in Stokes, The English Utilitarians and India., 51.

[40] Bentinck to Money, 1 June , 1834. PC/PwJf/2643/i. For charts outlining his judicial reforms see Stokes, The English Utilitarians and India, 142-3.

the human breast:"[41] sati, slavery, mutilation, and thagi. Sati, or widow immolation, had been a subject of concern for East India Company administrators since at least 1787.[42] However, no formal regulation abolishing the act was passed until 1829 because it was believed that the ritual was embedded in the Hindu religion, and therefore was not to be interfered with. Bentinck's justification of Regulation XVII of 1829 on the abolition of sati relied upon a belief in the superiority of British morality and his obligation to impart it. He wrote: "now that we are supreme, my opinion is decidedly in favour of an open and avowed prohibition, resting entirely on the moral goodness of the act, and our power to enforce it."[43] Similarly, the preamble to Regulation II of 1834 to abolish corporal punishment declared that the paramount power ought to present itself as the reference point for the "most enlightened legislation," and the thagi campaigns of the 1830s were an aggressive program of eradication based on the argument that the East India Company had a moral obligation to root out the evil which underlay it.[44] Bentinck found in Macaulay an administrator who identified with his reforming spirit, and the Evangelical and Utilitarian influences that were instrumental in the elaboration of paramountcy. Macaulay's inscription on Bentinck's statue in Calcutta expressed his respect for Bentinck and recognized the moral obligation they both felt to 'civilize' India.

> To William Cavendish Bentinck ... Who infused into oriental Despotism the spirit of British Freedom: Who never forgot that the end of Government is The Happiness of the Governed: Who abolished cruel rites: Who effaced humiliating distinctions... Whose constant study it was, to elevate the intellectual And moral character of the Nations committed to his charge...[45]

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[41] Bentinck's evidence to Select Committee on Steam Navigation with India PP 1837, Vol. VI, 551. Quoted in Roselli, Lord William Bentinck, 66. See pages 61-6 for the influence of Evangelicalism on Bentinck.
[42] The first official reports of the practice were in 1787, 1788, and 1789, and the first recorded discussion of sati's legality was in February of 1789. Anand A. Yang, "Whose Sati? Widow Burning in Early Nineteenth Century India," Journal of Women's History 1:2 (1989), 11-12. Lata Mani, Contentious Traditions, 17.
[43] Bentinck, "Minute on Sati, 8 November, 1829." The Correspondence of Lord William Cavendish Bentinck, Ed. C.H. Phillips, 2 vols. (Oxford: Oxford University Press, 1977), II: 337.
[44] Singha, "'Providential' Circumstances: The Thuggee Campaign of the 1830's and Legal Innovation," Modern Asian Studies 27:1 (1993), 88. Singha, A Despotism of Law, 172-3, 234-5, 250-1.
[45] T.B.M. "Inscription on the Statue of Lord Wm. Bentinck in Calcutta," Works, XII: 501.

Macaulay, like his father and Bentinck, demonstrated a vital component of Evangelical attitudes to social problems: he believed that they were essentially moral. His early *Edinburgh Review* articles on Machiavelli, Hallam, and the social and industrial capacities of Negroes argued, similarly to James Mill, that morality was a product of circumstances produced by the social and political institutions of a given period.[46] Macaulay was an outspoken advocate for the 1832 Reform Bill in England which restructured the geographical representation in the House of Commons and redefined who had the right to vote, thereby increasing the political voice of the middle class. Macaulay recognized that the existing political institutions needed reform in order to incorporate the middle class into English political culture, and feared the consequences should they be excluded.

> The danger is terrible. The time is short. If this bill should be rejected, I pray to God that none of those who concur in rejecting it may ever remember their votes with unavailing remorse, amidst a wreck of laws, the confusion of ranks, the spoilations of property, and the dissolution of social order.[47]

Similar to Utilitarian philosophy, it is implicit in his argument that the moral environment is the product of social and political institutions. Macaulay was probably first introduced to the principles of Utilitarianism, to the extent of questioning existing institutions based on the criterion of utility, while studying law at Cambridge.[48] Though his *Edinburgh Review* essays in response to James Mill established a clear line between the Utilitarian conception of government, replete with democratic tendencies, and his own, [49] Macaulay certainly questioned the utility of many institutions. This questioning

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[46] Clive, Macaulay, 105. T.B.M., "Machiavelli," Works, VII: 63-113. Originally published in March 1827. T.B.M., "Hallam's Constitutional History," Works, VII: 221-326. Originally published in September 1828. T.B.M., "Negroes," Edinburgh Review XVLI (1827), 383-423.
[47] T.B.M., "A Speech," 2 March 1831, Works, XI: 425-6.
[48] Clive, Macaulay, 62-5.
[49] The essays by Macaulay in the Edinburgh Review, and those by James Mill and the Utilitarians in the Westminster Review have been reprinted, accompanied by a lucid analysis of the debate, in Jack Lively and John Rees, Utilitarian Logic and Politics: James Mill's 'Essay on Government', Macaulay's critique and the ensuing debate (Oxford: Clarendon Press, 1978).

propelled the endeavor and formed the informing spirit behind Macaulay's draft penal code of 1837. This influence is evident in his 1833 Charter Act Speech, in which he outlined provisions and a rationale for a code of laws, in his 1835 instructions for the composition of the code, in the introductory notes to the code, in his private correspondence, and in the form of the draft penal code itself.

In June of 1832 Macaulay was appointed to the Board of Control for India, replacing influential Whig intellectual and lawyer Sir James Mackintosh, and was subsequently promoted to secretary. Once in office Macaulay immersed himself in the study of India, reporting to his sisters in June that he was "already deep in Zemindars, Ryots, Polygars, Courts of Phousdary, and Courts of Nizamut Adulut."[50] In many ways he found the work at the Board of Control more rewarding than English politics, which provided neither financial security nor political independence. At the Board of Control and in his later "exile" in India he found an arena to deploy Utilitarian ideas for institutional reform and Evangelical ideas about morality and respectability.[51] From his post on the Board of Control, his assistance to prominent Evangelical and President of the Board, Charles Grant, was integral in the preparation of the 1833 Charter Act. He believed that the program of reform, for which the Act made provision, could be applied with greater ease in India than in Britain. His Government of India speech on July 10, 1833 was presented to a considerably reduced House of Commons. Macaulay found the lack of interest in Indian affairs advantageous because it "has enabled us to effect some most valuable improvements with little or no opposition."[52] This speech, made on the occasion of the second reading of the Act, outlined the Utilitarian program he envisioned

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[50] T.B.M. to Hannah and Margaret Macaulay, 10 June, 1832, Thomas Pinney ed., The Letters of Thomas Babington Macaulay, 4 vols. (Cambridge: Cambridge University Press, 1974), II: 129.

[51] Exile was the word Macaulay used to describe his time in India to his sisters. T.B.M. to Selina and Frances Macaulay, 11 September, 1837, Pinney, ed., Letters, III: 223.

[52] T.B.M to Margaret, 17 July, 1833, Pinney, ed., Letters, II: 272. Later Sir James Fitzjames Stephen would also suggest that the liberal administrative state was easier to implement in India because the government did not have to deal with public opinion. "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." Sir James Fitzjames Stephen, A History of the Criminal Law of England, 3 vols. (London: Macmillan and Co., 1883), III: 304.

for India; how the application of Bentham's science of jurisprudence to India would assist in the production of a morally and politically respectable civilization.

Macaulay expressed his admiration for Mill's *History of British India*, which had demonstrated the cultural and political backwardness of Indian civilization. However, due to British influence, Macaulay perceived that the

> bloody and degraded superstitions [were] gradually losing their power. I see the morality, the philosophy, and the taste of Europe, beginning to produce a salutary effect on the hearts and understanding of our subjects. I see the public mind of India, that public mind which we found debased and contracted by the worst forms of political and religious tyranny, expanding itself to just and noble views of the ends of government and of the social duties of man.[53]

This new Indian public mind could be further developed, he argued, through the good government – though certainly not representative government – that the 1833 Charter Act provided. Macaulay combined Evangelical and Utilitarian influences to produce a rhetoric that emphasized improvement, especially moral improvement, through legislation.

One component of good government was a unified code of laws. In February and June of 1832, James Mill, a leading Utilitarian figure and the Chief Examiner for the East India Company, gave evidence before Select Committees on the Affairs of the East India Company on the occasion of the Charter's renewal. He testified that the establishment of good government in India required a uniform code of laws that applied to all persons in India, regardless of race, religion, or social status.[54] Mill outlined how he would compose a law commission for the production of such a code. The commission had to be small as the political and moral condition of India put a representative body out of the question. Macaulay agreed that the "work of digesting a vast and artificial system of unwritten law is far more easily performed, and far better preformed by few minds than many..."[55] Mill

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[53] T.B.M., "Government of India Speech," 10 July 1833, Works, XI: 567.
[54] Evidence of James Mill, 21 February, 1832, "Minutes of Evidence Before Select Committee," PP, IX (1832), 46.
[55] T.B.M., "Government of India Speech," 10 July, 1833, Works, XI: 582.

recommended that the commission be composed of a person familiar with the laws of England, a Company Servant with knowledge of the "native character," and a "native" of the highest character who possessed a knowledge of local legal systems. At the head of this commission, proposed Mill, should be "a man capable of bringing to the great work the aid of general principles: I mean, in short, a person thoroughly versed in the philosophy of man and government."[56] The rest of commission, argued Mill, was mainly to assist the head as knowledge of local law was of minor importance and often detrimental to the project of codification.[57] Jeremy Bentham, in his 1822 *Codification Proposal* on the "Idea of a Proposed All-Comprehensive Body of Law," urged that the composer of a code of laws should be a foreigner, as a 'native' does not posses the appropriate intellectual nor moral aptitude.[58] Macaulay publicly reiterated Mill's proposal of a "Commission for the purpose of digesting and reforming the laws of India, so that those laws may, as soon as possible, be formed into a code."[59]

He forecast a system of laws that would operate according to one simple principle: "uniformity where you can have it; diversity where you must have it; but in all cases certainty."[60] The criminal justice system as it existed in India in 1833 certainly did not operate in accordance with any of these. There were "several systems of law widely differing from each other, but coexisting and coequal."[61] Islamic Law had been administered in South Asia for centuries by various sultanates, the Mughals and their successor states, and formed the basis for criminal law in most of Colonial India. In the Bengal and Madras presidencies this had been overlaid and modified by Company Regulations and circular orders that had been prepared to address specific crimes, such as Regulation XVII of 1829 on the abolition of sati.[62] In Bombay criminal law had been

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[56] Evidence of James Mill, 21 February, 1832, "Minutes of Evidence Before Select Committee," PP, IX (1832), 46.
[57] Jeremy Bentham, "Codification Proposal," The Works of Jeremy Bentham, Ed. John Bowering, 11 vols. (New York: Russell & Russell Inc., 1962), IV:562.
[58] Ibid., 560-61.
[59] T.B.M., "Government of India Speech," 10 July 1833, Works, XI: 578.
[60] Ibid., 582.
[61] Ibid., 579.
[62] There was no uniformity between these two presidencies though. The regulations for each developed in relative independence from one another.

based on either Hindu or Islamic law depending on the personal law of the defendant. In 1822 Governor Mountstuart Elphinstone (1819-1827) wrote: "We do not as in Bengal profess to adopt the Mohammedan code. We profess to apply that code to Mohammedan persons, the Hindoo code to Hindoos, who form by far the greatest part of the subjects."[63] In 1827 this system was supplanted by Elphinstone's 1827 code, which was little more than a digest of existing regulations and orders.[64] Furthermore, this "impenetrable chaos" of laws was administered by an equally non-uniform system of courts.[65] Within the presidency towns of Madras, Bombay, and Calcutta, criminal law was administered by Supreme Courts, which administered English criminal law.[66] Outside the presidency towns there were three levels of courts for criminal offences: the district magistrate; the Sessions, City, or Zillah Judge; and the chief criminal court in each presidency - the Sadr Nizamat Adalat in Bengal and the Sadr Foujdari Adalat in Madras and Bombay. The jurisdiction of each court was determined by the class and severity of the offence, and administered by the substantive law as described above.[67] The judicial function of the magistrate was limited to petty offences, such as abusive language, calumny, and minor assaults. Sessions Judges had jurisdiction over practically all offences and tried all offenders apprehended by the magistrates. They could impose a maximum fine of 14 years imprisonment. The Sadr Nizamat Adalat and the Sadr Foujdari Adalat were courts of reference and revision. Any cases punishable by death, transportation, or imprisonment beyond fourteen years were referred to the chief criminal court. Certain classes of

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[63] Quoted in A.C. Banerjee, English Law in India (New Delhi: Abhinav Publications, 1984), 39.
[64] Act XIV of 1827 (Bombay).
[65] The system of laws was described as such in William H. Morely, An analytical Digest of all the reported cases decided in the supreme courts of judicature in India, in the courts of the hon. East-India company, and on appeal from India, by Her Majesty in council. Together with an introduction, notes, illustrative and explanatory, and an index, 3 vols. (London: William H. Allen and Co., 1850), I:i.
[66] The Superior Courts were established by Regulating Acts of 1773, 1800, and 1823 for Bengal, Madras, and Bombay respectively. Much historical work has been done on the legal system in India. In addition to Ibid., See: B.B. Misra, The Judicial Administration of the East India Company, 1765-1781 (Delhi: Motilal Banarsidass, 1961; A.C. Banerjee, English Law in India; M.C. Setalavad, Role of English Law in India (Jerusalem: The Hebrew University, 1966; J.D.M. Derret, Religion, Law and the State (New York: The Free Press, 1968).
[67] Jorg Fisch, Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal law 1769-1817 (Wiesbaden: Franz Steiner Verlag, 1983), 44. B.B. Misra, The Administrative History of India 1834-1947 (Oxford: Oxford University Press, 1970), 522-3.

offence, such as rape, had to be sent to them for reference.[68] Of this system Macaulay said that there existed

> in our Eastern Empire Hindoo law, Mahometan law, Parsee law, English law, perpetually mingling with each other and disturbing each other, varying with the person, varying with the place. In one and the same and the same cause the process and the pleadings are in the fashion of one nation, the judgement is according to the laws of another.[69]

India was, Macaulay believed, the ideal country in which to implement a code of laws. "I believe that no country ever stood so much in need of a code of laws as India; and I believe also that there never was a country in which the want might so easily be applied."[70] Much attention has been focused upon the first part of this statement,[71] but the subjunctive clause is perhaps more important in its indictment of the code in the use of India as a laboratory for the liberal administrative state. Certainly it demonstrates that the authoritarian potential of utilitarianism, as compared to its liberating urges, was in the ascendant in India; the 'happiness' of the people was more important than their freedom. "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 government."[72] But, it also suggests his knowledge of the history of, and frustration with, the pressure for radical legal reform in England.

The justification that no country needed a code more than India was perhaps no more than a rhetorical flair as England's criminal law was certainly no more uniform than India's. The 'Bloody Code' was an accumulation of over 750 narrowly interpreted

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[68] Regulation XVII of 1817 (Bengal).
[69] T.B.M., "Government of India Speech," 10 July 1833, Works, XI: 579.
[70] Ibid., 579. He reiterated this point in the same speech. "As I believe that India stands more in need of a code than any other country in the world, I believe also that there is no other country on which that great benefit can more easily be conferred." p. 582.
[71] David Skuy's recent study has questioned this entire supposition by demonstrating that England's system of laws was just as confusing and non-modern as India's. Skuy, "Macaulay and the Indian Penal Code of 1862." His article was written as a corrective to the assumption in the literature that England's legal system was modern in 1834. See particularly Marc Galanter, "The Displacement of Traditional Law in Modern India," Journal of Social Issues 24:4 (1968), 65-66.

statutes that dealt with specific criminal acts rather than a species of crime. The result was a number of statutes that dealt with the same offence. Between 1826 and 1832 Robert Peel, acting upon the recommendations made by the Select Committees of 1800 and 1819, introduced and secured the enactment of eight Criminal Law Amendment Acts that consolidated and amended over 200 statutes.[73] However, these merely listed offences in a few statutes and failed to clearly define criminal acts and streamline procedure. In 1834, the year Macaulay arrived in India, the Royal Commission appointed to prepare a draft criminal code for England reported that it was impossible to draw written law and common law together as neither provided uniform rules or principles on a consistent basis, they were each internally contradictory, and case law was not located in any one place.[74] As early as 1818 Macaulay was fully aware that English law did not live up to the 'modern' standards he set for India's law in 1833. Upon the death of early nineteenth century legal reformer Sir Samuel Romilly (1757-1818), Macaulay wrote:

> Poor Sir Samuel ... How long may a penal code at once too sanguinary and too lenient, ... and half undefined and loose as the common law of a tribe of savages be the curse and disgrace of this country? How many years may elapse before a man who knows like him all that law can teach, and possesses at the same [time] like him, a liberality and discernment of general rights ... shall rise again to ornament and reform our jurisprudence.[75]

Macaulay was well aware of the challenge of radical legal reform, and used it to justify his decision to begin the codification process with the criminal law. He wrote:

> ... there is no department of law which so early attracted the attention of philosophers, or which still excites so general an interest among reflecting and reading men. It is now more than seventy years since the famous treatise 'Dei delitti e delle peae' acquired an European reputation, and from that time down to the present day a succession of

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[72] T.B.M., "Government of India Speech," 10 July 1833, Works, XI: 582.
[73] Skuy, "Macaulay and the Indian Penal Code of 1862," 526-31.
[74] Ibid., 533.
[75] T.B.M. to Zachary Macaulay, 9 November, 1818, Letters, Ed. Pinney I: 104-5.

> men eminent as speculative and as practical Statesmen has been engaged in earnest discussion of the principles of penal jurisprudence.[76]

Law reform engaged "eminent" statesmen in both India, such as Sir William Jones, and England, such as Sir Samuel Romilly and Sir James Mackintosh. Advocacy for reform of both systems had many parallels. Certain existing punishments within both Indian and English law were believed to be too cruel. Reformers desired to limit judicial discretion through a codified law containing strict parameters for sentencing. An increased emphasis on written texts over customary law resulted in numerous informal attempts to consolidate the law for the purposes of research and education as well as formal attempts at consolidation for the purposes of administration. Radical reformers contended that consolidation was too conservative and that more radical reform was needed in order to produce a truly uniform and certain system of laws according to general and scientific laws of jurisprudence. Finally, reformers in both India and Britain confronted a fear of perceived criminal classes and elaborated a program for the imposition of a new bourgeois morality.

Within the 750 statutes comprising the English 'Bloody Code,' there were 200 distinct capital offences.[77] Though recent studies have problematized the historical reality of the 'bloody code' and the humanitarian justifications provided for its slow repeal,[78] reformers, fueled by new penal theories that focused on rehabilitative as opposed to punitive sentencing, did, nonetheless, attack the perceived cruelty and viciousness of the

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[76] T.B.M. "Minute by the Hon'ble T.B. Macaulay," 4 June, 1835, Macaulay MSS. 0.15.73. #2.

[77] Leon Radzincowicz, A History of English Criminal Law and its Administration from 1750, 5 vols. (London: Stevens & Sons Limited, 1948), I: 575 n. 25. Also Skuy, "Macaulay and the Indian Penal Code of 1862," 525.

[78] Clive Emsley, Crime and Society in England 1750-1900 (London: Longman, 1987), 33 and 251-3. V.A.C. Gatrell, The Hanging Tree (Oxford: Oxford University Press, 1994), Skuy, "Macaulay and the Indian Penal Code of 1862," 525-7. Douglas Hay, "Property, Authority and Criminal Law" in Hay et al. eds., Albion's Fatal Tree: Crime and Society in Eighteenth Century England (London, 1975), 17-64. These studies have problematized this period by demonstrating: that ninety-five percent of prosecutions in the second half of the eighteenth century were based on pre-1742 statutes; that there were far more executions during the late sixteenth and early seventeenth centuries than during the eighteenth; and that there was a reduction in the number of capital punishments due to a more efficient prison system, and because selfish reasons, such as the maintenance of the dignities of the hangman and other officials and fear of the crowds, outweighed humanitarian ones.

body of laws.[79] Similarly in India, English judges, lawyers, and legal scholars such as Sir William Jones, had attacked what they perceived to be an overly sanguinary criminal law. By 1817 much of the Islamic law relating to punishment had been replaced by an ad hoc code of Company Regulations.[80] These reforms, based on recommendations made by Hastings in 1773 and confirmed by Governor-General Charles Cornwallis' (1786-1793) enquiry in 1789, were intended to eliminate apparently cruel penalties.[81] Under Mughal practice, crimes such as unlawful intercourse, theft, and highway robbery, carried fixed and immutable punishments (*Hadd*), including death. Though it was generally felt that Islamic law contained too few capital offences,[82] certain punishments were construed as barbaric. In 1790 the Magistrate of Burdwan reported the case of fifteen prisoners who had been sentenced to mutilation of their right hand and left foot for theft. He wrote that in these cases the punishment brought "a slow, cruel and lingering death ... [and] cruelty becomes the emblem of justice, and death, mercy."[83]

Reformers made these arguments despite the fact that the indicated cruelties and death sentences were only rarely enforced in England and India. Judges commonly used discretion in their sentencing, which led to contradictions in the case law. In England only perpetrators of the most vicious crimes were sentenced to death. A strict interpretation of statutes allowed judges to avoid passing a death sentence, and juries were also reluctant to prosecute in these cases.[84] In India reformers also pointed to the limited use of capital punishment.[85] Conviction in capital cases was difficult to attain because, prior to the amendments to the Islamic law of Evidence in 1817,[86] confessions had to be discouraged by judges, circumstantial and written evidence were not admitted,

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[79] For fuller discussions on this see Michael Foucault, Discipline and Punish: The Birth of the Prison, trans. Alan Sheridan (New York: Vintage, 1977), and Michael Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850 (Hammondsworth, England: Penguin, 1989). 1st ed.1978.

[80] Fisch, Cheap Lives and Dear Limbs, 117.

[81] Ibid., 33-4.

[82] Ibid., 27.

[83] Quoted in B.B. Misra, The Central Administration of the East India Company, 1773-1834 (Manchester: Manchester University Press, 1959), 322.

[84] Skuy, "Macaulay and the Indian Penal Code of 1862," 526-7.

[85] Fisch, Cheap Lives and Dear Limbs, 27

[86] Act XVII of 1817 (Bengal). For and elaboration see Fisch, Cheap Lives and Dear Limbs, 82-4.

and interested parties, slaves, and women were not permitted to testify. This last exclusion made it extremely difficult to prosecute for rape as the required proof of eyewitness testimony from four free males was most often not possible.[87]

Even after 1817 though, advocates for Indian legal reform commonly echoed the 1834 Royal Commission's observation that English common law was administered inconsistently and arbitrarily.[88] British judges, unfamiliar with indigenous systems of law, were increasingly replacing their Indian counterparts in the late eighteenth century. They required easily accessible materials in order to ascertain the law and evaluate cases. The two methods that were employed to address this need relied on textual sources; legal prescriptions of Indian law officers, and digests of Indian law. Officers of Islamic law, *muftis*, prepared *fatwas* (legal prescriptions) to guide English judges in response to abstract and hypothetical questions posed to them by the judges. The *fatwas*, necessarily abstract themselves, were then applied to cases resulting in a rigid application of the Shari'a. However, *fatwas* often reflected the latitude that existed in the application of the Shari'a by prescribing different sentences to apparently similar cases. Administration of the Shari'a, or established law, was mutable based on the law of judicial practice or customary law.[89] Centuries of Islamic legal theory in the form of commentaries and interpretations had allowed leeway for the application of the Shari'a according to knowledge of local politics and relationships. The multiplicity of differences between and within regions and ethnic and religious groups in India led to considerable variety and interpretation. To British administrators the legal system appeared as though "it was a mere lottery."[90] Macaulay wrote:

> I asked a most distinguished civil servant of the company, with reference to the clause in this Bill [the 1833 Charter Act] on the subject of slavery, whether at present, if a dancing girl ran away from her

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[87] Fisch, Cheap Lives and Dear Limbs, 15

[88] First Report, Royal Commission on Criminal Law, PP, XXVI (1834), 4.

[89] In 1850 William H. Morely recognized the importance of precedent in Indian, which administrators and legal experts of the nineteenth century had not. "The practice of abiding by precedent is perfectly recognized by both the Hindu and Muhammadan laws..." William H. Morely, An analytical Digest of all the reported cases decided in the supreme courts of judicature in India, vii.

[90] T.B.M., "Government of India Speech," 10 July 1833, Works, XI: 580.

> master, the judge would force her to go back. "Some judges" he said "send a girl back. Others set her at liberty. The whole is a mere matter of chance. Everything depends on the temper of the individual judge."[91]

The inconsistent and arbitrary appearance of the *fatwas* resulted in a general mistrust of Indian law officers by East India Company officials. Sir William Jones, a Supreme Court Judge in Calcutta under the administrations of Hastings and Cornwallis and President of the Asiatic Society of Bengal, was suspicious of the diversity of opinion in the application of Islamic law. Though he felt that the imposition of a 'superior' English law was tyrannical, he also felt that English judges were at the mercy of native lawyers and legal scholars.

> ... if we give judgement only from the opinions of the native lawyers and scholars, we can never be sure that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my expertise justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers, in any case in which they could have the remotest interest in misleading the Court.[92]

Jones distrusted Indian law officers and their monopoly over indigenous legal knowledge. He studied Sanskrit in order to compile his own digest of laws in an effort to make systems of indigenous law better known to British judges and administered in a stable and consistent manner. Beginning with Warren Hastings, administrators focused on ancient written texts in order to quickly ascertain general legal rules and because it was believed that they contained unified systems of law, unchanged since remotest antiquity. The customary law of India was not as well recorded and so the British took for their point of reference the Shari'a, which gave it an importance that it had not held in practice. Hastings made the mistake of treating classical religious texts as unified and binding codes of law. He overlooked internal contradictions and varying levels of moral

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[91] Ibid., 580-81.

[92] Sir William Jones, quoted in J.D.M. Derrett, Religion, Law and the State (New York: The Free Press, 1968), 243.

approbation.[93] Nevertheless, he initiated a program of Oriental studies that included collecting knowledge about Indian systems of law.

Given the emphasis on texts and the mistrust of the *muftis*, administrators were eager to have English translations of Indian legal texts. Jones reinforced the contention that an historically fixed body of laws and codes had become corrupted over time by commentaries, accretions and interpretations, and sought out the most ancient and, therefore, the most authoritative legal texts. Jones proposed to Hastings that he compile a complete digest of Hindu and Islamic law. He found Nathaniel Brassey Halhed's English translation of a code that Hastings had commissioned eleven *pandits* (Hindu law officers) to compile to be badly marred.[94] In 1791 Charles Hamilton translated *al-Hidaya*, a compilation of Islamic legal opinions, into English and in 1792 Jones himself translated *al-Sirajiyya*, on the Islamic law of inheritance. H.T. Colebrooke completed Jones's translation on Contracts and Inheritances in 1797 and continued the quest to produce a more certain and uniform set of laws that British judges could administer independent of their law officers. In the nineteenth century, works such as W.H. MacNaghten's compilation of a number of *fatwa* along with his own observations in *Principles and Precedents of Mohammadan Law*, were used as textbooks. These works contributed to the production of an Islamic criminal law that, unlike English law, was seen to be fixed beyond the realm of judicial interpretation and discretion.[95]

Similarly, in eighteenth-century Britain there was an increased demand for digests and textbooks of English law. This demand was fueled by a sharpened concept of a legal "profession," increasingly formalized legal education and training, and the creation of University lecturing positions in English law.[96] William Blackstone, who began lecturing at Oxford in English Law in 1753, produced from his lecture notes a treatise that was

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[93] Michael R. Anderson, "Islamic Law and the Colonial Encounter in British India," in Islamic Family Law, Eds. Chibli Mallat and J. Connors (London: Graham and Trottman, 1990), 211-12.
[94] Nathaniel Brassey Halhed, A Code of Gentoo Laws, or, Ordinations of the Pundits (London, 1776).
[95] Anderson, "Islamic Law and the Colonial Encounter in British India," 215.
[96] A.H. Manchester, A Modern Legal History of England and Wales 1750-1950 (London: Butterworths, 1980), 52. This increase should not be overemphasized as formal education in law had mixed results, and university law faculties really only began to flourish in the late nineteenth century. University legal education prior to vocational training was made compulsory only in the twentieth century.

probably the most comprehensive study of English law since the thirteenth century.[97] *Commentaries on the Laws of England* provided law students with a sort of textbook. Moreover, it recognized the importance of law in written form and had the effect of consolidating criminal law. Blackstone divided the law into two types: common law (judge made or case law) and statute law (law established by Royal authority, whether by King or Parliament), which was declaratory of common law or remedial of some defects within. He perceived statutory law as paramount, though in practice case law was.[98] The imperative of statute law and the legislative supremacy of Parliament began to be established by Tudor Kings Henry VII and Henry VIII, who used Parliament to entrench their positions as sovereigns. Later legal experts, such as Sir Edward Coke, recognized that the power and jurisdiction of Parliament in making statutes "is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds."[99] Blackstone, a century later, wrote that to permit judicial review of unreasonable legislation "were to set judicial power above that of the legislature which would be subversive of all government."[100] A new reverence for the written text emerged with these new concepts of legislation, though until the nineteenth century most lawyers continued to regard the written law as technically inferior.[101] These same lawyers though, men such as Francis Bacon, Sir Edward Coke, and Sir Mathew Hale, prescribed the production of, or themselves produced, treatises and digests that were intended to simplify legal research, but had the added effect of stabilizing and consolidating statute and common law.

Francis Bacon (1521-1623) spent a portion of his life devising a way to simplify the law. In 1616 in his *Proposition touching the amendment of the Law* he proposed a plan to discard obsolete statutes, reconcile conflicting decisions, and prepare an

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[97] William Blackstone, Commentaries on the Laws of England. (1st ed. 1765-1769) 4 vols. (Chicago: University of Chicago Press, 1979). J.H. Baker, An Introduction to English Legal History, 3rd ed. (London: Butterworths, 1990), 161, 166.

[98] Blackstone, Commentaries on the Laws of England, I: 86. For an analysis of this see Manchester, A Modern Legal History of England and Wales 1750-1950, 22.

[99] Edward Coke, Treatises on the Laws of England, as quoted in Baker, An Introduction to English Legal History, 239.

[100] Blackstone, Commentaries on the Laws of England, I: 90.

[101] Baker, An Introduction to English Legal History, 250

authoritative statement of the law through digests of common and statute law.[102] Bacon did not wish to abolish common law (he also proposed the establishment of a law commission to revise these digests and keep them up to date), but merely to arrange the sources of law in order to simplify research. Interestingly, while Macaulay was preparing the draft penal code for India he was also writing an essay on Bacon. Macaulay described Bacon's work on English law as "the most arduous, the most glorious, and the most useful that even his mighty powers could have achieved..."[103] Following Bacon, Sir Edward Coke's *Institutes of the Laws of England* (1628) and Sir Matthew Hale's posthumous *History of the Common Law* (1713), and the most influential *History of the Pleas of the Crown* (1736), furthered the consolidation of English law for the purposes of education and research.[104]

Law reform through consolidation had the limited effect of removing the rust without affecting the substance.[105] Even formal consolidation through Peel's measures was too conservative for advocates of radical reform through codification, such as Jeremy Bentham, who wrote: "Mr. Peel is for consolidation in contradistinction to codification." He described Peel's object of consolidation as merely to "lighten the labour employed by learned gentlemen in making use of the index..."[106] Three men were particularly crucial in voicing the Benthamite program for reform: Sir Samuel Romilly, Sir James Mackintosh, and Henry Brougham. They also figured into and influenced Macaulay's life in various ways. One of the earliest advocates for radical reform of English law was Sir Samuel Romilly, whose death Macaulay had lamented in an 1818 letter to his father.[107] A lawyer, a writer, and an admirer of Jeremy Bentham, he published a series of articles advocating the promulgation of a law code.[108] Upon his death, Sir James Mackintosh,

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[102] Francis Bacon, Proposition touching the amendment of the Law (1616) as summarized in Baker, An Introduction to English Legal History, 250.
[103] T.B.M., "Lord Bacon," Works, VIII: 546.
[104] William Hale, The History of the Pleas of the Crown 2 vols. (London: Professional Books Limited, 1971).
[105] Skuy, "Macaulay and the Indian Penal Code of 1862," 530.
[106] Jeremy Bentham quoted in Stokes, The English Utilitarians and India, 203.
[107] T.B.M. to Zachary Macaulay, 9 November, 1818, Letters, ed. Pinney, I: 104-5. See n. 75 above.
[108] Skuy, "Macaulay and the Indian Penal Code of 1862," 525. On Romilly's campaign for reform see Radzincowicz, A History of English Criminal Law, I: 497-525.

whom Macaulay replaced on the Board of Control in 1832, took up the reform campaign. Mackintosh was an historian, an anti-slavery advocate, and an immense intellectual influence on both the Whigs and Macaulay, who late in life recalled what a kind friend Mackintosh had been to him early in his career.[109] Macaulay wrote only two essays while in India preparing the draft penal code: the one on Bacon and a lengthy one on Mackintosh. Though he wrote nothing specifically about Mackintosh's law reform efforts, he did praise him along with Jeremy Bentham because they both "obeyed the guidance of observation and reason."[110] In the 1820s Macaulay was in part propelled towards the Whig party and guided by a man central in the continuing debates surrounding law reform in the 1830s.[111] Henry Brougham, though not strictly a Benthamite, had a long-standing relationship with Bentham, and injected his principles into his 1828 law reform speech.[112] The efforts of these reformers resulted in three draft penal codes for England, but alas, nothing in legislation.[113] More importantly though their spirit in part drove Macaulay to codify a body of law for India.

James Mill labeled William Jones' program of consolidation in India conservative in much the same way and with much the same tone as Bentham had Peel's.[114] This criticism was based on his belief that India required a uniform and complete penal code based on General Principles, and an efficient system with which to administer them. Mill "was not aware that the history of them afford[ed] any great experience of their utility..."[115] Macaulay, himself critical of the system of laws in India, found digested laws and half measures to be unacceptable and inefficient. In June of 1836, Macaulay

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[109] Clive, Macaulay, 217.

[110] T.B.M., "Sir James Mackintosh," Works, VIII: 430. For details of Mackintosh's role as Romilly's successor see Radzincowicz, A History of English Criminal Law, I: 532-40.

[111] For Brougham's involvement in law reform see Michael Lobban, "Henry Brougham and Law Reform," English Historical Review 115:464 (2000), 1184-1215. On his relationship with Macaulay see Clive, Macaulay, 67, 234, 245-6.

[112] Lobban emphasizes Brougham's distance from Benthamism, while simultaneously delimiting the influence of Bentham in Brougham's position on law reform, which was more a critique of institutions than a program for reform. It was also a self serving initiative to revamp his career. However, his platform probably was not possibly without the influence of Bentham.

[113] The English Royal Commissions of 1843 and 1848 both produced draft penal codes as did James Fitzjames Stephen. See Skuy, "Macaulay and the Indian Penal Code of 1862," 518, 535-6.

[114] Javed Majeed, Ungoverned Imaginings: James Mill's History of British India and Orientalism (Oxford: Clarendon Press, 1992), 3.

recommended that the consolidation of the laws of Civil Procedure prepared by Frederick Millet, the secretary of the law commission, be "sent to the Law Commission for consideration at the proper stage of their proceedings" instead of being passed into law.[116] Macaulay, like Bentham before him, feared that consolidation might be substituted for codification and that conservatives may seize upon this to forestall radical schemes of renovation.[117]

The Law Commission appointed in 1834-35 embodied the spirit, though not the detail of Mill's proposed commission; its membership was not that defined by Mill, but it was small and led by a man "thoroughly versed in the philosophy of man and government." Macaulay accepted acting Governor-General Charles Metcalfe's request that he assume the head of the Indian Law Commission in May of 1835. On July 16, 1834 four men had been named to that Commission.[118] W.H. Macnaghten never served on the committee as Bentinck had requested him to remain in his capacity as the secretary to the Political, Revenue, and Judicial Departments and that Frederick Millet, an East India Company judge, be named secretary to the Commission. Charles Hay Cameron was named to the Commission because he had completely reformed judicial procedure and the judicial system in Ceylon.[119] Macaulay described Cameron as "an excellent commissioner."[120] Macaulay described the third commissioner, John M. Macleod, who had experience with the Madras judicial system, as a man that "has a really philosophical mind, and will be of great use."[121] Macaulay did not think as highly of the fourth commissioner, Bombay administrator G.W. Anderson, who he described as "a very good sort of person, but just as fit to be an opera singer as to be a law commissioner. I most earnestly wish that you could manage to have him sent back to Bombay as a member of

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[115] James Mill's evidence, 29 June 1832, PP, XII (1831-2), 120.
[116] T.B.M., "Mr. Millet's Draft of a Code of Civil Procedure for Bengal. The expected progress of codification for India," 6 June 1836. Macaulay MSS. 0.15.73 #3.
[117] Stokes, The English Utilitarians and India, 203.
[118] Legislative Despatch # 41 of 1834, 16th July. "India Public Department: Indian Law Commission," L/P&J/3/1197, O.I.O.C.
[119] Clive, Macaulay, 438.
[120] T.B.M. to John Cam Hobhouse, 15 September 1835. BP #175. Hobhouse was a friend of Macaulay's and at this time was President of the Board of Control.
[121] Ibid.

council there, and to furnish us with another member from England., - such a man as Cameron if possible."[122] Macaulay wrote his friend Thomas Ellis that he and his Law Commission, Cameron, Macleod, Anderson, and Millet, had "immense reforms in hand, - such as ... would make old Bentham jump in his grave."[123] Though he anticipated tremendous assistance from the entire Commission in preparing the draft penal code, the attention of the other commissioners was distracted by illness and other official duties; Macaulay was left to prepare the code himself.[124] In 1848 Macleod confirmed that Macaulay was the code's author. "I may state a fact already generally known when I say that Mr. Macaulay is justly entitled to be called the author of the Indian Penal Code." [125] The code had been prepared according to Bentham's dictum that the "greatest happiness of the greatest number requires that every draught [of a code of laws]... be, from beginning to end, if possible, the work of a single hand."[126] It had only been prepared this way because circumstance had dictated it. Macaulay was opposed to Bentham's dictum in the case of India. A unified code of law, he wrote, should be:

> entrusted to a single person. It was on this account that the Legislature of Louisiana though it advisable to entrust the work to Mr. Livingstone rather than to a Commission. In this country the case is different. ... [I]t would be quite impossible, I apprehend, to find in India a man capable of singly forming a good code for India.[127]

Despite this objection, Macaulay did essentially frame the criminal law of India on his own according to the general principles and informing spirit of Utilitarianism.

Bentham's *Codification Proposal* had anticipated Macaulay's draft penal code for India in four ways. Its underlying principle, which pervaded every section, was the

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[122] Ibid.
[123] T.B.M. to Thomas Ellis, 2 June 1835, Letters, ed. Pinney, III: 146.
[124] Macaulay explained the delays in the preparation of the code in a minute dated January 2nd 1837, "On the Constitution and Labours of the Law Commission," Macaulay MSS. 0.15.73 #4; and in the Introductory Report to the Draft Penal Code dated October 14 1837. PP, XLI (1837-38), 1-10.
[125] John M. Macleod, Notes on the Report of the Indian Law Commissioners on the Indian Penal Code (London, 1848), iv.
[126] Bentham, "Codification Proposal," The Works of Jeremy Bentham, IV:554.
[127] T.B.M., "On the Constitution and Labours of the Law Commission," 2 January, 1837, Macaulay MSS. 0.15.73 #4.

felicific calculus: the greatest happiness for the greatest number through the optimum balance between pleasure and pain. Macaulay's instructions for framing the code and the code itself echoed this principle. His instructions to the Law Commission stated that it "should be framed on two great principles - the principle of suppressing crime with the smallest possible infliction of suffering, and the principle of ascertaining the truth at the smallest possible cost of time and money."[128] Second, the first section of Bentham's proposal stated that the "greatest happiness of the greatest number requires, that it be provided with an all comprehensive body of law."[129] Macaulay intended his code to be just this. He wrote: " A code, I mean a code which deserves the name, - is not a mere series of unconnected provisions. It is one great and entire work, symmetrical in all parts, and pervaded by one spirit."[130] Based on this maxim, Macaulay ordered the Commission to "make this code *complete*. From the day when that code shall be promulgated, every other law whatever relating to criminal jurisprudence, ought to be at once abolished. Not only everything in the Code to be law, but nothing that is not in the Code ought to be law."[131] Third, Bentham stated that the laws should be uniform and precisely defined. Macaulay's code aimed at uniformity, the avoidance of vagueness by emphasizing precise definitions and concise expressions.[132] Finally Bentham stressed the importance of including explanatory notes to provide the rationale of the given laws.[133] The Law Commission agreed and appended explanatory notes to the code, "assigning their reason for all provisions of which the reasons are not obvious."[134] The principles of the code were largely influenced by those of Utilitarianism. The code's substantive law favoured

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[128] T.B.M. "By the Hon'ble T.B. Macaulay, President [should read a member] of the Council of the Governor General," 4 June 1835, Macaulay MSS. 0.15.73 #2.
[129] Bentham, "Codification Proposal," The Works of Jeremy Bentham, IV: 537.
[130] T.B.M., "On the Constitution and Labours of the Law Commission," 2 January 1837, Macaulay MSS. 0.15.73 #4.
[131] T.B.M. "By the Hon'ble T.B. Macaulay, President [should read a member] of the Council of the Governor General," 4 June 1835, Macaulay MSS. 0.15.73 #2.
[132] Ibid.
[133] Bentham, "Codification Proposal," The Works of Jeremy Bentham, IV: 538-45.
[134] T.B.M. "By the Hon'ble T.B. Macaulay, President [should read a member] of the Council of the Governor General," 4 June 1835, Macaulay MSS. 0.15.73 #2.

English forms at the expense of Indian law.[135] This had the effect of importing not only definitions of crime, but also the moral imperatives of bourgeois respectability, elaborated primarily through Evangelicalism, that informed them.

Reform efforts were rooted in the particular social conditions produced by industrialization, rapid population growth, and urbanization. New industrial cities presented new problems, such as poor housing and a lack of sanitation, which engaged early Victorian administrators, voluntary societies, philanthropic individuals, Evangelicals, and Utilitarians in a discourse of moralization. In these new centres, it was argued, "the restraints of character, relationship and vicinity are ... lost in the crowd .... Multitudes remove responsibility without weakening passion."[136] Thus, all social problems were the product of a morally deplorable environment. Edwin Chadwick, author of the 1848 Public Health Act, warned of moral danger from unhealthy and unregulated urban masses.

> ... noxious physical agencies depress the health and bodily condition of the population, and act as obstacles to education and moral culture; that in abridging the duration of adult life of the working classes they check the growth of productive skill, and abridge the amount of social experience and steady moral habits in the community: in that they substitute for a population that accumulates and preserves instruction and is steadily progressive, a population that is young, inexperienced, ignorant, credulous, irritable, passionate and dangerous.[137]

This, along with the publication of criminal statistics beginning in 1805, produced the perception of an increase in crime due to a criminal class, distinct from the urban working class. One contemporary journalist conveyed that he was "anxious that the public should no longer confound the honest, independent working men, with the vagrant beggars and pilferers of the country; and that they should see that one class is as

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[135] Skuy, "Macaulay and the Indian Penal Code of 1862," 538. Fisch, Cheap Lives and Dear Limbs, v. Bernard Cohn, An Anthropologist among the Historians, and other Essays (Delhi: Oxford University Press, 1987), 75.

[136] "Causes of the Increase of Crime," Blackwoods Edinburgh Magazine 56 (July-Dec., 1844), 7-8. Quoted in Martin Wiener, Reconstructing the Criminal: Culture, Law, and Policy in England, 1830-1914 (Cambridge: Cambridge University Press, 1990), 19.

respectable and worthy, as the other is degraded and vicious."[138] He defined "criminal tribes" as "that portion of our society who have not yet conformed to civilized habits."[139] In India also, increasingly rigorous attention was being paid to 'criminal communities' of robbers and plunderers in the 1830s, and as early as 1811 these had been identified as being devoid of morality.[140] Martin Wiener has contextualized the Utilitarians continued push for codification within the relationship between criminal law and morality. He has argued that "the tendency of Victorian legal change was towards establishing a more uniform and non discretionary body of laws and an explicit system of gradations of offences and penalties in closer correspondence with accepted moral rules."[141] Crime was thought to symbolize a general social disorder linked with self-management. Reform, therefore, should develop the character of individuals for the benefit of society.

Macaulay's 1837 draft penal code was a product of this spirit, this tendency, this imposition of a new morality that was defined in the early nineteenth century by members of the rising middle class. Central to the self-definition of bourgeois society was the elaboration of an ideology of public and private spheres. The work of Leonore Davidoff and Catherine Hall has been crucial to uncovering this convergence of class and gender history.

> The linkage of Christianity, godliness and the family was crucial. In the new alliances and alignments of the early nineteenth century,... Christians shared a core of beliefs in the central importance of family. The precise doctrines on manliness, femininity and the family within different religious groupings varied ..., but there was enough common ground to allow for the emergence of a set of beliefs and practices as to the distinct and separate spheres of male and female which provided the basis for a shared culture among the middle class by mid century.[142]

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[137] Edwin Chadwick, quoted in Ibid., 19.
[138] Henry Mayhew, quoted in Ibid., 23.
[139] Henry Mayhew and John Binney, The Criminal Prisons of London and Scenes of Prison Life (London: Griffin, Bohn, and Company, 1862), quoted in Ibid., 24.
[140] Singha, "'Providential' Circumstances: The Thuggee Campaign of the 1830's and Legal Innovation," Modern Asian Studies 27:1 (1993), 83-146.
[141] Weiner, Reconstructing the Criminal, 69.
[142] Davidoff and Hall, Family Fortunes, 74.

The next chapter will examine how Macaulay's conceptualization of masculinity, femininity, and appropriate sexual behavior was moderated and shaped by his Evangelical background, his bourgeois notions of respectability, and his personal relationships. The criminal law of rape will provide a type of case study to examine how these notions of gender, sexuality, and morality were stabilized and made normative through the text of the 1837 draft penal code and its relatively unmodified promulgation as the Indian Penal Code through Act XLV of 1860.

CHAPTER TWO: The Codification of Respectability: Thomas Babington Macaulay and the Bourgeois Feminine

The law pertaining to the offence of rape as proposed in Macaulay's 1837 draft penal code was largely based upon English legal definitions and as such imported certain cultural assumptions about men and women. English legal definitions of rape that had evolved over the eighteenth century became more rigid in the early nineteenth century. This rigidity coincided with the emergence of Evangelical and Utilitarian moral and jurisprudential philosophies that contributed to the production of a new legality that focused on the reform of character and behaviour. In the case of sexual offences, however, scrutiny of the behaviour and character of the victim was more likely than scrutiny of the accused. Her very act of voicing the 'unspeakable' and the 'atrocious' violated the virtue of feminine modesty, and was an admission of her compromised chastity. The cardinal virtues of feminine domesticity - modesty, chastity, submission, and piety - became increasingly stable symbols of bourgeois respectability in the early nineteenth century. This can be seen in Evangelical-influenced prescriptive literature concerning female behaviour and propriety and representations of middle class women in popular culture. Macaulay drew largely upon English definitions of rape and upon his Evangelical background in conceptualizing femininity, masculinity, and sexuality. His draft penal code stabilized and preserved these conceptions simultaneously.

The 1837 draft penal code defined the offence of rape in the following way:

> Sec. 359. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
>
> First: Against her will
>
> Secondly: Without her consent, while she is insensible.
>
> Thirdly: With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.
>
> Fourthly: With her consent, when the man knows her consent is given because she believes that he is a different man to whom she believes herself to be married.
>
> Fifthly: With, or without her consent, when she is under nine years of age.

> *Explanation.* – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.* – Sexual intercourse by a man with his own wife is in no case rape.
>
> Sec. 360. Whoever commits rape shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.[1]

Excepting the fifth circumstance and the prescribed punishment, this law was based upon English law and defined rape according to the act and to the behaviour of the accused.[2] The concept of consent, penetration as the act constitutive of the crime, and the exception of sexual intercourse between husband and wife from the definition of rape had precedent in the English legal tradition.

Indian legal definitions of rape focused on the relation and social status of the litigants. The earliest definitions of indigenous rape laws in the British colonial period are found in Halhed's translation of the *Code of Gentoo Laws*. All types of sexual offence were defined in the section on adultery, which loosely referred to any sexual behaviour, from "where, in a Place where there are no other Men, a Person, with Intent to commit Adultery, holds any Conversation with a Woman, and Winks, and Gallantries, and Smiles pass on both Sides" to "when the Man and Woman Sleep and Dally upon the same carpet, or in some retired Place kiss and embrace, and play with each others Hair..."[3] A matrix of fines, determined by the type of action, whether the action was forcible, consensual, or deceitful, the marital status of the woman, the character of the woman, and most importantly the relative caste status of the man and the woman determined punishments in over fifty individual definitions of the crime of adultery.[4] Though the concepts of consent, force, violence, and deceit were contained within the clauses pertaining to rape, the operative section of each clause in determining punishment was relative social status.

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[1] "Copy of the Penal Code Prepared by the Indian law Commissioners, and published by Command of the Governor-General of India in Council," PP, XLI (1837-38), 52-3. (Hereafter cited as "Draft Penal Code.")
[2] The fifth circumstance and the prescribed punishment will be examined in third chapter as sites of negotiation and accommodation.
[3] Nathaniel Brassey Halhed, A Code of Gentoo Laws, or, Ordinations of the Pundits (London, 1776), 268.

> If a Man, by Force, commits Adultery with a Woman of an equal or inferior Cast, against her Consent, the Magistrate shall confiscate all his Possessions, cut off his *Penis*, and castrate him, and cause him to be led round the City, mounted upon an Ass.
>
> If a Man, by Cunning and Deceit, commits Adultery with a Woman of an equal or inferior Cast, against her Consent, the Magistrate shall take all his Possessions, brand him in the Forehead with the Mark of the *Pedendum Muliebre*, and banish him the Kingdom.
>
> If a Man, by Violence, or by Cunning, or Deceit, or against the Woman's Consent, commits Adultery with a Woman of a Superior Cast, the Magistrate shall deprive him of Life.[5]

Zina, unlawful intercourse, was punishable under Islamic law according to *Hadd*. In a "Sketch of [the] General Principles of Mahomedan Law," British administrators understood the necessary circumstances to constitute the crime to be "that the act should have been committed by a Mussulman married, sane, free and of mature age, with a woman in whom the man has no right either by marriage or bondage."[6] Again, the crime was defined primarily by the relation between the social status of the two participants. The fixed punishment on conviction of *zina* was 100 lashes.[7] Many Administrators thought this punishment was too harsh; it was difficult, however, to obtain a conviction for the offence as the law of evidence demanded "the positive testimony of four men, of ascertained credit ... [and] the confession requisite to establish the charge must be made by a person of sound mind and mature age, at four different times, at four different sittings," at which his confession must be refused until the fourth time.[8] The first Company Regulation to formally define the terms of criminal liability in cases of *zina* was not introduced until 1817. Section 6 of Bengal Regulation XVII of 1817 allowed judges to rule counter to the *fatwa* of the law officers and convict on strong presumption of guilt. This clause shifted the emphasis of the law from the status of the persons to the

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[4] Ibid., 268-280.
[5] Ibid., 270.
[6] "Sketch of General Principles of Muhammaden Law," PP, IX (1832), Appendix 6, 699.
[7] Ibid., 699. Also see, Radhika Singha, A Despotism of Law (Delhi: Oxford University Press, 1998), 140.
[8] Ibid., 699. Also see, Jorg Fisch, Cheap Lives and Dear Limbs (Wiesbaden: Franz Steiner Verlag, 1983), 81-2. Singha, A Despotism of Law, 139-41.

criminal behaviour.[9] The Regulation also mandated a general disregard for the Islamic law of evidence which prohibited women from testifying because the "defects of the Mahomedan law were found to have the most injurious effects in cases of rape, incest and adultery,... its exceptions to the competency of witnesses being, in several instances, arbitrary and unjust."[10] This allowed judges the opportunity to give full weight to the testimony of a female witness, often the victim, whose testimony was often the only evidence in the prosecution for rape. Punishment for conviction of the crime, or in the presumption of guilt, was imprisonment with hard labour, not exceeding seven years, with thirty-nine lashes, though in all cases of rape the case had to be referred to the Nizamat Adalat.[11] The combination of a relaxed standard of evidence and lesser punishments than those prescribed by Islamic law increased the chances of conviction. This was embedded in a larger reference to the superiority of British civilization. Leniency was justified by reference to the standards of a superior civilization as was the admittance of testimony of females. British administrators generally felt that the law pertaining to *zina* and the general treatment of wives in India was harsh by the standards of a superior civilization.[12] The 1817 regulation though remained fairly vague in its definition of the crime itself, as did the Bombay Penal Code of 1827 which defined:

> the crime of rape, as also an assault committed on the person of any one in such a way as to maim or destroy the action of a limb temporarily or permanently, or injure the health, or to occasion what the Court may consider a great degree of bodily suffering to the person assaulted, or to cause the severe shock to the mental feelings of the sufferer, shall be punished by fine, imprisonment or flogging, or any of these combined.[13]

Macaulay's draft penal code primarily drew upon English legal definitions, which should not really be surprising. He studied English law in preparation for the Bar in 1826

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[9] Fisch, Cheap Lives and Dear Limbs, 81-2.
[10] Bengal Regulation XVII, 1817. As summarized in "Sketch of the Principles of Muhammaden Law," PP, IX (1832), Appendix 6, 699.
[11] Ibid.
[12] Singha, A Despotism of Law, 140.

and joined the Northern Circuit at Lancaster.[14] He was, no doubt, as familiar with the great treatises and digests of English law as he was with the legal works and codes of Sir Samuel Romilly, Francis Bacon, Edward Livingstone, and Justinian.[15] Macaulay's draft penal code contains evidence of the influence of seventeenth-century chief justice of the King's Bench Sir Mathew Hale (d.1676), Oxford lecturer in English Law Sir William Blackstone (1723-1780), and a chief justice of the Supreme Court of Bengal Sir William Oldnall Russell. Though these texts were not binding within English legal practice, they offer guides to the ways in which offences were being prosecuted, defined, redefined, and modified in English case law. They are an index to the definitions of rape in early nineteenth-century English criminal law. These works are quite similar for the most part, yet small variations in definition, based on new cases they cite, offer room for analysis and indicate areas where legal debate lay and gender constructions were shifting.

Between 1736 and 1837 rape laws became increasingly stable, and predominantly sexual as opposed to proprietary. Between the thirteenth and the sixteenth centuries there was little to no distinction between rape and abduction. From the first statute of Westminster in 1275 until rape legislation under Elizabeth I in 1597, rape was defined as theft of another man's property, not a sexual crime. Thirteenth-century court records suggest that *raptus* was used to mean seizure or abduction and the medieval law on rape was formulated to deal with abduction and illicit marriage of heiresses. [16] After the sixteenth century emphasis gradually shifted to the woman as the aggrieved party, not her father or husband. This was especially evident in the delineation of abduction as a distinct offence from rape, and the definition of rape as primarily a sexual offence constituted by proof of penetration.[17]

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[13] Bombay Regulation XIV of 1827. Chapter V, section XXIX. Acts and Codes, Bombay, 1827 V/8/24. O.I.O.C.

[14] John Clive, Macaulay: The Shaping of the Historian (Cambridge Mass.: Harvard University Press, 1987), 60-1.

[15] Macaulay was enormously well read. While in India, the *Edinburgh Review* paid him in books for his articles on Bacon and Mackintosh. He referred to Blackstone directly in the notes to draft penal code. "Draft Penal Code," PP, XLI (1837-38), 108.

[16] Barbara Toner, The Facts of Rape (Sydney: Arrow books, 1977), 117.

[17] Prior to proof of penetration, proof of ejaculation had been necessary in prosecuting cases of rape. The concern for ejaculation indicates the concern for proprietary value. Men viewed ejaculation during rape as

Penetration, sufficient to constitute the offence of rape in Macaulay's draft penal code of 1837, was first noted by Mathew Hale in 1736. "To make a rape there must be actual penetration..."[18] In the early nineteenth century, legal experts related penetration to the spoilation of respectable femininity and its injurious effect on the morality of society. Sir William Russell, like Hale before him, defined penetration as the act constitutive of the offence and outlined, not the physical and emotional injuries suffered by the victim, but the implications of such injuries for femininity and consequently for society. Russell wrote:

> ... at one time the offence would not have been considered as complete without some proof of the *emissio seminis*. But this doctrine is not free from considerable difficulty, and what appears to be fairly open to observation, that where the violence has proceeded to the extent of actual penetration of the unhappy sufferer's body, an injury of the highest kind has been effected. The quick sense of honour, the pride of virtue, which nature, in order to render the sex amiable, has implanted in the female heart, is violated beyond redemption; and the injurious consequences to society are, in every respect complete.[19]

The investment in penetration as the act necessary to constitute the offence of rape reflects the greater concern for morality in the emergent discourse of bourgeois respectability. Physical injury, demonstrated through proof of penetration, was only an outward signifier of the greater injury to the virtues of femininity and to morality. The evolution of the law did not represent an attempt to protect women themselves, but to protect female sexual propriety. Rape was still viewed as theft, only now of chastity and

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pollution of a woman, which affected her value on the marriage market. See, Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845 (London: Pandora, 1987), 61. Roy Porter, Rape: Does it Have a Historical Meaning?," in Rape, Eds. S. Tomaselli and R. Porter (Oxford: Basil Blackwell,1986), 217.

[18] William Hale, The History of the Pleas of the Crown 2 vols. (London: Professional Books Limited, 1971), I: 628

[19] William O. Russell, A Treatise on Felonies and Misdemeanors, 4th ed. 3 vols. London: Stevens and Sons Ltd., 1865. (1st ed. 1826)., I: 912. The second part of this quote was taken directly from Edward Hyde East, Pleas of the Crown, 2 vols. (London: Professional Books Ltd., 1972),

modesty - two essential virtues of the institution of feminine domesticity as elaborated in the early nineteenth century discourse of bourgeois respectability. Anna Clark has argued that the requirement of penetration was an attempt by lawyers, doctors, and moralists "to invest the power of proving rape in their own moral judgements, not in women's words or bodies."[20] This requirement was not quite the conscious and insidious plot against women that Clark has envisioned, but it does demonstrate that sexuality was regulated through the laws of rape as governed by moral judgements and the concern for sexual restraint in 'respectable' society.

The related concepts of "against her will," and "consent," crucial to the descriptions of rape in Macaulay's draft penal code, were also largely drawn from English legal definitions. Though they appeared in Indian law, they were not so central to the definition of the offence. Hale, Blackstone, and Russell all defined rape as the carnal knowledge of a woman by force and against her will. Proof of violence was necessary in establishing the offence and in proving that she had resisted and the offence had been perpetrated against her will. The concept of consent filtered into legal definitions of rape in the early nineteenth century, when it was recognized that in some cases rape could be committed without violence, but also without consent while the woman was "insensible" or with consent obtained by deceit or under the threat of injury.[21] Insensibility was defined as a state in which a woman "has no power over her will," often induced by alcohol.[22] Macaulay maintained in the first circumstance of the crime of rape the recognition of 'against her will", but modified it to include consent in terms of deceit and insensibility. His draft penal code was the first code to define consent and it did so dually.

> The words 'free consent' denote a consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury.
> The words 'intelligent consent' denote a consent given by a person who is not, from youth, mental imbecility, derangement, intoxication or

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(1st ed. 1803), 436-7. See note 71.
[20] Clark, Women's Silence, 62.
[21] Russell, A Treatise on Felonies and Misdemeanors, I: 905-6.
[22] Ibid., 906.

> passion, unable to understand the nature and consequences of that to which he gives his consent.[23]

An emphasis on consent, as opposed to "against her will," shifted the focus of the trial onto the behaviour and character of the prosecutrix. "Against her will" relied on proof of resistance to the act, whereas consent – though it allowed for the definition of rape to extend to situations where sex was induced without physical coercion – indicted a code of respectability. Consent, both proof of consent and of "without her consent," was gleaned, or at least inferred, from references to the character and past sexual behaviour of the prosecutrix. If it were proved that she was of a respectable family and of a modest and chaste nature, her testimony was more likely to be believed than if she were a woman of disreputable character who frequented unrespectable establishments such as pubs and gambling houses. Such behaviour was suggestive of unrestrained sexuality and compromised her claims to denying consent.

The final component of the offence of rape in Macaulay's draft penal code that was drawn directly from English legal traditions is the clause stating that no husband is capable of a rape upon his wife. "A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given and which she cannot retract..."[24] Also a woman, according to English law, could not prosecute for rape on the grounds that the rape was perpetrated by a man she thought was her husband, though Macaulay's draft code would reverse this. This exception to the law of rape had roots in legal definitions of rape that legally confined the woman to a proprietary status. In the early nineteenth-century though, through a philosophy of sexual restraint that defined the appropriate expression of sexuality as that practiced within the institution of marriage, the exception so thoroughly protected and enforced that philosophy that it established the proper expression of sexuality as an always legal expression. It protected the institution of marriage in the extreme and reeked of allusion to the feminine 'virtue' of submission.

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[23] "Draft Penal Code," PP, XLI (1837-38), 14.
[24] Russell, A Treatise on Felonies and Misdemeanors, I: 905.

Underlying each of these three components of Macaulay's draft penal code - penetration, consent, and marriage - were important cultural assumptions about gender that defined bourgeois respectability. Several studies of rape in nineteenth-century England have explored the general influence of discourses of respectability on jurisprudence and case law,[25] but pinpointing direct connections between the law and prescribed gender roles, expressions of appropriate sexuality, and moral admonishments is often difficult. Macaulay offers an opportunity to examine the production of a text. This text enunciated legal definitions of rape from existing English law and also as refined by his own conceptualizations of femininity, masculinity and the appropriate expression of sexuality. These conceptualizations can be reconstructed through an analysis of his personal correspondences, relationships and background. His code, though often noted for its precision of definition and detailed explanations of each law in the illustrations of each law and the appended notes, provides no additional information. This would suggest that this topic was possibly too repugnant to discuss,[26] or not thought to be so important as to merit much discussion. Or, it may have been that the reasons for defining the law as such were self-evident, at least to members of respectable society. Underlying the definitional elements of rape – penetration, consent, and marriage – were concepts that defined bourgeois respectability and its component domestic femininity: submission, piety, modesty, and chastity. Respectable society was divided into public and private spheres; masculine and feminine spheres; spheres governed by rationality on one hand and morality and emotion on the other. Evangelical authors, such as Hannah More, Thomas Gisborne and Frances Elizabeth King were prominent in the definition and prescription of these spheres. They were also authors familiar to and influential in the intellectual and moral development of Thomas Babington Macaulay.

Thomas Gisborne, the author of *An Enquiry into the Duties of the Female Sex* (1758-1846), was a clergyman, country squire, good friend to Evangelical author Hannah

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[25] Clark, Women's Silence. Carolyn A. Conley, The Unwritten Law: Criminal Justice in Victorian Kent (New York: Oxford University Press, 1991). Shani D'Cruze, Crimes of Outrage: Sex, Violence and Victorian Working Women (London: University College London Press, 1998).

[26] "Draft Penal Code," PP, XLI (1837-38), 108. This is how the notes to the draft penal code characterized unnatural acts, which included sodomy and bestiality.

More, and Thomas Macaulay's "uncle." Gisborne was the son-in-law of Jean Babington, Macaulay's aunt, and Thomas Babington, the man to whom Zachary Macaulay owed his Evangelical faith, and to whom Thomas Babington Macaulay owed his name. It was perhaps due to the large discrepancies in their ages that Macaulay referred to Gisborne as his uncle. Thomas Gisborne attributed the ideology of separate spheres to a natural order in a chapter titled "The Peculiar Features by which the Character of the Female Mind is Naturally Discriminated From that of the Opposite Sex [by] the Creator."[27] The male mind, possessing reason and endurance in addition to physical strength, was best suited to the "science of legislation, of jurisprudence, of political economy; the conduct of government in all its executive functions; ... the inexhaustible depths of philosophy;... the knowledge indispensable in the wide field of commercial enterprise; the arts of defence, and of attack by land and by sea, which the violence or the fraud of unprincipled assailants render needful."[28] As for women, God "amply compensated the defect of muscular vigour by symmetry and expression, by elegance and grace."[29] The female mind needed nothing more than to occupy the private sphere; "the sphere of domestic life,... in which female exertion is chiefly occupied, and female excellence is best displayed."[30]

The real worth of the female character, wrote Gisborne, lies in "the dispositions and feelings of the heart." Emanating from that place are the virtues of the female character, important in their ability to affect human happiness through the most perpetually recurring influence.[31]

> Were we called upon to produce examples of the most amiable tendencies and affections implanted in human nature, of modesty, of delicacy, of sympathizing sensibility, of prompt and active benevolence, of warmth and tenderness of attachment; whither should

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[27] Thomas Gisborne, An Enquiry into the Duties of the Female Sex, In A Garland Series: The Feminist Controversy in England 1788-1810, Ed. Gina Laurie (New York: Garland Publishing Inc., 1974), 14-5.
[28] Ibid., 21.
[29] Ibid., 20.
[30] Ibid., 2.
[31] Ibid., 11-12.

> we at once turn our eyes? To the sister, to the daughter, to the wife. These endowments form the glory of the female sex.[32]

By these most amiable tendencies women had the most influence over the day to day concerns of life and formed the moral backbone of the family and society. They attended to the domestic life and comfort of husbands, parents, friends, and family. They were integral to the formation and improvement of manners, disposition and conduct of the male sex. Thirdly, they had to model appropriate behaviour and provide moral examples to children of each sex.[33]

Critics lauded Gisborne for his ability to "comprehend the general duties of women,"[34] but his work was also criticized for perhaps expecting too much of women.

> we must repeat our wish that the *theory* laid down had been more frequently enlivened by *facts* and illustrated by *example*. The moralist might not, indeed, in that case have *deserved* more *success*, but we are sure he would have *obtained* it.[35]

The reviewer's observation about the paradox between fact and theory is one that historians need to maintain when employing prescriptive literature as a source. A tension that has to be negotiated when analyzing prescriptive literature is between the degree that the work reflects behaviour and the degree that it dictates how people ought to behave. Prescriptive literature may in fact indicate the author's perception of a substantial gap between the reality and the ideal necessitating the work. Regardless, it was often the prescriptive that reflected the conceptualization of gender, class, and racial roles that informed institutions. Gisborne's guide to female behaviour was certainly important in shaping Macaualy's attitudes to proper feminine behaviour, so much so that he acquired it for his sister Hannah to instruct her on appropriate behaviour when she accompanied him to India.

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[32] Ibid., 23.
[33] Ibid., 12-13.
[34] The Analytic Review, quoted in introduction to Ibid., 6.
[35] European Magazine, quoted in introduction to Ibid., 7.

> It is now my duty to omit no opportunity of giving you wholesome advice. I am your papa now. I have bought Gisborne's duties of women, Moore's fables for the female sex, Mrs. King's Female Scripture Characters, and Fordyce's sermons. With the help of these books I hope to keep my responsibility in order on our voyage in India.[36]

Hannah's behaviour was crucial because as a woman, her femininity helped to determine Britain's superior civilization. Just as with liberal reform measures that elaborated British paramountcy, Britain's superiority was symbolized in its apparently superior treatment and status of women. Their position in society and their refinement were beacons of civilization. Gisborne compared the modesty, refinement, delicacy and sympathy resident within the heart of the respectable female that was allowed to develop within the confines of British civilization with signifiers of femininity in barbaric societies.

> At almost every period it [female excellence] has been rated among nations, deeply immersed in barbarism, by the scale of servile fear and capacity for toil. Examine the domestic proceedings of savage tribes in the old world and in the new, and ask who is the best daughter and the best wife.... She ... is most tolerant of hardship and unkindness. When nations begin to emerge from gross barbarism, every new step which they take towards refinement is commonly marked by a gentler treatment, and a more reasonable estimation of women; and every improvement in their opinions and conduct respecting the female sex, prepares the way for additional progress in civilization.[37]

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[36] Gisborne, An Enquiry into the Duties of the Female Sex. Frances Elizabeth King, Female Scripture Characters Exemplifying Female Virtues, 3rd ed. (London, 1816). Edward Moore, Fables for the Female Sex, 4th ed. (London, 1771). James Fordyce, Sermons to Young Women, 3rd ed. 2 vols. (London, 1766). T.B.M. to Hannah, 2 January, 1834. The Letters of Thomas Babington Macaulay, 6 vols. Ed. Thomas Pinney (Cambridge: Cambridge University Press, 1974), III:7.

[37] Gisborne, An Enquiry into the Duties of the Female Sex, 17-8.

Women were unable to realize the grace and elegance of the female mind in countries where the labours of women were "more severe than the offices of domestic life."[38] The endowments of the feminine heart – modesty, delicacy, sensibility – the very virtues that caused women to excel in, and also confined them to, the domestic sphere signaled the superiority of British society. "They shine amidst the darkness of uncultivated barbarism; they give civilized society its brightest and most attractive lustre."[39]

In 1820 a royal incident gripped the people of England. The Caroline Affair became the 'most perplexing domestic question' and the sexual infidelities of Kings and Queens threatened the domestic virtue of England, the symbol of its advanced state of civilization.[40] The Prince of Wales and heir apparent to George III, George Augustus Frederick, married German Princess Caroline of Brunswick in 1795. Their marriage, one of financial convenience for the Prince, was doomed from the beginning. Their only child, Charlotte, was born nine months after the wedding. The couple soon separated, and in 1814 Caroline left England and was rumoured to have engaged in adultery.[41] Upon her return in 1820 to claim her rightful place as Queen after the death of George III, George IV introduced into the House of Lords a Bill of Pains and Penalties in an attempt to divorce his Queen. The Ecclesiastical Courts were not really an option, as his own sexual infidelities surely would have damaged his reputation. There were also political considerations. The reputation of the monarch was not the only reputation threatened by the scandal; Whigs saw it as an opportunity to embarrass the Tory government, and there was also the possibility of permanent damage to the monarchial constitution of the country. Macaulay's observation that "agitation [had] spread to the far corners of the Island" indicates the widespread support that existed for Caroline.[42] The popularity of Caroline's cause reflected popular disillusion with the monarchy and the corruption of the political system. Caroline's cause was the cause of "all those who are desolate and

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[38] Ibid., 20.
[39] Ibid., 23-4.
[40] Leonore Davidoff and Catherine Hall, Family Fortunes: Men and Women of the English Working Class, 1780-1850 (Chicago: University of Chicago Press, 1987), 150-5.
[41] For a chronology of the events see, Allison Plowden, Caroline & Charlotte: The Regent's Wife and Daughter, 1795-1821 (London: Sidgwick & Jackson, 1989).
[42] Quoted in Davidoff and Hall, Family Fortunes, 150.

oppressed."[43] The rhetoric of this discontent, however, relied on notions of public virtue, private morality and the national projection of domesticity. In order to prove her innocence, the Queen was forced to resort to her role as the "poor forlorn woman," as she described herself.[44] Leonore Davidoff and Catherine Hall have suggested that Caroline, as the symbol of the virtues of womanhood, needed to seek salvation in the nation's qualities of masculinity and chivalry. An anonymous tract written in 1820 would seem to support this interpretation.

> The beauty – the goodness – the very helplessness of the sex are so many claims on our support, are so many sacred calls on the assistance of every manly and courageous arm ... whilst an example is held up to every ruffian in the land to abuse and insult the wife, that he promised to cherish and protect, is it unreasonable to apprehend the degeneracy and decay of our national morals?[45]

Though in many ways Caroline was far from a portrait of female virtue (there seems to have been good evidence to support allegations of her extra-marital affairs), a great many Britons felt strongly that George IV needed to fulfil his domestic obligations before he could be father to the country. On the tenth of November 1820 the Bill was abandoned as there was only a small majority of support for it.

Macaulay's belief in the Queen's purity and innocence is not entirely clear. His "Ode to the queen," penned on the occasion of her return to England, suggests his belief in her purity. However, Thomas Pinney has suggested that it is "so effusive as to require ironic reading."[46]

> Though tyrant hatred still denies
> Each right that fits thy station,
> To thee a peoples love supplies
> A nobler coronation:

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[43] Quoted in Glyn Williams and John Ramsden, Ruling Britannia: A Political History of Britain, 1688-1988 (London: Longman, 1990), 180.
[44] Davidoff and Hall, Family Fortunes, 151.
[45] Quoted in Ibid., 151.
[46] Thomas Pinney, Letters, I: 148, n. 2.

A Coronation all unknown
To Europe's royal vermin:
For England's heart shall be they throne,
And purity thine ermine;
Thy proclamation our applause
Applause denied to some;
Thy crown our love; thy shield or laws.
Thank Heaven, our Queen is come![47]

Other remarks concerning this affair made by Macaulay throughout his life, from being harangued by a friend in support of her innocence and claiming that "the late queen was abominably used," to reportedly being very strong in his denunciations of Queen Caroline and her advisors and referring to her "vices," further confuse the issue.[48] What is clear with regards to Macaulay and this incident is that, regardless of his belief in her innocence, he, like many other people of Britain, joyously received the news of the Bill's withdrawal. "All here is ecstasy. – 'Thank God the Country is saved!' were my first words when I caught a glimpse of the papers Friday night ... [and it] is written on every face and echoed by every voice."[49] Certainly Macaulay was happy that a modicum of social stability had been restored; that "the public danger, like all dangers which depend merely on human opinions and feelings, has disappeared from our sight almost in the twinkling of an eye."[50] However, it is also likely that the ecstasy that Macaulay expressed was a product of the fulfilment of the protection of domesticity and femininity that marked British superiority. It has already been noted that this ideal materialized in advice to his sister. On one occasion, Macaulay suggested to Hannah that she carefully consider her choice of a maid to accompany them to India. This passage is crucial to establishing links between the ideologies of femininity held by Macaulay, and those prescribed by Thomas Gisborne and Frances Elizabeth King. He expressed concern that any lack of

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[47] Quoted in G.O. Trevelyan, The Life and Letters of Lord Macaulay, 2nd ed. (London: Longmans, Green, and Co., 1877), I:100.
[48] T.B.M. to Zachary, 21 November, 1820. Letters, Ed. Pinney, I: 150. T.B.M. to Lord Mahon, 31 December, 1836. Letters, Ed. Pinney, III: 207.
[49] T.B.M. to Zachary, 13 November ,1820. Letters, Ed. Pinney, I: 148.
[50] Ibid., I: 148.

manners, an ill-refined character, will bring scandal upon his house by not demonstrating the proper signs of femininity that a woman of civilized society should posses.

> no class of people misconduct themselves so much in the East as female servants from this country. They generally treat the natives with gross insolence – an insolence natural enough to people accustomed to stand in servile relation to others when, for the first time, they find a great population placed in a servile relation towards them.... I have ... a sense of duty which will lie upon me of protecting my native dependants against the insolence of my own countrymen. It is, indeed, for this special purpose that I am sent to India. The fourth member of Council is to be, in a peculiar manner, the guardian of the people of India against European settlers. I must not suffer the abuses against which I am to provide in my public capacity to bring scandal on my own house.[51]

Macaulay was also concerned with the potential maid's morality, her modesty and her general character, not only in consideration of her social impact in India, but also the effect that colonial culture could potentially have upon her. "Then too the state of society is such that they are very likely to become mistresses of wealthy Europeans, - and to flaunt about in magnificent palanquins, bringing discredit on their country by the immorality of their lives and the vulgarity of their manners."[52] Outward signifiers of this vulgarity include vanity in dress and general appearance, demonstrations of ill temper and arrogance. Thomas Gisborne, like Macaulay, attributed the happiness of the household to the quality of the female character. However, upon the introduction of a young woman into general society, he suggested that she might encounter things that are "most dangerous to everything that is valuable in the female character."[53] He cautioned that "if there is sweetness on the surface there is venom deeper in the cup; [she must be] fortified with those principles of temperance and rectitude which may guard her against unsafe indulgence.... [V]anity, and other unwarrantable springs of action ... exert their influence on the female character ... at no time ... more dangerous than when a young

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[51] T.B.M. to Hannah, 22 November, 1833. Letters, Ed. Pinney, II: 340.
[52] Ibid., 340.
[53] Gisborne, An Enquiry into the Duties of the Female Sex, 94.

woman first steps into public life."[54] Certainly Macaulay felt similarly in his "responsibility ... with respect to a poor girl, brought by us into the midst of temptations of which she cannot be aware and which have turned many heads that might have been steady enough in a quiet nursery or kitchen in England."[55]

Signs of vanity, such as Macaulay's fear of servants parading about in magnificent palanquins, were strictly to be avoided according to Gisborne. His dictates about fashion warned of the dangers of the immodest expression in elaborate dress. He prescribed against fashions "which entrench either on the principles of decency, or on the rules of reasonable frugality." These, both vain and inconsiderate, "shew that delicacy, the chief grace of the female character; and economy, the support of not merely honesty alone, but of generosity, are deemed objects only of secondary importance."[56] To dress in an immodest manner not only compromised the graces of femininity, but also suggested a compromised chastity, which was especially important in the formation of matrimonial connections. Lavish indulgence "conceals many defects in moral character, and compensates for others; and frequently proves the decisive circumstance which leads the deluded victim to the altar, there to consign herself to splendid misery for life."[57]

The preservation of the chaste reputation of whomever Hannah took to India as her maid was another of Macaulay's concerns. He worried that "if she should be weak and vain she will probably form connections that will ruin her morals and reputation."[58] Connections such as these could possibly be made on the dance floors and at the gaming tables that Gisborne warned would be detrimental to the virtue of a young woman. Expressions of vanity and the impending envy between competing women in the ballroom made sinful "an amusement [dancing] in itself both innocent and salubrious and therefore by no means improper under suitable regulations." This activity could come "at the expense of some Christian disposition, some Christian virtue." [59] These dances were

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[54] Ibid., 96.
[55] T.B.M. to Hannah, 22 November, 1833. Letters, Ed. Pinney, II: 340.
[56] Gisborne, An Enquiry into the Duties of the Female Sex, 120-1.
[57] Ibid., 130.
[58] T.B.M. to Hannah, 22 November, 1833. Letters, Ed. Pinney , II: 340.
[59] Gisborne, An Enquiry into the Duties of the Female Sex, 180-1, 182.

frequented by men, strangers, fellows whose high morality could not be easily established, nor could their motives.

The over-indulgence of young women in amusements generally associated with the public sphere, especially in the shadows of that sphere, could have the effect of tarnishing a woman's purity, and her claims upon chastity. *Female Scripture Characters Exemplifying Female Virtues*, by noted philanthropist and Evangelical author Frances Elizabeth King, was also among the books that Macaulay purchased for his sister. It retold the stories of eighteen Old and New Testament Women in order to teach lessons about the duties of women in society and to prescribe proper feminine behaviour. In it the author credited the fall of the biblical Jezebel to her participation in the public sphere, to the corruption of power in the hands of a female.[60] King ruminated upon the despondency aroused by female immorality before discussing Jezebel and the proclivity for women to be corrupted by participating in the public sphere.

> this picture of depravity is the more revolting, as it exhibits the portrait of a female. For woman is, by her nature, ... more peculiarly dedicated to virtue; and her example possesses a powerful influence in every rank of society. But that bad characters exist among them, is a melancholy truth.... The whole life of Jezebel seems to have been one continued scene of wickedness, without the contrast of a single virtue. Her extreme depravity seems to have arisen from ... the luxury in which the worldly prosperity and power, attached to her exalted situation, enabled her to indulge.[61]

Gisborne suggested an increased female participation in the public sphere when he observed a proliferation of women at gaming tables that "were once in the exclusive possession of men,"[62] These women, wrote Gisborne, "have discarded the restraints of timidity and shame ... [and are] venturing to the very borders of ruin."[63] He certainly

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[60] King, Female Scripture Characters, 140-2.
[61] Ibid., 127-130.
[62] Gisborne, An Enquiry into the Duties of the Female Sex, 185.
[63] Ibid., 186.

referred to financial ruin primarily, but at the gaming table the female mind faced the imposition of "the most violent and the blackest of passions; where the springs of benevolence and charity, and of sympathy and friendship may be dried up;... where the foundations of domestic misery ... may be laid; where every principle of delicacy, of virtue, of religion may be sapped..."[64]

In the early nineteenth century narratives of sexual danger became the focus of intensified attention on the place of women and reinforced the ideology of separate spheres.[65] Women who dared to step beyond the bounds of their domestic role were regarded as deviant, and doubts were cast upon their chastity. If it were proved that a woman who had brought rape charges had transgressed this boundary, she was characterized as deviant rather than as a victim. Dancing and gambling compromised feminine propriety, but these "promiscuous assemblage[s] of the plunderers and plundered" also brought women into contact with "an evil of great moment, which is too frequently known to occur at the places of amusement now under notice."[66]

In the early nineteenth century, Anna Clark argues, a myth began to evolve, "which covertly warns us that rapists punish women who stray from the proper place."[67] At the centre of this myth lies the stranger, even though the historical record indicates that women were raped just as often by men they knew as by strangers.[68] During this period the myth was increasingly employed by judges, journalists and pamphleteers to reinforce the notion of separate spheres. This myth informed Gisborne's cautions to women concerning dances and gaming tables because it may result in "the introduction of women to undesirable and improper acquaintance among the other sex; undesirable and improper, as I would now be understood to mean, in a moral point of view;"[69] and

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[64] Ibid., 189-90.
[65] Clark, Women's Silence, 3-5.
[66] Gisborne, An Enquiry into the Duties of the Female Sex, 183.
[67] Clark, Women's Silence, 1.
[68] Ibid., 1. Also, Karen Dubinsky, Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929 (Chicago: University of Chicago Press, 1993), 37-43.
[69] Gisborne, An Enquiry into the Duties of the Female Sex, 183.

Macaulay's fear of his sister's choice of maid forming "connections that will ruin her morals and reputation."[70]

Contact with a stranger of undetermined morals threatened to compromise a woman's chastity. Chastity, a woman's virginity or fidelity, defined her worth. Rape certainly compromised a woman's chastity and modesty and was an affront to the institution of marriage. Noted legal author Edward Hyde East called it "a brutal and violent attack upon the honour and chastity of the weaker sex."[71] In unmarried women the proof of chastity was virginity, and though rupture of the hymen was not necessary to constitute the crime, penetration, or the act that would have ruptured the hymen, was sufficient and necessary to convict for rape. At the moment of the rape, that is at the moment of penetration, "the quick sense of honour," wrote East, "the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart ... is already violated past redemption, and the injurious consequences to society are in every respect complete."[72] Honour, chastity, virtue, modesty and society are injured by this description. Nowhere is the woman herself considered.

Even though her person was violated, Frances King employed the character of Susanna to illustrate the importance of a rigid chastity. Susanna was the beautiful, graceful and chaste wife of a man of great wealth and status. One day two elders attacked her as she bathed in a garden fountain. They accomplished "their wicked purpose, and then proceeded to threaten her with a false accusation, that should blast her hitherto unblemished reputation."[73] When her servants finally answered her cries, the elders accused Susanna of "being detected in the last act of female depravity with a young man who had escaped."[74] She stood trial for adultery and was sentenced to death. However, her respectable reputation and true chastity were apparent to God and He intervened to prove her innocence. King's story put a premium on chastity by arguing that a woman, truly chaste in the eyes of God, would triumph in the material world as well.

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[70] T.B.M. to Hannah, 22 November, 1833. Letters, Ed. Pinney , II: 340.
[71] East, Pleas of the Crown, 436-7
[72] Ibid., 436-7
[73] King, Female Scripture Characters, 192.
[74] Ibid., 192.

The emphasis on character and the required proof of a chaste and modest lifestyle, are more easily examined with records from the courtroom,[75] but Macaulay included in his draft penal code explicit provisions that protected female chastity and modesty from assault. Though not contained within the law pertaining to the offence of rape, they make explicit reference to its attempt. Rape was an outrage against modesty, and the other virtues of domestic femininity rather than as solely an assault perpetrated on a woman.

> 346. Whoever assaults any woman in attempting to commit rape on her, shall be punished with imprisonment of either description for a term which may extend to three years and must not be less than three months, and shall also be liable to fine.
> 347. Whoever assaults any woman, intending thereby to outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or fine, or both.[76]

Protecting modesty, chastity and women from sexual danger in the early nineteenth century restricted women's freedom. Women should be "keepers at home"; each excursion, each "of these voluntary absences from the home ... is proper in its season ... [and] is culpable and pernicious in its excess."[77] Respectable women operated predominantly within the confines of the domestic sphere as defined in opposition to a masculine public sphere. This assumed, and normalized within the discourse, that women took their 'rightful' place in the domestic sphere within the institution of marriage. Evangelical writers portrayed male superiority and feminine submissiveness within marriage as part of the natural order, part of God's divine will. Thomas Gisborne cited a biblical reference to support his contention that obedience was a "branch of connubial duty."[78] "'Wives, submit yourselves unto your own husband as unto the Lord; for the husband is the head of the wife, ... so let the wives be to their own husbands in everything.'"[79] Frances King sought a basis for feminine submissiveness in biblical

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[75] See chapter 3.
[76] "Draft Penal Code," PP, XLI (1837-38), 51.
[77] Gisborne, An Enquiry into the Duties of the Female Sex, 283, 285.
[78] Ibid., 229.
[79] Ibid., 227.

authority also. She employed Eve as the woman foundational to women's eternal subjection. Her initial disobedience of God resulted in vice and misery for all humans and in the requisite submission of woman to man.[80] King told her readers that Eve, or woman, was created to complete the happiness of man. However, that happiness was sacrificed by her neglect of wifely duties and virtues, including submission.

> The general reflections we are led to, from reviewing the character of Eve, are on the duties it suggests to ourselves. First, in patience and submission to those inevitable evils to which her transgression has doomed us, in obedience to our husbands, and in the performance of all our domestick and christian duties, with piety, diligence and zeal...[81]

King also used other biblical figures, such as Esther, Susanna, and the Virgin Mary, to illustrate the virtues of submissiveness.[82] Macaulay, like Gisborne and King, expressed a belief in the authority of husbands. Macaulay asked his sister Hannah to accompany him to India, and would have liked to ask his other favourite sister Margaret to go. She, however, was recently married. Macaulay wrote to Hannah that she "may of course shew the letter to Margaret – dear, dear Margaret – if I could take you both with me, I should hardly care to return: - and yet I should: for I love my country dearly. Margaret may tell Edward: for I never cabal against the lawful authority of husbands."[83] In the early nineteenth century, a wife's duties included her sexual submission to her husband. Section 359 of Macaulay's draft penal code expressly defined one circumstance of rape as that occurring "with her consent, when the man knows her consent is given because she believes that he is a different man to whom she believes herself to be married;" and expressly stated that "sexual intercourse by a man with his own wife is in no case rape."[84] This simultaneously subjugated a wife to her husband's authority and protected the

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[80] King, Female Scripture Characters, 1-20.
[81] Ibid., 19.
[82] Ibid., 149-72, 189-208, 228-62.
[83] T.B.M. to Hannah, 17 August, 1833. Letters, Ed. Pinney, II: 301-2.
[84] "Draft Penal Code," PP, XLI (1837-38), 52.

integrity of the institution of marriage by protecting a wife's chastity from an assault in the name of marriage.

By the prescription of Evangelical anti-sensualism and the philosophy of sexual restraint,[85] the proper expression of sexuality occurred within marriage. Macaulay, himself rooted in an Evangelical upbringing and a bourgeois familial ideology, looked to domestic relationships for grounding. His notions of proper femininity and acceptable expressions of sexuality within domestic relationships indicate his adherence to concepts of feminine propriety as foundational. Within these, the bourgeois family was built, as too were legal institutions and concepts that protected domesticity. The pious, submissive, modest, chaste, and modern woman was at the centre of the bourgeois world, and her adherence to these virtues, as elaborated through the discourse of bourgeois respectability, determined her respectability and her credibility. The discourse of bourgeois respectability prescribed not only chastity and submission, but also a code of modesty that restricted sexuality to the private realm of marriage. To discuss sexuality publicly, even on the witness stand in the case of a sexual offence, violated the virtue of modesty.

One indicator of modesty was the ability to conduct an intelligent conversation. Too much education though, or the demonstration of a superior intellect in a woman was warned against. Education for women was capable of alleviating "unsteadiness of mind;... fondness of novelty;... habits of frivolousness;... dislike of sober application;... vanity and affectation."[86] However, women were told they had a number of domestic duties to which the acquirement of knowledge should be subservient. The pursuit of education at the expense of performance of these duties and the demonstration of feminine virtues threatened to blur the boundary between male and female character, and between public and private spheres.

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[85] Michael Mason developed these concepts to refer to Victorian sexuality, however, he also redefined Victorian sexuality to refer to the period beginning in the early nineteenth century, coinciding with the influence of moral Evangelicalism. "Victorian" then refers to a philosophy rather than a time period.
[86] Gisborne, An Enquiry into the Duties of the Female Sex, 34.

> Married women have a variety of domestick business;... and all the most useful acts of charity are required at their hands. When women have conscientiously performed all these duties, they may find some time for valuable reading. ... Finally let every woman constantly bear in mind that her own appropriate virtues are humility, gentleness, modesty, and reserve; and that there is a strong line of distinction drawn between the male and female characters, which must never be broken...[87]

With this in mind women were instructed to demonstrate their intellect carefully in conversation so as to appear neither shallow nor superior.

> If it be admitted ... that female fluency in discourse is greater and more persevering than that of the other sex; it behoves women the more steadily to remember, that the fountain will be estimated according to the stream: that if the rill runs babbling along, shallow and frothy, the source will be deemed incapable of supplying an ampler current: that if the former is muddy, bitter, and corrosive, its offensiveness will be ascribed to the inherent qualities of the latter."[88]

Though Macaulay never married or left much evidence concerning any romantic relationships, he once wrote of his youthful love for his cousin Mary Babington. He later remembered, however, "her conversation soon healed the wound made by her eyes."[89] Though we know not whether he found her conversation to be shallow and frothy or bitter and muddy, he did find her conversation lacking, and conversation, as Thomas Gisborne said, "is an index to the mind."[90]

As John Clive has indicated, the domestic void caused by the lack of romantic relationships in Macaulay's life was filled by his love of domesticity, especially as represented by his two youngest sisters, Hannah and Margaret.[91] Certainly his love of the domestic was well known to Hannah More, his sister's namesake, Evangelical mother

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[87] King, Female Scripture Characters, 125-6.
[88] Gisborne, An Enquiry into the Duties of the Female Sex, 99-100.
[89] T.B.M. Trinity Journal, 21 July, 1858. Macaulay MSS.
[90] Gisborne, An Enquiry into the Duties of the Female Sex, 99.
[91] Clive, Macaulay, 271.

figure, counselor to Zachary Macaulay,[92] and the teacher of Selina Macaulay, Thomas' mother. Though their relationship became strained in the 1830s, Macaulay fondly remembered her encouragement, companionship, and his boyhood trips to Barley Wood, her country home.

> She was exactly the very last person in the world about whom I should chuse to write a critique. She was a very kind friend to me from childhood. Her notice first called out my literary tastes. Her presents laid the foundation of my library.... She really was a second mother to me. I have a real affection for her memory.[93]

One of the true joys of Macaulay's youth was his time spent at Barley Wood, where he and More would play word games, he would preach to the field hands, and she would give him money to help build his library.[94] The importance of the time he spent with More is in part measured by the fact that his father once threatened to deny young Macaulay his trips to Barley Wood to visit Hannah if his penmanship did not improve.[95] Macaulay's second mother conceivably had a tremendous influence on the development of Macaulay's conception of the domestic, and his need for it. More's 1807 work *Coeleb in Search of a Wife* was written as a guide to behaviour in a form of literature peculiar to the middle class: the novel. Immensely popular, it was in its fourteenth edition by 1816. It is the fictional account of the proper relations between men and women. Coeleb, a young man of landed wealth, instilled with a belief in domestic happiness inherited from his late parents, sets out in search of a wife. Disappointed and discouraged by the immorality and irreligious character of the women in London, Coeleb goes to the home of Mr. Stanley, a country gentlemen and friend of his father. In Mr. Stanley's daughter Lucilla, Coeleb

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[92] Ibid., 29.

[93] T.B.M. to Macvey Napier, 15 June, 1837. Letters, Ed. Pinney , III: 216. The ties between Hannah More and the Macaulay family are close. Macaulay's mother was educated at the school run by Hannah and her sisters. It was at Hannah's house that Macaulay's father Zachary met Selina. Zachary would refer to Hannah More as his closest advisor. Thomas would refer to her as a second mother. She and Thomas were close until 1882 when she "made a political move against the grain but cutting Macaulay out of her will because of his fiery speeches in favor of Parliamentary reform." Charles Howard Ford, Hannah More: A Critical Biography (New York: Peter Lang Publishing Inc., 1996), 264.

[94] Clive, Macaulay, 28, 23-4, 27.

finds a woman who encompasses beauty, modesty, and domesticity, was obedient and passive, and content in her role as the pious source of inspiration for male virtue.[96] Her work "affirm [ed] that it is the perfection of the character of a wife, 'to study household good, and good works in her husband to promote.'"[97] Under the influence of her ideas, Macaulay wrote to Hannah More about his love of and longing for domesticity.

> ... in itself, I am no great admirer of this monastic life: I love the cheerful blaze of a domestic hearth, the reciprocation of varied conversation and mixed company, to well to relish the state to which I am here necessarily doomed.[98]

Many Evangelicals and members of 'respectable' society, including Macaulay, often viewed the object of Coeleb's search, domestic happiness, as part of the natural order. On the occasion of the engagement of his sister Margaret to Edward Cropper, Macaulay described marriage as a *natural* union.

> I do not wonder that, situated as you were with respect to him and to his late wife, you should have become attracted to him. I rather expected, before you went down to Liverpool, that this would happen, - not from any particular information which I had received, - but from my general knowledge of men and women. ... The result was quite natural and in the common order of things.[99]

Commenting upon the same event, Macaulay wrote to both of his younger sisters about the domestic happiness derived from marriage with an allusion to popular early nineteenth-century novelist Jane Austen.

> I am not at all of the mind of Mr. Woodhouse, or in the least disposed to talk about "poor Margaret." It has always been my wish to see my

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[95] Ibid., 25.
[96] Davidoff and Hall, Family Fortunes, 167-72.
[97] More, Hannah. Coelebs In Search of A Wife, Comprehending Observations on Domestic Habits and Manners, Religion and Morals, 14th ed. 2 vols. (London, 1814), 2.
[98] T.B.M. to Hannah More, 11 November, 1818. Letters, Ed. Pinney , I: 106.
[99] T.B.M. to Margaret, 18 August, 1832. Letters, Ed. Pinney , II:184.

> dearest girls honourably and happily married. ... My father ... speaks very favourably, not only of Edward's principles and temper, but of his good sense. My dear girl will therefore have every chance for happiness.[100]

Employing Jane Austen as an historical source with any degree of certainty is almost impossible. Modern critics cannot agree on whether her works reproduced or critiqued middle class propriety, whether she was a feminist or a protector of the status quo, and whether she was a defender of moral virtue or of happiness.[101] Most do agree though that her characters extol the virtues of feminine modesty, whether imposed by society or by themselves, and that her works reproduce certain bourgeois ideas about marriage. Macaulay didn't leave too many clues about how he read her, only that he avidly read her. Prior to Margaret's engagement, he charged her "as the venerable circle charged Miss Byron, to tell me of every person who 'regards you with an eye of partiality.'"[102] G.O. Trevelyan recalled how his mother, Hannah Macaulay, and uncle, Thomas Macaulay, were intimately acquainted with the works of Jane Austen. "On matters of the street or of the household they would use the very language of Mrs. Elton and Mrs. Bennett, Mr. Woodhouse, Mr. Collins, and John Thorpe, and other inimitable actors on Jane Austen's unpretending stage: while they would debate the love affairs and the social relations of their own circle in a series of quotations from Charles Grandison or Evelina."[103] Trevelyan's father, Charles, recalled that his "first conception of his [Macaulay's] conversational powers was formed from hearing him and his sister [Hannah] discuss the characters in ... Miss Austen's novels with a familiarity and minuteness of detail which made me at first doubt whether they were actual acquaintances, or heroes of romance about whom they were talking..."[104]

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[100] T.B.M. to Hannah and Margaret, 20 August, 1832. Letters, Ed. Pinney , II: 185. Mr. Woodhouse is a character in Jane Austen's Emma.

[101] Anne Crippen Ruderman, The Pleasures of Virtue: Political Thought in the Novels of Jane Austen (London: Rowman & Littlefield Publishers Inc., 1995), 1-9.

[102] T.B.M. to Hannah and Margaret, 4 July, 1832. Letters, Ed. Pinney , II: 146. Allusion to the Jane Austen novel, Sir Charles Grandison.

[103] Trevelyan, The Life and Letters of Lord Macaulay, 132-3.

[104] Charles Trevelyan, "Memoir of TBM by Sir Charles Trevelyan. September 1873," Macaulay MSS. 0.15.73. #10.

Though it is difficult to ascertain the type of influence these works may have had on Macaulay, there are a number of ideological trends common to both the work of Jane Austen and the thought and private correspondence of Macaulay: primarily the emphasis on female modesty and the importance of marriage. Ann Crippen Ruderman has cited numerous examples in Austen's work of how a woman's modesty influences a man's behaviour towards her.[105] And her examination of what Laura Mooneyham White has called the marriage plot, in which a marriage closes the plot 'naturally', and that it is the only desirable end for female heroines,[106] has demonstrated that an underlying assumption of Austen's work is that humans are naturally inclined to couple.[107] Austen took seriously "the blessing of domestic happiness, and pure attachment."[108] Macaulay's sister Hannah wed while she and Macaulay were in India. He described the event to his sisters Selina and Frances, commenting that "I gave her away, with the fullest confidence that the event will be for her happiness."[109] Austen's personal correspondence with her niece demonstrates her resignation to her niece's happiness through marriage rather than through individualism. "I do wish you to marry very much, because I know that you will never be happy till you are."[110] Marriages in Austen's novels were the product of love (not necessarily of social demand and convention), of a genuine attachment between two people that only virtue could make possible, and that resulted in a happy domestic arrangement.[111]

> With so much true merit and true love, and not want of fortune of friends, the happiness of the married cousins must appear as secure as earthly happiness can be. Equally formed for domestic life, and

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[105] Ruderman, The Pleasures of Virtue: Political Thought in the Novels of Jane Austen, 9, 167.
[106] Laura Mooneyham White, "The Marriage Plot," in Jane Austen and Discourses of Feminism, Ed. Devoney Looser (New York: St. Martin's Press, 1995), 1-24.
[107] Ruderman, The Pleasures of Virtue: Political Thought in the Novels of Jane Austen , 13.
[108] Jane Austen, Mansfield Park, 350. Mansfield Park is interesting to imperial historians for other reasons, namely because of the centrality of the slave trade to the story. See, Moira Ferguson, "Mansfield Park: Slavery, Colonialism, and Gender," in Critical Essays on Jane Austen, ed. Laura Mooneyham White (New York: G.K. Hall, 1998), 103-120.
[109] T.B.M. to Selina and Frances, 26 December, 1834. Letters, Ed. Pinney, III: 117.
[110] Quoted in Ruderman, The Pleasures of Virtue: Political Thought in the Novels of Jane Austen, 12.
[111] Ruderman, The Pleasures of Virtue: Political Thought in the Novels of Jane Austen, 13.

> attached to country pleasures, their home was the home of affection and comfort.[112]

The dual sphere ideology was in opposition to lavish displays of consumption by the aristocracy. Respectable bourgeois families sought to establish homes that imparted the proper moral values that were lacking in the aristocracy.[113] Women occupied the centre of the domestic sphere, and the happiness of the family depended upon the pious nature of the woman. Thomas Gisborne instructed that the "foundation of the greater portion the unhappiness which clouds matrimonial life, is to be sought in the unconcern so prevalent in the world, as to those radical principles on which character and permanence of character depend, - the principles of religion."[114] Women were crucial for taking care of relatives, improving the manners of the opposite sex, and providing a good Christian upbringing for children. Women were to be responsible for the moral conduct of all persons residing in their house. Frances King used the biblical story of Sarah to illustrate the performance of the appropriate duties of her sex. They included the salvation of "herself and her servants from that useless waste, idleness, and extravagance, which ruin the morals of domesticks..."[115] Macaulay's advice to Hannah on the subject of a selection of a maid resembled this, for not only was he worried about her morals, he was concerned that she may disrupt the happiness of the house. "The happiness and concord of our native household ... may be destroyed by her if she should be ill-tempered and arrogant."[116] Mothers were also responsible for imparting Christian and feminine ideals to children, especially their daughters. Frances King used the story of the Pharaoh's daughter to illustrate that "the care of young females is a woman's exclusive duty; not only in instructing them as children, but regulating their morals and conduct as young women..."[117] Possibly the most important female duty, according to Gisborne, was the influence they possessed over the conduct and character of their husbands.

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[112] Mansfield Park, 473. Quoted in Ibid., 12.
[113] Davidoff and Hall, Family Fortunes, 21.
[114] Gisborne, An Enquiry into the Duties of the Female Sex, 233.
[115] King, Female Scripture Characters, 32.
[116] T.B.M. to Hannah, 22 November, 1833. Letters, Ed. Pinney, II: 340.
[117] King, Female Scripture Characters, 61.

Women, because they "appear to be ... more disposed to religious considerations than men" and "they are less exposed than the other sex to the temptations of vice," are in the optimal position to diffuse the "steady glow of piety" onto their husbands. [118] The effect of a woman on a man should be to soften his actions and manners. Her affect should engender in the husband "the mildness, the conciliating forbearance, the lively and never-failing tenderness of affection, which every branch of his behaviour towards his partner ought to display..."[119]

Macaulay took occasion to share his observations of this, and his apparent approval of it, with his sisters. "I liked their [George and Hyde Villiers, acquaintances at a dinner] behaviour to their sister very much. She seems to be the pet of the whole family; and it is natural that it should be so. Their manners are softened by her presence; and the roughness and sharpness which they have in rather unpleasant degree in intercourse with men vanishes at once."[120] The softening influence of women was illustrated by the characters of Coeleb and Mr. Stanley in Hannah More's *Coeleb in Search of a Wife*: crying, care and consideration, thoughtfulness and reason, and the ability to enjoy domestic life were all acceptable expressions of masculinity.[121] Again upon the occasion of Margaret's engagement, Macaulay openly expressed sentiment of all these kinds to his sisters. On one occasion he wrote:

> How could you think, my darling Margaret, that any event could diminish the tender love which I feel for you? – It is true that I shall grieve to lose you. It is true that I could not learn, without a flood of very bitter tears, that we are to be separated. But my love for you is not so selfish that I should repine at your decision. ... You have nothing, my own dearest girl, of censure of coldness to fear from me. Let Edward make you happy, and he shall be as a brother and more than a brother to me in affection. Of this I am sure, that, love you as he may, he will never love you more dearly than I have done. God bless you,

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[118] Gisborne, An Enquiry into the Duties of the Female Sex, 245-6.
[119] Ibid., 232.
[120] T.B.M. to Hannah and Margaret, 23 July, 1832. Letters, Ed. Pinney, II:157.
[121] Davidoff and Hall, Family Fortunes , 169.

> my own dear Margaret – and make you as happy as I wish you to be. I had much more to say – but I can scarcely see the paper for weeping.[122]

If Macaulay was unable to enjoy domestic life, he certainly longed to enjoy it. His relationship with his sisters is critical to appreciating the importance of domesticity, and by extension the virtues and affects of femininity, to Macaulay. He sought to establish with his sisters, women he had built up as paradigms of virtue, the comforts of a domestic life. Unfortunately for Macaulay, this was not to be, and both of his sisters' marriages hurt him deeply.[123] Macaulay's first attempt to establish a domestic arrangement with his sisters was in July 1831.

> I pine for your society, for your voice, for your caresses. I write this with all the weakness of a woman in my heart and in my eyes. We have difficulties to pass through. But they are not insurmountable; and, if my health and faculties are spared, I feel confident that, however the chances of political life may turn, we shall have a home, perhaps a humble one, but one in which I can be happy, if I see you happy. – Farewell my dearest, and believe that there is nothing on earth that I love as I love you.[124]

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[122] T.B.M. to Margaret, 18 August, 1832. Letters, Ed. Pinney, II: 184.

[123] These events, along with the death of Margaret, hurt him so deeply that he returned from India a man transformed from a socialite to a scholarly recluse. Eric Stokes, "Macaulay: The Indiam Years 1834-38," A Review of English Literature 1:4 (1960), 43-7. It is tempting to see Macaulay's relationship with his sisters as somewhat incestuous, however, expressions of the kind of love that Macaulay felt for his sisters was not uncommon in the early nineteenth century. Certainly, the theme of sibling love was strong within the novels of Jane Austen. Glenda A. Hudson, Sibling Love and Incest in Jane Austen's Fiction (New York: St. Martin's Press, 1992). Also, the affective modes of parenting that developed in the eighteenth century were replaced by stricter modes of parenting in some Evangelical families. Parents, in an effort to inculcate in children the necessity of self-discipline and humility, subjected them to physical and psychological hardship. Macaulay's relationship with his father was always somewhat strained due to Zachary's reprimands for Macaulay's remarks, performance in school, or his seemingly frivolous literary pursuits which ,to Zachary, represented a lack of discipline. Children often banded close together in search of consolation. Moreover, different conventions of writing between siblings existed then than do now. Economic factors often delayed marriages and moral factors prohibited sexual relations before marriage, resulting in strong bonds between brothers and sisters. Other sets of siblings expressed sentiments similar to Macaulay's in the early nineteenth century: Byron, Wordsworth, de Quincey, Disraeli, Charles Lamb and others. Clive, Macaulay, 273-4.

[124] T.B.M. to Hannah, 13 July, 1831. Letters, Ed. Pinney, II: 69.

Their co-habitation at this juncture did not happen, but in 1833 Macaulay, saddened by the news of Margaret's engagement, yet excited by the prospect of being offered the position of the legislative member of the Supreme Council of India, asked Hannah to accompany him to India. On the 17th of August he wrote:

> Whether the period of my exile shall be one of misery, or of comfort, and, after the first shock, even of happiness, depends on you, my dear, dear [Hannah]. I can scarcely see the words which I am writing through the tears that force themselves into my eyes. Will you, my own darling, if, as I expect, this offer shall be made to me, will you go with me.[125]

Her apparently reluctant response prompted this plea from Macaulay.

> It is principally on your account that I feel pained by the precariousness of my present situation. It is that I may have a home for my Nancy, that I may surround her with comforts, and be assured of leaving her safe from poverty, that I am ready to leave the country which I love and a sister who is dearer to me save one in this world. If, on mature reflection, you really would prefer that we should remain in England, and take the chances of political life here, I will, at once and without a moment's regret, give up the scheme, and forget everything connected with it, except your generous and confiding affection.[126]

Hannah finally accepted Macaulay's invitation, at which time Macaulay informed her of his purchase of Gisborne's *Duties of the Female Sex* and King's *Female Scripture Characters*. These books were bought in order to assist Hannah in fulfilling the gendered prescripts of bourgeois respectability as a representative of British white femininity and, therefore, civilization and modernity. These same prescripts also informed the conception of Macaulay's draft penal code.

The virtues of domestic femininity - piety, modesty, chastity, and submissiveness – that were elaborated through a discourse of bourgeois respectability were encoded in

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[125] T.B.M to Hannah, 17 August, 1833. Letters, Ed. Pinney, II: 301.
[126] T.B.M to Hannah, 21 August, 1833. Letters, Ed. Pinney, II: 304.

and enforced by Macaulay's draft penal code, especially in the clauses relating to consent, penetration, and marriage. There are, however, two clauses within the code that provided sites upon which a cultural dialogue occurred. Clause 5 established the age of consent in India at age nine. In England, however, the age of consent was ten, and it was a misdemeanour offence if the child was between the ages of ten and twelve.[127] This discrepancy was predicated upon the notion that the Oriental woman 'ripened' at an early age. In discussing the application of criminal law between 1827 and 1846 in Bombay, the Deputy Registrar and Compiler for the Sadr Foujdari Adalat of Bombay wrote that "in India where females come to maturity so early, this [English] doctrine must be received with considerable caution, and must always be a point to be determined by the discretion of the Court..."[128] The English law on the age of consent had to negotiate with and accommodate social identities, or colonial perceptions of Indian social identities.

The code also had to seek points of negotiation and accommodation with these identities when it prescribed punishment on conviction of rape. The 1837 draft penal code set the limits of a sentence at between two and fourteen years. Macaulay himself left no indication in the notes or illustrations as to why, in this instance, he delimited a range of punishment thereby requiring the use judicial discretion in a code that in part was designed to severely restrict such acts. In 1847, law commissioners Charles Hay Cameron and Daniel Elliot defended this wide latitude with reference to native codes of honour.

> On the one hand , let us take the case of the chaste high-caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of low caste, say a chandala or a Pariah. On the other hand, that, of a woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive refuses to comply with the solicitation of a man, and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.[129]

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[127] East, Pleas of the Crown, 436.
[128] Quoted in Singha, A Despotism of Law, 139, n. 76.
[129] "Report on the Indian Penal Code," PP, XXVIII (1847-8), 79.

Rape, as Radhika Singha has suggested, "was taken less seriously as an injury against the woman's sensibilities than as a point for discourses about native codes of honour,"[130] thereby indicating the focus of the colonial gaze during trials for rape. Thus, the import of concepts drawn from bourgeois concepts of femininity had to be refined and negotiated to be meaningful in a colonial courtroom and in a colonial discussion about native codes of honour. Recognition of the law, in some instances, as a cultural production rather than a cultural imposition allows for a more complex analysis of the ways in which the competing identities of race, gender, and social status affected the production of a authoritative code of law.[131] The subject of next chapter is this colonial gaze and the cultural dialogue in which it was engaged that resulted in the substance of Act XLV of 1860, the Indian Penal Code.

[130] Singha, , A Despotism of Law, 141.
[131] Radhika Singha, A Despotism of Law, viii. "Law making is treated as a cultural enterprise in which the colonial state struggled to draw upon existing normative codes – of rule, rank, status and gender – even as it also reshaped them to a different political economy with a more exclusive definition of sovereign rule."

CHAPTER THREE: Negotiating Identities: Rape and Colonial Law, 1830-1862

> It appears to me remarkable, that by this time the proper authority, whatever that authority may be, should not have made up their mind as to what should be finally done in the matter, and either have set the code aside altogether, or adopted it, or made the requisite alterations and passed it.
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> - J.M. Macleod, 1852.[1]

> ...the code has finally had justice done to it. If it had been done sixteen years ago I would have given more attention to legislation and less to literature.
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> - T.B. Macaulay, 1854.[2]

Macaulay's 1837 draft penal code could not become a complete solution to the inconsistent form, substance, and application of criminal law in India. Even he recognized that it was merely one step in a process of complete legal codification for all of India. He hoped that even after his departure the Indian Law Commission would continue this process by producing a civil code of law as well as civil and criminal codes of procedure. However, not until 1860 was a Penal Code based upon but not entirely consistent with the 1837 draft penal code enacted. Even then, its application was delayed by almost another full year, from May 1, 1861 until January 1, 1862, in order to introduce it concurrently with a Code of Criminal Procedure. An analysis of the twenty-plus years of correspondence on the subject of Macaulay's code indicates that the delay may in part be attributable to a crisis in corporate memory: the constant replacement of various colonial personnel reconstituted the dynamics of the colonial administration and resulted in a discontinuous consideration of the draft penal code. During this crisis, the many

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[1] "Evidence of John Macleod, 15th June 1852," Minutes of Evidence Taken Before the Select Committee On the East India Company's Charter, PP, XXX (1852-53), 287.

[2] T.B.M. to Hannah, October, 1854. Quoted in Clive, Macaulay: The Shaping of the Historian (Cambridge Mass.: Harvard University Press, 1987), 465. And, G.O. Trevelyan, The Life and Letters of Lord Macaulay, 2nd ed. (London: Longmans, Green, and Co., 1877) I:469.

official and unofficial reports that rehashed debates about the content of Macaulay's draft penal code produced an extended conversation on a number of subjects in the code, including rape. These conversations provide an opportunity to see how officials constructed notions of gender and sexuality about a racial other and negotiated with those perceptions to be able to apply the law, as informed by bourgeois respectability, to them. Judges' reports offer another perspective from which to examine the processes of accommodation and negotiation. The questions of caste, age, and the nature of Indian sexuality that colonial administrators were contemplating in the negotiative process of codification, were implicitly and explicitly addressed by judges in the practice of administrating law. Though the Indian Penal Code did not officially come into effect until the end of the period with which this study is concerned, law was administered according to, or by way of comparison with, law encoded with notions of bourgeois respectability, primarily English law though there were also suggestions that judges in the Bombay Sadr Foujdari Adalat, the chief criminal court of Bombay, were using Macaulay's draft code. [3] These processes indicate that the codified and administered law were products of a cultural dialogue, albeit a lopsided one.

A crisis in corporate memory resulted in an almost twenty-five-year delay in the implementation of Macaulay's draft penal code of 1837 as Act XLV of 1860.[4] In practice, the administration of criminal justice continued much as it had, both with reference to any and all existing English, Islamic, and East India Company legal treatises, statutes, regulations, and the non-binding *fatwas* of the *muftis*. The administration of justice negotiated with many types of law and social identities and was more of a cultural production than an imposition. However, the drawn out exercise of introducing the code in this period was subject to changing personnel at various levels of administration, to reprioritization, to personal preferences and grudges, to changing political, socioeconomic and legal climates and ideologies, and to delays in correspondence

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[3] "Evidence of John Macleod, 15th June 1852," Minutes of Evidence Taken Before the Select Committee On the East India Company's Charter, PP, XXX (1852-53), 296.

[4] Much work has been done on corporate memory and Canadian Indian Policy. See, John Leslie, "The Bagot commission: Developing a Corporate Memory for the Indian Department," Canadian Historical

between London and Calcutta that could take up to sixty days on some overland routes.[5] All of these contributed to a crisis in corporate memory that resulted in a quarter of a century delay in the enactment of the Indian Penal Code.

The crisis really began prior to the completion of the code. Illness and distraction among the members of the Law Commission delayed the production of the code that Macaulay was essentially left to compose alone.[6] All the members, save Macaulay, were ill for periods of time and the secretary, Frederick Millet, had other administrative duties to fulfill.[7] Commissioner Charles Hay Cameron was so far removed from the process of drafting the code that his name does not even appear on it. Macaulay knew he would leave India after his draft criminal code was completed and before the civil and procedural law had been codified, but expected that his successors would oversee these projects. Macaulay rarely looked back upon the code later in his life. But, upon hearing that the code was finally about to be enacted in 1854 he wrote to Hannah.

> I cannot be but pleased to find that, at last, the Code on which I bestowed the labour of two of the best years of my life has had justice done to it. Had this justice been done sixteen years ago, I should have probably given much more attention to legislation, and much less to literature than I have done. I do not know that I should have been either happier or more useful than I have been.[8]

Whether he would have been able to impose the code upon the Indian government sooner had he remained in India as the legislative member of Council, as he had imposed his will on other issues, is an interesting point to ponder, but fruitless. What we need to know is that the beginning of the crisis in corporate memory began with Macaulay and the Indian Law Commission in 1835 and did not end until 1862, eight years after

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Association Historical Papers (1982), 23-44. Also, Sally Weaver, Making Canadian Indian Policy: The Hidden Agenda, 1968-70 (Toronto: University of Toronto Press, 1981).

[5] It took some correspondence regarding the draft penal code sixty days to reach Calcutta from London on overland routes.

[6] See chapter 1.

[7] T.B.M., "On the Constitution and labours of the Law Commission," 2 January, 1837, Macaulay MSS. 0.15.73 #4.

Macaulay's comments to his sister, and twenty-five years after the draft code's completion. Its end was ultimately brought about by another crisis, one in colonial authority.

If the implementation of a liberal administrative state required peace and stability, then the turbulent twenty-five years between 1837 and 1862, under the rule of Lord George Auckland (1836-42), Lord Edward Ellenborough (1842-44), Sir Henry Hardinge (1844-48), the Marquess of Dalhousie (1848-56), and Lord Charles Canning (1858-61), ensured that any reforming momentum built up during the terms of Bentinck and Metcalf would be dissipated. The 1st Afghan War (1838-42), the 1st and 2nd Sikh Wars (1845-46, 1848-50), the 2nd Burmese War (1852), the Indian rebellion (1857-58), annexations of the Sindh (1843), the Punjab (1849), and Awadh (1856), and devastating famines under both Auckland and Canning distracted the government, leaving neither time nor money for the reform of state institutions. Dalhousie's administration was the exception to this. It planned the first extensive railways in India, and the first telegraph line, and created new departments of education, forestry, jails, and public works. He was also intent on legislating a uniform code of criminal law in India. His efforts, though, were impeded by the crisis of corporate memory at the bureaucratic level.

When the code was completed and delivered to the government of India, which only just preceded Macaulay's departure, Governor-General Auckland found himself embroiled on the Northwestern frontier with the 1st Afghan War. On account of these demands on his attention, he "expressed doubts whether the time had yet come when a critical examination of the important and difficult subject could be properly undertaken by the government of India."[9] Auckland recommended that the code should "fall into the hands of individuals conversant with the matters upon which it treated: that the public authorities would then be more competent to judge both of the merits of the project itself, and of the scrutiny which it might be proper it should undergo before being enacted as

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[8] T.B.M. to Hannah, October, 1854. Quoted in Clive, Macaulay, 465. And, G.O. Trevelyan, The Life and Letters of Lord Macaulay, I:469.

[9] "8 July, 1847," Miscellaneous Judicial Letters Received and Sent 1827-1879, L/P&J/2/193, 9: 459-65. O.I.O.C.

law."[10] The Court of Directors entirely concurred in this course of proceeding, and remarked that "after the Penal Code should for some time have engaged the attention of persons conversant with the subjects of which it treats, authorities in India and England would feel themselves more competent than they were then to form a satisfactory judgement concerning its general merits, and to determine what sort of scrutiny it ought to undergo before being brought into general operation."[11] Based on this recommendation, reports were furnished by Sir J.P. Grant and Sir H.W. Seton, both judges from Calcutta; Sir R.B. Comyn and Sir E.J. Gambier, both Chief Justices from Madras; Sir H. Compton, and Sir J. Awdry, both Chief Justices from Bombay; also from Mr. G. Norton, Advocate General at Madras, Mr. John Cochrane, the Company's Standing Counsel at Calcutta, and Colonel Henry Sleeman, Commissioner for the Suppression of Thagi. Various reports were also furnished by the Sadr (chief criminal) Court of the Northwest Provinces, two judges of the Sadr Court at Madras, three judges of the Sadr Court at Bombay, and various other judges and magistrates.[12] John Cochrane found many provisions of the code to be highly objectionable.[13] Though his precise reasons for finding sections of the code to be objectionable have not been preserved, there are suggestions that he differed philosophically from Macaulay. In 1838 he requested that his brother notify Sir John Hobhouse, President of the Board of Control, of "the policy of not pledging the administration to the defence of the new 'Penal Code' for India, until the reports from the different members of the service are sent into government and get home. This I think important to be mentioned as the high reputation of Macaulay may lead the administration into difficulties."[14] On its own the statement appears ambiguous, yet there is reason to suspect that Auckland and his administration were at odds philosophically with Macaulay and anything resembling Utilitarian modes of

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[10] "Evidence of David Hill, 26th June 1852," Minutes of Evidence Taken Before the Select Committee On the East India Company's Charter, PP, XXX (1852-53), 334.
[11] "8 July, 1847," Miscellaneous Judicial Letters Received and Sent 1827-1879, L/P&J/2/193, 9: 459-65. O.I.O.C.
[12] Excerpts of these reports survive in the, "Report on Indian Penal Code," PP, XVIII (1847-48), 1-116; and the "Second Report on the Indian Penal Code," PP, XVIII (1847-48), 117-231.
[13] John Cochrane, in the "First Report on the Indian Penal Code," PP, XVIII (1847-8), 7.
[14] "John Cochrane to Captain Cochrane R.N. 15 June, 1838," Miscellaneous Judicial Letters Received and Sent 1827-1879, L/P&J/2/185, 1: 7. O.I.O.C.

reform. In 1838 Auckland complained to Hobhouse that the code contained, perhaps, too much Benthamism.[15] It appears as though Auckland was also critical of certain aspects of Macaulay's personality, particularly his ability to accomplish administrative and legislative goals at the expense of offending other administrators. Auckland advised Hobhouse that the new legislative member of Council should possess, beyond ability and the general requirements of the position, "a good sense and temper, and address in conciliation in large proportions."[16]

The code was effectively buried under the Auckland administration and was not addressed again until October of 1842, when Andrew Amos, Macaulay's successor as the legislative member of the Council of India (1837-43), reported that "the code had been consulted attentively and with advantage of passing acts which had reference to its provisions, but that questions of Police, of Criminal Procedure, of Prison Discipline, and of Transportation were of more practical importance than a mere Code of Definition and Punishment." [17] One of the main complaints was that the code was simply a code of definition and punishment, and as such it did not address questions about the administration of justice, of police, or of prisons. In December of that same year the government of India submitted the various reports that had been solicited under Lord Auckland to the Court of Directors and reported "that they were not prepared to take up the question whether the Code should either in whole or in part, be introduced into practice."[18] The issue of the penal code was only taken up again in 1845. The Council of India, under the leadership of Governor-General Hardinge, stated their desire to either revise the draft code and enact it, or to dispose of it. The code and the various reports upon it were submitted to the Law Commission, which at this time consisted of Daniel Elliot and Charles Hay Cameron, the successor to Andrew Amos as the legislative member of the Council of India. As Cameron put it in 1852, the Law Commission at this

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[15] Quoted in George Bearce, British Attitudes Towards India, 1784-1858 (Oxford: Oxford University Press, 1961), 176.
[16] Quoted in Clive, Macaulay, 466.
[17] "8 July, 1847," Miscellaneous Judicial Letters Received and Sent 1827-1879, L/P&J/2/193, 9: 459-65. O.I.O.C.
[18] Ibid.

time was "very nearly extinct."[19] Upon Cameron's departure from the position of legislative member of Council in 1848, the Commission did cease to exist, contrary to the mandate of the 1833 Charter Act. This, no doubt, further delayed action upon the draft penal code. However, the task of Cameron and Elliott in 1845 was to examine the draft code and the reports upon it in order issue an exhaustive report to "assist the government in forming a judgement on the merits of the code."[20] The commissioners issued two reports, dated 23 July 1846 and 24 June 1847. Their reports considered the criticisms of the draft penal code and compared it with the proposed English *Acts of Crimes and Punishments*, English legal commentaries such as those by Blackstone, the French Penal Code, the Louisiana Criminal Code, and the law as practiced in the Company Courts. Though the commissioners did not wholly agree or disagree with all the provisions of the draft code, nor with the criticisms of the many commentaries upon it, they felt that it could soon be enacted with little alteration.

> It is sufficiently complete, and, with such slight modifications as we have suggested, fit to be acted upon, and that if it be brought into operation it may be reasonably expected to work an important improvement in the administration of Criminal Justice. We think it might be brought into operation, in the Company's courts, with little if any alteration of procedure, with the help of a few plain and simple directions as to the manner of laying the charges, and some rules to define the offences falling to the jurisdiction of the several courts, with reference to the punishments they are respectively authorized to inflict. It does not appear to us at present advised, that there would be any great difficulty in adapting the procedure of Her Majesty's courts to the new system.[21]

Upon this recommendation, the Council of India submitted the report to the Court of Directors, requesting direction as to whether they should enact the draft code. The Court of Directors thought "that it might be satisfactory to the gentlemen by whom the

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[19] "Evidence of Charles Hay Cameron, 7th June 1852," Minutes of Evidence Taken Before the Select Committee On the East India Company's Charter, PP, XXX (1852-53), 183.
[20] Ibid.
[21] "Report on Indian Penal Code," PP, XVIII (1847-48), 107.

code was framed ... if the report of the present Law Commissioners ... were referred to them for any observations which they might see fit to offer."[22] The Court of Directors hoped that these gentlemen would help "to place the provisions in the code in such a form and state as will admit of its being framed and put forth as a Legislative Enactment."[23] John Macleod issued his *Notes on the Report of the Indian Law Commissioners on the Indian Penal Code*, fully endorsed by Macaulay, in 1848.[24] This treatise was a complete defence of the original draft penal code. In his subsequent testimony and defence of the draft code before the House of Lords Select Committee in 1862, he indicated that a crisis in corporate memory was responsible for the delay of the code; the code had been the object of many comments made by many people with little effect of enacting it.

> [The Code] was referred by the government to a great many authorities in India, and reports on it, containing an immense mass of comments, were in consequence received; those reports were afterwards referred to the Law Commission, which then consisted of new members; there was not a single member who had been present at the time of the framing of the code as it came forth from the Commission. These members considered the code, together with the voluminous reports .... They then made a report, which upon the whole was very favourable to the code; they recommended that with some not very important alterations it should be enacted. ... I think I may say safely, that I know of no work whatever which ever was subjected to such severe scrutiny and criticism as the Indian Penal Code, and I do not see that the result has been to detect any great errors in it.[25]

In September of 1848 the Court of Directors forwarded Macleod's notes along with instructions to the Council of India, stating that "under these circumstances, we see no objection to your enacting the Code as Law, if you shall see fit, with such amendments

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[22] "8 July, 1847," Miscellaneous Judicial Letters Received and Sent 1827-1829, L/P&J/2/193, 9: 459-65. O.I.O.C.
[23] Ibid.
[24] John Macleod, Notes on the Report of the Indian Law Commissioners on the Indian Penal Code (London: 1848).
[25] "Evidence of John Macleod, 15th June 1852," Minutes of Evidence Taken Before the Select Committee On the East India Company's Charter, PP, XXX (1852-53), 287.

or modifications, as on full consideration may appear to you advisable."[26] Macleod was not the only person anxious to see the code passed. There is evidence to suggest that there was a public impatience with the inaction of the government in this respect. An article in the *Calcutta Review* in 1846 reported that despite the ten years that had elapsed since the submission of the code, the three years labour of some of the ablest men, and the £70,000 expended on its production, the code

> has been laid upon the shelves at Leadenhall-Street to smoulder amongst rubbish and sink into oblivion, - while the antiquated laws of a former age continue to be administered to millions of human beings. Remonstrances have been frequently made; it has been urged that the Home Authorities ought either to get the Code revised by the Law Commissioners or to pass it at once into law, - but all in vain. That apathetic body have remained deaf to all kinds of complaints.[27]

For reasons that are not clear, the government did not act upon the instructions from the Court of Directors.

The draft code lay dormant for another couple of years. There was revived interest in it again in 1850, when the Black Acts were under consideration. These Acts proposed to extend the jurisdiction of Company Courts to all British-born subjects in India, who at the time were amenable only to the Supreme Courts of the presidencies and their implementation of English law. When Governor-General Dalhousie discovered that these Acts would place British subjects under the jurisdiction of courts governed by Islamic law and Company Regulation he withdrew his support for the Acts and reverted to the authority he had been given from home to enact the draft penal code. He suggested that it might be desirable to enact the penal code as a component of a new system of law which extended jurisdiction of Company courts to British-born subjects.[28] In April of 1850 Dalhousie intimated to the Court of Directors that the work of preparing and revising the

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[26] "Indian Legislative Despatch #20 1848, 20th September: Penal Code," Legislative Despatches to India 1833-1858, L/P&J/3/1199, 628. O.I.O.C.
[27] G.C. Datta, "Administration of Criminal Justice in Bengal," Calcutta Review 6:11 (1846), 148-9.
[28] "Evidence of David Hill, 10th March 1853," Minutes of Evidence Taken Before the Select Committee on Indian Territories, PP, XXVII (1852-53), 96.

penal code may, "at an early date, be brought to a successful completion."[29] By August of 1851 the Court of Directors expressed their impatience, and that they were "desirous of being informed what progress [had] been made in the revision of the code."[30] Once again, though, the draft code was being subjected to scrutiny by a new batch of officials. Though they had access to and were familiar with the old reports upon the code, knew of the government's desire to enact the code, and were aware of Dalhousie's reasons for wishing to pass it, there was yet another crisis in corporate memory. Called away to deal with troubles in the North Western Provinces, Dalhousie left the task of revising the draft code to his Council, more specifically to the legislative member of Council, Drinkwater Bethune – Cameron's successor. Bethune, with no Law Commission to turn to, relied upon the observations of Sir Frederick Currie, member of the Supreme Council, Major-General Sir J.H. Sittler, and various judges in India. In August of 1851 the minutes written by these men along with a revised code was forwarded to the Court of Directors. In these minutes a new set of officials rehashed debates about judicial discretion, the usefulness of appended notes, the invention of language in the definition of offences, the necessity of illustrations, the merits of a code of definition and punishment, a consideration of the proposed English *Acts of Crimes and Punishments*,[31] and whether the men revising the code were even authorized to consider this latter code. Bethune took a particularly unfavourable view of Macaulay's draft penal code, especially its use of illustrations as a temporary substitute for case law in India until such time as one developed. He was so adverse to it that he essentially prepared a completely new penal code, based on the English *Acts of Crimes and Punishments*. Sittler and Currie disagreed with Bethune's selected path of revision. Sittler suggested that they should adhere as closely as possible to the framing of the draft penal code by the Law Commissioners and Currie expressed his concern that Bethune had strayed from the task assigned to him.

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[29] "Indian Legislative Despatch #11 1851, 6th August: Penal Code," Legislative Despatches to India 1833-1858, L/P&J/3/1199, O.I.O.C.
[30] Ibid.
[31] Royal Commission on [English] Criminal Law PP, XIX (1843).

> It is the code of the Law Commissioners which the court of directors have authorized us to pass with such modifications as may be necessary. I am afraid by the terms of this minute, that what Mr. Bethune proposes to bring before us, is another code founded partly on this, partly on the English Acts of Crimes and Punishments, and in some points differing from both.[32]

Dalhousie concurred with the opinions of Currie and Sittler. In July of 1851 he expressed his concern and disappointment with the report and with Bethune's revised code in a letter to the Court of Directors which sought instructions as to what should be done next. He reported that the draft penal code had "become a Penal Code substantially different from that which was constructed by the Law Commission, and sanctioned as fit for enactment by the Honourable Court of Directors." He continued to express his frustration at the process, yet he hoped that the draft code might soon be enacted.

> In submitting the work of the legislative council to the Honourable Court of Directors, I take the liberty of expressing respectfully and earnestly my hope, that the honourable Court will not permit the subject of the Penal Code to be now laid on the shelf, but that they will send some definite instructions for the guidance of the Governor General in Council in legislating fully and at an early period for the Establishment of some one Code of Criminal Law in the Territories of the East India Company.[33]

In response to Dalhousie's request, the Court of Directors authorized the council to "proceed to pass a law giving effect to the code as it may finally be arranged by you.... We request the immediate attention to this important matter."[34] This important matter would again be delayed considerably though as the task of revising the draft code was assigned to the latest legislative member of the Council of India, Barnes Peacock, who

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[32] "Minute by Sir Frederick Currie," (No Date) Correspondence with India: Judicial Letters Received From India, 1834-1856, L/P&J/3/290, 853-5. O.I.O.C.
[33] "Minute by the Most Noble Governor-General," 7 July, 1851. Correspondence with India: Judicial Letters Received From India, 1834-1856, L/P&J/3/290, 953-6. O.I.O.C.
[34] "Indian Legislative Despatch # 2 1852, 4th February: Penal Code," Legislative Despatches to India 1833-1858, L/P&J/3/1199, O.I.O.C.

again had to familiarize himself with the two codes before Council, – those drafted by Macaulay and Bethune - and the debates surrounding them before choosing one and revising it. The Court of Directors inquired into the progress of this work in May of 1852 and 1853, receiving replies both times that the "code is now under the consideration of our colleague Mr. Peacock."[35]

No doubt the anxiety of the Court of Directors and their desire to pass a code was intensified by the evidence being collected by Parliament in the Select Committees prior to the Company's Charter renewal. The East India Company's Charter to govern India came up for renewal in Parliament every twenty years. Prior to each renewal, Select Committees from both the House of Lords and the House of Commons examined administrators from the previous twenty years as part of their scrutiny of the East India Company's ability to effectively rule India. The inability of the Company and its employees to pass a code of laws for India would certainly be a black mark on the record of the Company's government. Evidence given by former law commissioners John Macleod and Charles Hay Cameron especially reveal the frustration felt by many about the long delay in enacting a Penal Code in India. The evidence presented at these proceedings in 1852 indicates that the collective memory of what was trying to be enacted had become so murky that by the early 1850s it was necessary for the Court of Directors to again iterate, in response to an application from the Indian Legislative Council stating that their progress had been stayed because they did not know against which system of Penal Law - Macaulay's or Bethune's - the revision was to be applied, that they were "aware that this measure has for some time engaged the attention of your Government and we desire to be informed what progress has been made towards its completion and when we may expect that the labour of revision will be terminated."[36] In September of 1854 the Legislative Council, the legislative arm of the Council of India as established by the 1833 Charter Act, responded by stating that they had determined to

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[35] "Home Department Legislative Despatch #11 1852, 7th May," Correspondence with India: Judicial Letters Received From India, 1834-1856, L/P&J/3/291, 110. O.I.O.C. "Home Department Legislative Despatch #4 1853, 4th May," Correspondence with India: Judicial Letters Received From India, 1834-1856, L/P&J/3/292, 85. O.I.O.C.

recommend to the Council of India that the draft penal code as originally prepared by the Indian Law Commission should form the basis of the system of penal law to be enacted in India. In August of 1856 the Court of Directors ordered the Council of India to bring before them the code for their approval.[37] Yet, enactment of the code was again delayed, until 1862. The reason this time was the Indian rebellion – which ironically delayed it and raised awareness of its need. In May of 1860, Charles Wood, Secretary of State for India, requested information on when the Codes of Civil Procedure, Criminal Procedure, and Penal Law, which had been for a long time been before the Legislative Council might be expected to become law.[38] Finally, Act XLV of 1860, the Indian Penal Code, was enacted in December of 1860, and was to enter use on May 1, 1861. Though, it was delayed one last time until January 1, 1862 in order to coincide with the introduction of the Code of Criminal Procedure.[39]

Though there had always been certain individuals who urgently pushed for the introduction of the Indian Penal Code, hesitancy and delay had reigned for twenty-five years: there were too many opinions, commissioners, legislative members of Council, and other officials to accomplish the purpose of the Code with any expediency. In 1857 and 1858 British power in India faced a very public crisis of authority, one complete with atrocities committed on the very symbols of British paramountcy: white womanhood and all her attendant virtues.[40] The Indian rebellion, more popularly, though inaccurately,

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[36] "Indian Legislative Despatch # 15 1854, 5th April," Legislative Despatches to India 1833-1858, L/P&J/3/1200. O.I.O.C.

[37] "Despatch #47 1857, 19th August," Judicial and Legislative Despatches to India (copies) 1835-79, L/P&J/3/1206. O.I.O.C.

[38] "India Office Judicial Despatch # 44 1860, 17th May," Judicial and Legislative Despatches to India (copies) 1835-79, L/P&J/3/1208. O.I.O.C.

[39] "India Office Judicial Despatch #15 1861, 8th January," Judicial and Legislative Despatches to India (copies) 1835-79, L/P&J/3/1209. O.I.O.C.

[40] On causes of the rebellion see Eric Stokes, The Peasant Armed: The Indian Revolt of 1857, ed. C. A. Bayly (Oxford, 1986). For an analysis of the most storied event of the rebellion, the Kanpur Massacres, see, Randragshu Mukherjee, Spectre of Violence: The 1857 Kanpur Massacres (New Delhi: Viking, 1998). The fallout from the rebellion is examined in, Thomas Metcalf, Aftermath of Revolt: India, 1857-1870 (Princeton: Princeton University Press, 1964). Two recent studies that examine in the intersection of gender and race in literature about the rebellion are, Nancy Paxton, Writing Under the Raj: Gender, Race and Rape in the British Colonial Imagination, 1830-1947 (New Jersey: Rutgers University Press, 1999). Jenny Sharpe, Allegories of Empire: The Figure of Woman in the Colonial Text (Minneapolis: University of Minnesota Press, 1993).

referred to as the Sepoy Revolt, Mutiny or Uprising, has been approached from a number of different perspectives with a number of different agendas. For our purpose we should see it as the locus of two imperial legacies. First, it called into question the liberal assumption that all men were inherently rational.[41] Indian rebels appeared to cling to traditional ways rather than pursue their own best interests. It also forced the British to reclaim and entrench their authority, whether through immediate and brutal acts of suppression, such as blowing suspected rebels from cannon, placing Queen Victoria, a symbol of Divine and Maternal Governance, at the head of the Indian State, or strengthening and stabilizing government institutions used in the daily maintenance of authority. The late 1850s and early 1860s were marked by a spurt of legislative activity intended to restore British control over India.[42] The legal system alone was completely renewed and codified between 1859 and 1861. The Indian Legislature enacted a Code of Civil Procedure in 1859 (Act VIII 1859), the Indian Penal Code in 1860 (Act XLV of 1860), a Code of Criminal Procedure in 1861 (Act XXV of 1861), and established High Courts of Judicature in each presidency in 1861 (24&25 Vict., c. 104) to replace both the Supreme Courts and the Company's Sadr Courts for the administration of justice to all persons in India. The Indian Penal Code as enacted was substantially unaltered from Macaulay's 1837 draft code.

There were, however, some differences between definitions of rape in Macaulay's draft penal code and those in Act XLV of 1860. The first noticeable difference is in the second circumstance of the offence. The second part of the clause "Without her consent, while she is insensible" was removed from Act XLV of 1860. The concepts of "Against her will" and "Without her consent" had become so clearly differentiated by 1860 that the latter was *assumed* to pertain to cases in which the woman was "insensible, whether from drink or any other cause, or so imbecile that she is incapable of any rational consent."[43]

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[41] Metcalf, Ideologies of the Raj: The New Cambridge History of India, III.4 (Cambridge: Cambridge University Press, 1994), 47

[42] Metcalf, Aftermath of Revolt, 253-4.

[43] This is from the notes of A.G. Macpherson which accompanied the published version of the Code. Macpherson, himself a lawyer, published a number of articles on Indian Law in the Calcutta Review. Though his notes were not officially part of the code they are, like the English legal treatises of the early nineteenth century, valuable for insights on the ways in which judges understood the Code's definitions and

The concept of consent had become legally established to the extent that in 1860, not only was the sub-clause unnecessary, but the definition of the term itself had been removed from the chapter on General Explanations. Macaulay's draft penal code had defined "free consent" as that "consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury," and "intelligent consent" as that "consent given by a person who is not, from youth, mental imbecility, derangement, intoxication or passion, unable to understand the nature and consequences of that to which he gives his consent."[44] The exclusion of these clauses, and of the second part of the second circumstance that defined the offence of rape had been suggested and explained by Calcutta Supreme Court Judge H.W. Seton and published in the Report of Law Commissioners on the draft penal code in 1847.

> Sir H. Seton questions whether the word "consent" does not necessarily import the capacity of the party giving it, implying that the definition is unnecessary.... [Macaulay,] we conceive would construe the word "consent," which he appears to consider sufficient by itself to include consent given under deception, supposing the party to be capable of consenting at all, or able "to understand the nature and consequences of that to which he gives his consent."[45]

The fifth circumstance of the offence of rape was also modified between 1837 and 1860. The draft penal code defined rape as an offence "with or without her consent, when she is under nine years of age." Act XLV of 1860 raised the age of consent to ten. The age of consent in India was a contested site in the mid-nineteenth century, and increasingly so in the late nineteenth century.[46] By way of comparison, English law

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the unwritten assumptions of the written law. The Indian Penal Code (Act XLV of 1860), With Notes by A.G. Macpherson and W. Morgan (London: Baptist Mission Press, 1863), 324..

[44] "Copy of the Penal Code Prepared by the Indian law Commissioners, and published by Command of the Governor-General of India in Council," PP, XLI (1837-38), 14. (Hereafter cited as "Draft Penal Code.")

[45] "Report on the Indian Penal Code," PP, XXVIII (1847-8), 20.

[46] Padma Anagol-McGinn, "The Age of Consent Act (1891) Reconsidered: Women's Perspectives and Participation in the Child-Marriage Controversy in India," South Asia Research 12:2 (November, 1992), 100-118. Jim Masselos, "Sexual Property/Sexual Violence: Wives in Nineteenth Century Bombay," South Asia Research 12:2 (November 1992), 81-99. Mrinalini Sinha, Colonial Masculinity: the 'Englishman' and the 'Effeminite Bengali' in the Late Nineteenth Century (Manchester: Manchester University Press, 1995),

established two different ages of consent: ten was a felony offence punishable by death, twelve was a misdemeanor offence punishable by imprisonment[47] as twelve was the age at which girls were legally entitled to give their consent to marriage. English Statute 9GeorgeIV c.74 for "Improving the Administration of Criminal Justice in the East Indies," which applied only to the Supreme Courts in the Presidencies, had established the respective ages of consent at eight and ten.[48] These were lower than the English law due to the belief that Indian women came to sexual maturity at a younger age than did British girls. Though this belief was still in circulation in 1860, the age was raised to ten in order to protect young wives, as the definition of the offence also excepted from rape any sexual relations between man and wife. In these cases her age would be given preference over that exception.

> Mr. Thomas objects to the "exception which declares that sexual intercourse by a man with his own wife is in no case rape." He says "I doubt the propriety of this exception. The early age at which children are married and are in the eye of the law wives, makes it necessary that protection should be given to them by the law till they are of age to reside with their husbands. I remember a case of forcible violation and great injury to a child where the offender was the husband." Although marriages are commonly contracted ... before the age of puberty on the part of the female, yet usually the bride remains in the house of her parents till she is of fit age for the consummation of the marriage.... There may, however, be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely; to meet such cases it may be advisable to exclude from the exception cases in which the wife is under nine years of age.[49]

J.F. Thomas felt that the 1837 draft penal code also gave too much leeway in the punishment for rape. That code set the punishment at imprisonment for between two and fourteen years. The wide range was maintained by Act XLV of 1860, though the

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138-180. Dagmar Engels, "The Age of Consent Act of 1891:Colonial Ideology in Bengal," South Asia Research 3 (1983), 107-133.

[47] Edward Hyde East, Pleas of the Crown, 2 vols. (London: Professional Books Ltd., 1972), (1st ed. 1803), I: 436.

[48] 9GeoIV c.74 1828. "Improving the Administration of Criminal Justice in the East Indies"

[49] "Report on the Indian Penal Code," PP, XXVIII (1847-8), 78.

parameters were changed; the offence was punishable by transportation for life or imprisonment up to ten years. Mr. Thomas's arguments against any range were based upon the impossibilities of degrees of rape.

> ... it would not be rare to find women of caste by whom death would be considered a less evil than the violation of their persons by some low-caste fellow. In a society so constituted the offence of rape should be visitable with the higher penalty of imprisonment for life.... I can perceive no good reason for so low a penalty as two years. If rape at all, it must merit a higher penalty. This large range of two to fourteen years in the case of an offence not capable scarcely of degrees, for either there was or there was not a forcible violation, goes rather to meet cases of doubt as to the fact than degrees in the offence. If the fact of forcible violation was fully established, I can perceive no ground, even if the woman was without character, for lessening the security of the person.[50]

The authors of the report, Charles Hay Cameron and Daniel Elliot, disagreed with the assessment of Mr. Thomas. They felt that there were degrees of rape depending on the character of the woman.

> We cannot admit that this offence is not capable of degrees. Mr. Thomas has himself has suggested cases differing very greatly in degree. On the one hand, let us take the case of the chaste high caste female, who would sacrifice her life to save her honour, contaminated by the forcible embrace of a man of law caste, or of one who is below caste, say a Chandala or a Pariah. On the other hand, that of the woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive, refuses to comply with the solicitation of a man, and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.[51]

The language used to define degrees of rape slips between that of caste and that of respectability. Though caste was and is far more than an orientalist fiction, the fluid ideas

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[50] Ibid., 79.

and practices that named, grouped, and ranked people by order, function and region were broadly being reshaped and generalized across India beginning in the early eighteenth century. By the early nineteenth-century, notions based upon colonial understandings of these classifications were stabilized by both Indians and Britons and incorporated into the structures of colonial government.[52] Caste was a reality of Indian life, but in important ways it was also a 'discourse' to be negotiated with and sometimes manipulated. Hindu law had customarily defined crimes and punishments with reference to relative caste status. Islamic law too had allowed status to help determine the punishment. By way of contrast, English jurisprudence defined punishment according to the nature of the crime and the behaviour associated with it. Colonial law looked to find points of negotiation between these two discourses, ways to incorporate caste, or their understanding of caste into what was, substantively, English law. This law privileged behaviour over status, yet behaviour itself was a signifier of status. Chastity, character and honour were used to refer to high-caste females, and their antonyms to refer to a woman of low caste. Rarely was there a confusion of terms. Susan Bayly's study of caste provides two illustrations of how caste and respectability became entwined in the colonial imagination, much as class and respectability did at home. Favourable discussion about the feasibility of multi-caste juries in the Company's law courts in the early nineteenth-century indicated the belief that it was elevating to the "moral and political character" to have the right to serve as a juror. An essay by an influential 'native' judicial officer published in the *Journal of the Royal Asiatic Society* in 1836 found favor amongst the British for arguing that it was the members of respectable castes who were capable of exercising individual judgement in legal cases.[53] A better known example is that of thagi. Interest in and persecution of thags under William Sleeman intensified in the early 1820s and 1830s. Writers often used the word caste to refer to these groups of "vagrants" and "hereditary murderers and plunderers." The use of this word implied a potentially sinister and conspiratorial bond of allegiance. Character was determined by birth. The stories of their elaborate and ordered

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[51] Ibid., 79.
[52] Susan Bayly, Caste, Society and Politics in India from the Eighteenth Century to the Modern Age: The Cambridge History of India, IV.3 (Cambridge: Cambridge University Press, 1999), 3-4.

operation was especially fearful, for it implied that thags somehow "inverted the caste rules and proprieties that were beginning to be held as the hallmarks of virtue and normality in India."[54]

The very distinction and correlation between the character and status of a female formed the basis for maintaining section 347 of the 1837 draft penal code as section 354 of Act XLV of 1860. This section protected females from an assault "intending to outrage, or knowing it be likely that he will thereby outrage her modesty."[55] Though some reports on this section felt that the term "dishonour" was too vague and objected to the range of judicial discretion provided by this clause, the authors of the 1847 Report on the draft penal code concluded that the judicial discretion allowed by the section was sufficient to admit "due regard being paid to a variety of conditions and circumstances, making the same act less offensive to one person than to another."[56] Or as one commentator upon the code phrased it: "[I]t would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another. A kiss that would be highly resented by a lady, might be no affront to the maid."[57] The decision to acquit a prisoner based on references to the character and implied virtue of the prosecutrix in one case of rape from Madras in 1860 supports this distinction.

> The statement of the first witness ... appears to me incredible.... She admits that she is a prostitute by profession.... I have no doubt that if sexual intercourse took place between the prisoner and the first witness, it was either with the consent of the latter, or else with little or no resistance on her part.... I would direct the unconditional release of the prisoner. [58]

Reports of case law from the period probably allow the best entry into the various ways that femininity and female sexuality were legally characterized in this period. These reports need to be approached with a certain amount of caution. Minimal quantitative

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[53] Ibid., 116.
[54] Ibid., 116-119.
[55] The Indian Penal Code (Act XLV of 1860), 311-12.
[56] "Report on the Indian Penal Code," PP, XXVIII (1847-8), 75.
[57] Ibid., 75.

conclusions can be drawn from these reports as they represent an incomplete record. One hundred seventeen reports of rape cases decided in the Chief Criminal Courts (also called Sadr Courts or Company Courts) of the Bengal (Sadr Nizamat Adalat), Madras (Sadr Foujdari Adalat), and Bombay (Sadr Foujdari Adalat) presidencies between 1827 and 1861 form the basis of this section. However, the record is incomplete. In Bengal, for example, the reports that have been preserved from the period between 1851 and 1857 are for all of the rape trials that were referred to the Nizamat Adalat. As, by regulation XVII of 1817, all rape trials had to referred to the Nizamat Adalat this is an accurate account of the number of cases of rape tried in Bengal in that period. However from 1805 to 1850 and 1858 to 1861 the cases reported represent only a sample of all the cases tried. Similarly, the reports for Foujdari Adalat in Madras and Bombay are also more representative for the 1850s than other periods. Ninety-one of the 117 cases that have been considered in the preparation of this study come from the 1850s, sixteen from the 1860s, and ten for the period between 1827 and 1849. Moreover, the records are reports made by the Sessions Judge and then the Judge of the Sadr Court, and are not trial transcripts. Therefore, all reports of the trials are mediated by the impressions and biases of the individual judges. The original trials were held in the Sessions Courts, and the evidence was either collected there or beforehand by the district magistrate. The Sessions Judge made remarks upon the case and recommended a decision based upon the evidence and sometimes his consideration of the *fatwa* of the *mufti*, and forwarded these to the Sadr Court for consideration. The reports typically contain the remarks made by the judges at both courts, the facts of the case as ascertained by the judge, the evidence collected, and a summary of the witnesses' testimony. As such, any social history of the litigants is difficult to embark upon. Only rarely is the reader privileged to the status of those involved or aware of a pre-existing relationship between them. Since they are judges' remarks, and so offer comments upon Indian relations through the gaze of particular judges, they are tremendous sources from which to gain insight into colonial

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[58] MSFAR, 20 July, 1860. V/22/615. Vol. 10, 1860, 272-4.

legal definitions of femininity, sexuality, modesty, race, respectability, and on what grounds the prosecutrix warranted credibility.

Ninety-one of the 117 cases considered resulted in convictions for rape; the remaining resulted in acquittals or in convictions of 'lesser' crimes, such as assault or attempted rape. Nearly all the decisions were informed by references to feminine social and sexual propriety. Conviction and sentencing could depend on a number of factors: a confession, physical (medical) evidence, testimony of other witnesses, the age of the prosecutrix, and her testimony.[59] Her evidence was crucial because in most cases she was the only witness to the assault; it came under the most scrutiny as it formed the basis of the case for the prosecution. The dictates of the commentators on English law, Hale, Blackstone, and Russell, on this subject were frequently referred to by Company Judges in their reports, both explicitly and implicitly in their criteria for conviction. Hale's influential 1736 treatise, *Historia Placitorum Coronae*, informed judges that prostitutes, strumpets, common harlots, and concubines all had recourse to the law for protection from rape.[60] That said, not all women were equally credible in court. Many studies have pointed to the fact that judicial procedure required a woman's testimony to be treated with suspicion and to subject her personal character to trial.[61] The basis for this in the eighteenth and early-nineteenth centuries and even today is to be found in Hale's advice of caution. "It is true that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[62] A.E. Simpson has demonstrated that this dictum did not proceed from a personal bias of Hale's but arose out of particular circumstances

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[59] I have chosen to refer to the offended woman in each trial as the prosecutrix, though in many instances it was technically her father or the state that was the official plaintiff. I have done this for two reasons. First, the judges often referred to the offended as such. Second, I have tried to avoid referring to all women in rape cases as victims as it assumes they all were.

[60] William Hale, The History of the Pleas of the Crown 2 vols. (London: Professional Books Limited, 1971), I: 629.

[61] Among others see Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845 (London: Pandora, 1987). A.E. Simpson, "Rape and the Malicious Prosecutrix: The Blackmail myth and its origins in 18th-century legal and popular traditions" Journal of Criminal Law and Criminology 77:1 (1986), 101-150.

"concerned with the unhappy clash between the interests of a legal system undergoing modernization and the values of a particular culture."[63] Hale's cautionary warning was based upon a common male belief in the blackmail myth in which filing rape charges was actually a conscious ploy for monetary gain. This is represented in English popular culture by, among other things, a play written by future influential magistrate and author Henry Fielding in 1731 called *Rape upon Rape* in which he portrayed rape charges as attempts to blackmail respectable men.[64] Applied to nineteenth-century India, the ploy was rarely for monetary gain, but instead to avenge a perceived wrong.

This is glimpsed in a case from Madras in July of 1860 in which Judge H. Frere ruled in favour of the accused, citing that "in consequence of some trivial assault or quarrel wh[i]ch may have taken place on the road, the present serious charge has been preferred."[65] Similarly, a prisoner was acquitted by the Nizamat Adalat in Bengal in May of 1851 on the basis of a defence in which he accused the prosecutrix and two other women of taking his sugar cane. He claimed that he subsequently abused them and they brought a counter charge of rape.[66] Hale's warning had the effect of making the victim, not the defendant, the focus of the trial. In consolidated common law treatises, substantial portions of the chapters that related to rape focused on the character of the woman, how that character may be ascertained, and what type of evidence is admissible with regard to the woman's character. The sections contained in the treatises by William Blackstone, Edward Hyde East, William Russell, and those prepared by William Hough with reference to martial law in India basically restate the relevant sections of Hale, demonstrating the weight that his dictum carried, and the longevity of its observance.[67] His dictum also carried weight in the reports of the cases heard before the East India Company Courts. A prisoner was discharged in a case referred to the Bombay Foujdari

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[62] William Hale, The History of the Pleas of the Crown, I: 635.
[63] A.E. Simpson, "Rape and the Malicious Prosecutrix," 102.
[64] Clark, Women's Silence, 52.
[65] MSFAR, 20 July, 1860. V/22/615. Vol. 10, 1860, 272-4.
[66] BSNAR, 13 May, 1851. V/22/446. Vol. I 1851, 536.
[67] William Blackstone, Commentaries on the Laws of England, 4 vols.(Chicago: University of Chicago Press, 1979), I: 214. East, Pleas of the Crown, I: 445. William Russell, A Treatise on Felonies and Misdemeanors. 4th ed. 3 vols. (London: Stevens and Sons Ltd., 1865), I: 926. William Hough, The Practice of Courts Martial 2nd ed. (London: Kingsbury, Parbury, and Allen, 1825), 810.

Adalat in 1854. Upon doing so, Judge W.E. Frere requested that Lord Hale be kept in mind as the court had "nothing but the girl's unsupported assertion that she was abused."[68] Proving guilt in a rape trial was difficult. Hale made it clear that a woman's testimony needed to be corroborated, and that if she did not pursue charges immediately she came under greater suspicion as it was assumed that her motives were dishonorable.

> The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.
>
> For instance, if the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, shewd circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from the people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.
>
> But on the other side, if she concealed the injury for any considerable time after she had the opportunity to complain, if the place, where the fact was supposed to be committed, were near inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.[69]

The underlying assumption of these principles is that the character and reputation of the woman was essentially on trial; they also formed the basis for the majority of the decisions handed down by the Sadr Courts in the Presidencies of Bengal, Bombay, and Madras from the 1830s to the 1860s. A list of requisite circumstances had to be proved to lend credibility to the prosecutrix and her testimony: evidence of her general character was often extrapolated from her caste status, her intellect, her relative physical weakness,

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[68] BSFAR, 20 Apr., 1854. V/22/559. Vol. 1, 1854, 370-4. See also BSFAR, 7 Feb., 1855. V/22/561. Vol. 3, 1855, 150.

[69] Hale, The History of the Pleas of the Crown, I: 633.

immediate pursuit of her offender, the location and the time of the assault, proof of resistance such as screams, corroborating testimony, immediate disclosure of the incident to the authorities, and evidence of injury and penetration supplied by a medical officer or, in some cases, a matron. The absence or presence of any number of these conditions in conjunction with her testimony spoke about her character as defined by society, her chastity as determined by the medical profession, and her modesty as defined by the legal system.

Corroborating evidence, in light of all the scrutiny that the testimony of the prosecutrix was subjected to, was quite important. Prior to 1817 conviction for rape under Islamic law was extremely difficult because women could not testify, and four witnesses were required to substantiate the charge. Act XVII of 1817 allowed judges to convict on a strong presumption of guilt, regardless of the decision in the *fatwa* of the *mufti*. The testimony of women was also made admissible, though it came under intensified scrutiny. The increased protection to which women could have access was consistent with the elaboration of paramountcy to come in the 1830s. Women, and their condition in society, assumed symbolic and discursive importance as signifiers of modernity. White womanhood and its attendant virtues of domestic respectability were the hallmarks of a modern society. Moreover, the abolition of practices viewed as oppressive to Indian women were held up as modernizing reforms and used to justify British colonial rule.[70] The rhetoric employed in discussing the necessity of a woman's testimony in cases of rape was consistent with this.

> This verdict of acquittal is only in accordance with the Mahomedan Law, which as the *Moofty* [(mufti)] states, requires the testimony of four credible witnesses to the commission of the act, but fortunately the English Law dispenses in such cases with that positive evidence, without which ordinary charges could not be sustained.[71]

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[70] See for example Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India (Berkeley: University of California Press, 1998).

[71] MSFAR, 27 Aug., 185[2]. V/22/611. Vol. 2, 1852, 268-70.

Though allowing women to testify in rape cases empowered them by giving them a voice, it was also an early instance of the elaboration of paramountcy, through which authority was shifted from private to public and tangentially from Indian to British. It was a justification of colonial rule and at the same time a mechanism by which control was increasingly consolidated in the hands of colonial officials.

A tension existed within the category of the woman of good character, as defined by her adherence to sexual and social feminine propriety. Proof of modesty was important in establishing character, yet to report rape not only threatened to tarnish the honour and reputation of a woman, but also jeopardized her caste status and her chances of finding a husband. Women who did report these crimes, especially high caste women, were held up as paragons of virtue, much as voluntary satis were, for risking their reputation to prove their chastity,.[72] The establishment of the general character of a woman was so important that one Sessions Judge who did not attempt to ascertain it was ordered to examine the Policeman "to depose to the general character of the complainant for chastity."[73]

In cases which ended in the conviction of the accused, judges frequently remarked upon the unblemished character or modesty of the prosecutrix.[74] One way character was established was on the basis of her marital or family status. In December of 1858 a prisoner was convicted and sentenced to fourteen years imprisonment based on the testimony of the prosecutrix, which was "delivered with calmness, and with that degree of modesty, which a respectable woman, on whose character there has never been any imputation of levity, might be expected to display.... The prosecutor and the prosecutrix are respectable people living together, in perfect trust, as husband and wife."[75] In cases in which the prosecutrix was quite young, judges often referred to her intelligence and

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[72] See Mani, Contentious Traditions, 31-2, 50-51, 179-80.
[73] BSFAR, 7 Feb., 1855. V/22/561. Vol. 3, 1855, 150.
[74] BSNAR, 14 Jan., 1853. V/22/449. Vol.3:1 1853, 29; BSNAR, 13 Aug., 1853. V/22/450. Vol. 3:2 1853, 229;BSNAR, 13 Aug., 1853. V/22/450. Vol. 3:2 1852, 230; BSNAR, 22 Feb., 1854. V/22/451. Vol. 6:1 1854, 202; BSNAR, 31 Dec., 1855. V/22/454. Vol. 5:2 1855, 994; BSNAR, 2 Aug., 1856. V/22/456. Vol. 6:2 1856, 164; BSNAR, 31 Dec., 1857. V/22.458. Vol. 7:2 1857, 493; BSNAR, 9 June, 1858. V/22/459. Vol. 8 1858, 227.; BSNAR, 6 Dec., 1858. V/22/459. Vol. 8, 1858, 511.
[75] BSNAR, 6 Dec., 1858. V/22/459. Vol. 8, 1858, 511.

manner. In July of 1858 the Sessions Judge reported to the Sadr Judge in Bombay that the prosecutrix, a girl of ten or eleven, "gave her evidence with surprising intelligence, and in a manner that left no doubt on the mind of the Court that every word she said was the truth."[76] Earlier that year the same court concurred with the conviction recommended by the sessions judge in a case in which "the only evidence implicating the prisoner as the offender is that of [the prosecutrix] herself.... The manner of the child, however, in giving her evidence, is entirely such as to produce conviction of the truth of her statements."[77] The court did often have an appreciation for the paradox in which the prosecutrix found herself: her social status threatened by reporting the offence which had caused her dishonour. Bengal Sessions Judge H.C. Metcalf reported to the Sadr Court that "The prosecutrix described the circumstances attending the violence effected by the prisoner, clearly but as modestly as the subject permitted."[78] He recommended that the prisoner be convicted, based in part upon the "unimpeachable" character of the "unfortunate woman."[79] Indeed, judges did recognize the social sacrifice that the prosecutrix often made simply by bringing a charge of rape before the court and admitting her dishonour. A Bengal Sessions Judge recommended that the Nizamat Adalat convict in a December 1857 case, in opposition to the *fatwa* of the mufti, because bringing such a charge involved "if not an absolute loss of caste, a degree of disgrace which, however, unjustly attaches to the woman and her family so long as the memory of the occurrence lasts."[80] The Sadr Judge, D. I. Money, concurred, adding that "the credibility of her testimony would depend in a great measure upon the character she has born. This appears to have been irreproachable, ... Considering the aversion, which a modest woman would naturally feel to publish her disgrace, and the wish, with the prospect of loss of caste before her, to conceal it, no time appears to have been lost in giving information to her relatives and the police."[81] Her immediate disclosure and her

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[76] BSFAR, 7 July, 1858. V/22/568. Vol. 10, 1858, 6-8.
[77] BSFAR, 3 March, 1858. V/22/567. Vol. 9, 1858, 276-7.
[78] BSNAR, 14 Jan., 1853. V/22/449. Vol.3:1 1853, 29.
[79] Ibid.
[80] BSNAR, 31 Dec., 1857. V/22.458. Vol. 7:2 1857, 493.
[81] Ibid.

credibility, predicated on her selfless and potentially damaging act of reporting such a crime, lent credibility to her testimony.

Acquittals too were often based upon the general character of the prosecutrix. Her testimony could be disbelieved and the commission of the act doubted if it was suspected that a charge of rape had been brought in an attempt to save her honour when she had been discovered in an adulterous act. In 1851 Judge Ellis of the Bengal Nizamat Adalat found that "The evidence of the prosecutrix is too doubtful...[A witness] became aware of her adulterous intercourse with the prisoner, and shame and the fear of exposure led her to charge her paramour with having had connexion with her against her consent."[82] Similarly, one month earlier in the same court, the Sessions Judge concluded that the "woman only called out when she saw others approach, in order to screen her own guilt, and to afford a pretext for her own misconduct before her neighbors, and her own injured husband."[83] The Sadr Judge concurred, believing that there was evidence that the prosecutrix had been engaged in sexual relations with the accused for at least six months. He stated that the prosecutrix "was detected in the Act of adultery, and, to save her own honour, has brought this false accusation against the prisoner."[84] In cases such as this, where sexual intercourse was established but not force nor consent, judges argued that "reputation would be equally damaged if the connexion was voluntary."[85] Medical jurisprudence of the time supported the contention that women brought charges to protect their honour. "Nor is it uncommon that a woman, who has actually consented to her own dishonour, should on fear of discovery or on disappointment, or from jealousy prefer an accusation of rape against her seducer."[86]

Convictions in these cases and the character of the woman were based upon the actions of the woman during and immediately after the perpetration of the crime. Where did the offence occur: in a secluded area, or in an area where they were likely to be caught? If the latter, did she cry out, and if not why not? Did her cries attract witnesses,

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[82] BSNAR, 29 Aug., 1851. V/22/447. Vol. 1:2, 1851, 1251.
[83] BSNAR, 24 July, 1851. V/22/447. Vol. 1:2, 1851, 926.
[84] Ibid.
[85] BSFAR, 16 Jan., 1856. V/22/563. Vol. 5, 1856, 102-6.
[86] J.A. Paris and J.S.M. Fonblanque, Medical Jurisprudence, 3vol. (London: W. Phillips, 1823), I: 427.

or did they follow the discovery of the act? Did she report the incident immediately to the magistrate? Conviction hinged on the answers to these questions. A case from Bengal in July of 1853 demonstrates how the 'wrong' answers to these questions, introduced precisely to question the character of the prosecutrix, could result in an acquittal. The Nizamat Adalat Judge dissented from the recommendation of the Sessions Court Judge and remarked upon how the location, the lack of verbal indications of resistance, and the general character of the prosecutrix based upon the state of her marriage compromised her testimony.

> We do not place the same reliance on the statement of the prosecutrix as the sessions judge attaches to it. It is not easy to believe that violence of this nature would be committed so little removed from public observation and within so short a distance from a place occupied by members of the girls own family.... It seems more likely that they were detected in the act of sexual intercourse by the relations alluded to, and that the prosecutrix, in order to shield herself from the consequences of her frailty, and to avoid the loss of caste, has colluded with her relations in bringing this charge against the prisoner. She also said that he lay there for a long time, but that she screamed the entire time, but that no one came until the act was almost over. Further more the pain she described would be that of someone who had not had connection with a man before, but there are no signs of this violence. The above circumstances therefore lead us to view the girl's own statement (which does not at all accord with the innocence which she would assume) ... with great suspicion. We moreover believe ... that the character of the prosecutrix is not beyond suspicion, for the father said she had been turned out of her husband's house three days prior, and no satisfactory reason has been assigned for this. We acquit the prisoner.[87]

The location of the act and evidence of attempts to cry out were often considered together in the judge's determination of the character of the woman and in his decision of whether the case before him was of a criminal or consensual nature. A sexual act committed in proximity to a populated area and which was discovered because of the cries of the offended was likely to result in a conviction. A case from Bengal in 1850

resulted in the conviction of a man who had perpetrated the act in the house of the girl's family. She cried out. "Her screams attracted the notice of the neighbors, two of whom arrived in time to see the prisoner make his exit from the house where the girl was, and they found her senseless."[83] If, however, the sexual act occurred in a place near to witnesses, but no cries were made, the commission of a forceful sexual act was doubted. "The cries are stated also to have been uttered "slowly," or in a low voice. The place of the act, close to an occupied bungalow, is not one that would have been chosen for and act of violence."[89]

Furthermore, the prosecutrix' accusation and testimony were made more credible if the act was immediately reported to a public authority, usually the magistrate. However, her fear or her family's fear of her losing caste often delayed the disclosure of the crime. If her rape became public knowledge, she would be regarded as polluted, lose her caste status, and render her future social and marital status uncertain. In July of 1854 a prosecutrix, who originally complained of robbery, brought a charge of rape before the courts. She explained that that she delayed reporting this because she had been told that "by persisting in the charge of rape she was losing her reputation."[90] In 1856, a charge of rape before the Sadr Court in Bombay had originally been hushed up by the mother of the prosecutrix, aged ten years, because she feared that it would harm her daughter's reputation and her ability to find a husband. The court acquitted the prisoner because there was no immediate complaint and no apparent injuries. Though sex was established by the medical examiner, force was not. The Court concluded that her reputation would have been equally damaged if the sex had been consensual.[91] A conviction was more likely in cases in which the offence was immediately reported. Not only did this act lend credibility to her accusation, more importantly it allowed for an immediate physical examination in order to prove the sufficient and necessary criteria for rape: penetration.

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[87] BSNAR, 16 July, 1853. V/22/450. Vol. 3:2, 1853, 39.
[88] BSNAR, 27 Mar., 1850. V/22/445. Vol. 6, 1841-50, 266-7.
[89] MSFAR, 2 Feb., 1859. V/22/614. Vol. 9, 1859, 37-8.
[90] BSFAR, 12 July, 1854. V/22/560. Vol. 2, 1854, 24-7.
[91] BSFAR, 16 Jan., 1856. V/22/563. Vol. 5, 1856, 102-6.

More important than any other type of evidence, more important than the character of the prosecutrix, than corroborating evidence, and than other circumstances was the physical evidence of penetration, forcible penetration. By definition, the offence was a physical crime (though with important moral implications). It was an act of violent or non-consensual penetration, which could only be verified to have been perpetrated by a physical examination of the prosecutrix. This ultimately wrestled the burden of proof away from the mouth of the woman and put it upon her body, of which she was not, by the parameters of medical jurisprudence, the expert. When physical evidence was not collected, the Sadr Courts upbraided subordinate court and police officials. In 1851 T.L. Strange of the Madras Foujdari Adalat remarked that the police had "committed a great oversight in not having the prosecutrix inspected by a matron, and her evidence received as to the prosecutrix's condition, since she represented herself to have been lacerated."[92] When physical evidence was not apparent conviction was difficult to attain. In November 1851 the Sadr Court at Madras convicted the accused of attempted rape. The Judges were of the "opinion that the fact of actual penetration was not satisfactorily proved, but that the assault with the intent to commit the crime was substantiated."[93] A case before the Bengal Sadr Court in 1851 resulted in an acquittal based on a lack of physical evidence of the perpetration of the crime. The complaint was made to the magistrate twelve days after the alleged rape was said to have been committed. When the civil surgeon examined her at that time, "she had then no marks of violence upon her person, but he admits that if the laceration was not great, it might have become completely cured within the time." Before the Court the surgeon testified that "on examining the infant I saw nothing that could lead me to suppose sexual intercourse had taken place. I found no marks of laceration or swelling, neither did the vagina appear to me on examination to afford any reason for my supposing the child had been ravished." When asked if she could have completely

[92] MSFAR, 6 Dec., 1851. V/22/611. Vol. 1, 1851, 269-70. See also, BSFAR, 7 Feb., 1855. V/22/561. Vol. 3, 1855, 150. BSFAR, 23 May, 1855. V/22/561. Vol. 3, 1855, 695-8.
[93] MSFAR, 14 Nov., 1851. V/22/611. Vol. 1, 1851, 260-1.

recovered before he examined her, the surgeon replied that "it is possible, but not probable, when the lacerations were so extensive as reported to me."[94]

Physical evidence collected by medical officers included bleeding, swelling, lacerations, and indications of venereal disease. The injuries entered in as physical evidence in a case before the Foujdari Adalat in Bombay in 1858 were "very considerable; the flesh of her person was torn, and the parts were clotted with blood when examined, the bleeding having been so considerable as to saturate one of the child's 'sarees' with blood, and to have very much stained the next one which was changed for it."[95] Similarly, evidence of swelling, blood and lacerations were presented to the Court in Bombay in May of 1858. "Her person was very much swollen, and her clothes much stained with the blood which proceeded from the injury caused to her person by this violence.... The evidence of [the matron] shows that [the prosecutrix] was very much injured; the parts being covered with blood, and the flesh torn to the extent of a grain of wheat..."[96] In January of 1854 the sub-assistant general, Mr. Durant, testified before the Bengal Sadr Court that there was "evidence of considerable marks of violence. On the genitals, viz. In the complete laceration of the pudendum and the brushings of the other soft parts, which were also swollen, affording ample evidence of the charge of rape having been committed on the prosecutrix."[97] In a case before the Sadr Court in Bengal in May of 1851, the sub-assistant surgeon found evidence that the prosecutrix had been recently violated. He testified that the "defendant, has been up to the time of the rape under treatment for gonorrhea, and had the disease the morning after the occurrence; [he further testified] that he observed this disease on the child ... [and] that the disease still continued on her."[98]

Just as in English courtrooms, medical jurisprudence was increasingly important in demonstrating the offence of rape, not only in terms of penetration, but in proving that the act was perpetrated against the woman's will. Proof of penetration merely

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[94] BSNAR, 26 Apr., 1851. V/22/446. Vol. 1, 1851, 469.
[95] BSFAR, 3 Mar., 1858. V/22/567. Vol. 9, 1858, 276-7.
[96] BSFAR, 8 May, 1858. V/22/567. Vol. 9, 1858, 473-6.
[97] BSNAR, 7 Jan., 1854. V/22/451. Vol. 6:1, 1854, 18.
[98] BSNAR, 9 May, 1851. V/22/446. Vol. 1, 1851, 521.

demonstrated sex, not force. Other physical evidence was also necessary. Doubt could be cast upon the commission of the offence at the suggestion that the woman could have offered more physical resistance but didn't, thereby suggesting her consent to the act. J. A. Paris and J.S.M. Fonblanque explained in their book, *Medical Jurisprudence*, how relative body strength was an important criteria for determining whether a rape could have possibly been perpetrated if the victim had exerted any amount of resistance.

> After having determined the age, the most material examination is as to the *relative body strength* of the *parties*. It is at all times difficult to believe that in a mere conflict of strength, any woman of moderate power of body and mind, could suffer violation, so long at least as she retained her self-possession.... All accusation therefore must be viewed with suspicion, if there be not a great disparity of strength in favour of the assailant.[99]

This concern had been much raised by judges and other commentators upon the 1837 draft penal code in the context of objections to the third circumstance of the law, which defined rape as carnal knowledge "with her consent, when her consent has been obtained by putting her in fear of death, or of hurt."[100] The report made on the draft penal code made by the Law Commission in 1847 cited a number of objectors to this law.

> Mr. A. D. Campbell and Mr. Pyne recommended that the words "or of hurt" be omitted, on the grounds, as stated by Mr. Pyne, that "when the fear of the most trivial hurt produces consent, the woman's reluctance or chastity cannot be over great or rigid." Mr. D. Greenhill proposes the words "grievous hurt" instead of "hurt." We concur in this suggestion The words of the English law on this point, as given in the Digest, are "grievous bodily harm."[101]

Despite the commissioners' recommendation and the way this clause was interpreted in the courts, the original wording was maintained in Act XLV of 1860. In the judges'

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[99] Paris and Fonblanque, Medical jurisprudence, 423.
[100] "Draft Penal Code," PP, XLI (1837-38), 52.
[101] "Report on Indian Penal Code, PP, XVIII (1847-48), 78.

reports, this concern combined with the increasing attention to medical jurisprudence made consideration of relative body strength and amount of resistance prominent. In an 1839 case of gang rape referred to the Bengal Nizamat Adalat, Judge Dick proposed that "had the woman earnestly resisted, the assistance of the boys [who held her down] would not have been effectual..."[102] Despite his proposal the accused was convicted. In another case before the Madras Foujdari Adalat in 1857 the Sessions Judge acquitted the prisoner because he did not "think it possible the Prisoner, a lad of 20, could, single handed, have committed rape on the Prosecutrix, a sturdy girl of 15 or 16 years of age."[103] This type of evidence was also invoked to prove that it was possible for a rape to be perpetrated despite resistance when the relative body strength favoured the offender. In one case that the Sadr Judge overturned because he believed that the act was consensual based on its commission near a populated area and without cries for help, the Sessions Judge had recommended a conviction, in part, because of the relative size and strength of the parties.

> The prosecutrix is a rather weakly girl, I should say about fourteen of fifteen years of age; the prisoner a strong and stalwart young man, who could have no difficulty in subduing a girl like the prosecutrix and effecting his vile purpose.... If the prosecutrix had been a strong young woman capable of resistance, I should have deemed the case a suspicious one, as I consider it almost impossible for a single man to commit such a crime upon an able bodied woman, unless after inflicting some violent blow or other mode of overcoming resistance; but in the present instance the girls was powerless, in the grasp of a young man, like the prisoner.[104]

In a similar fashion the physical disability of the accused could affect the decision of the court. In May of 1858 a Judge ruled that, despite evidence of penetration, despite the young age of the prosecutrix - eleven, and despite the screams of the prosecutrix, the act had to have been consensual as the accused was blind. Judge Frere wrote that since

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[102] BSNAR, 16 Aug., 1839. V/22/444. Vol. 5, 1835-40, 140.
[103] MSFAR, 22 July, 1857. V/22/613. Vol. 7, 1857, 327-8.

"connection [was] admitted, the only point to be inquired into was, whether it was with consent or not, and the prisoner being blind, the possibility of the act being committed without consent becomes very remote."[105]

In August of 1854 a Sessions Judge went to great length to report on the relative physical and mental strengths of the parties. Consent was immaterial when the girl was "so imbecile that she was incapable of rational consent."[106] Mental disability could affect the outcome of a case.

> The Court will observe, that in reference to the imbecile state of the injured party, the woman ... and to the extreme youth of the prisoner [16], there were two points which I have felt it necessary to establish; 1st, that [the prosecutrix] was incapable of protecting herself from injury or of resisting an outrage upon her person, such as that with which the accused stands charged, and 2ndly, that she devoid of all sensual feelings or animal passions, a point by no means unimportant as affecting the prisoner, because, had she been capable of such emotions, it might have been inferred that she was no unwilling party to the act of the latter, and that indeed, looking to his age, she had rather seduced him, than that he violated her. The evidence of the Zillah Surgeon is conclusive on both these points and leaves it undoubted that from age and idiocy, [the prosecutrix] is not only incapable of resisting an injury or insult, but that she is absolutely without those feelings or passions, which, had they existed, might with reason have pointed her out as more guilty than her youthful paramour, the position in which the prisoner would then have stood.[107]

The consent of the prosecutrix in this case was immaterial once her mental capacity and incapability of sexual desire was established. In a similar case in June of 1857 the accused was convicted of raping a "dumb and idiotic" girl, conditions which "should have protected her against an outrage of this kind." Though the court established that she was not devoid of sexual feeling, her mental state made consent immaterial.

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[104] MSFAR, 2 Feb., 1859. V/22/614. Vol. 9, 1859, 37-8.
[105] BSFAR, 8 May, 1858. V/22/567. Vol. 9, 1858, 473-6.
[106] From the notes of A.G. Macpherson which accompanied The Indian Penal Code (Act XLV of 1860), 324.
[107] MSFAR, 27 Aug., 185[2]. V/22/611. Vol. 2, 1852, 268-70.

> while [the prosecutrix] is not incapable of lustful emotions, and that sexual intercourse may have been rather agreeable to her than otherwise, still her state of mind is such as to render her wholly powerless to resist affront or injury; and, further, Doctor Rogers states his opinion that possibly she might not even have been conscious of what was passing at such a time, and her appearance would seem fully to bear out this belief.[108]

Consent was also immaterial in cases in which the offended was of a young age – usually under ten. There was, however, a tension in this because of the young age at which women in India married. Section 71 of the 1837 draft code excepted from prosecution any act "which is done in good faith for the benefit of a person who is under twelve years of age, or of unsound mind, by that person's lawful guardian or guardians, or by the authority of such lawful guardians, is an offence by reason of any harm which it may cause to that person."[109] The fourth circumstance of this clause, however, stated that the exception did not apply to rape. It was illustrated by this example. "A. intending in good faith the pecuniary benefit of his Z. his daughter, a child under twelve years of age, abets a rape committed by B. on Z. Neither A. nor B. are within the exception."[110] This clause came under consideration in the 1847 Report on the draft penal code by the Law Commission. The section was defended with respect to what were viewed as morally deplorable marriage practices in India. Protection of young women from these 'morally deplorable practices' was consistent with other reform measures to 'improve' the status of women in India in turn which served to justify British colonial rule.[111] The code, as a symbol of moral superiority, must function to protect young women from such 'barbaric' practices.

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[108] MSFAR, 2 June, 1857. V/22/613. Vol. 7, 1857, 237-8.
[109] "Draft Penal Code," PP, XLI (1837-38), 18.
[110] Ibid., 18.
[111] Joanna Liddle and Rama Joshi, Daughters of Independence: Gender, Caste and Class in India (London: Zed Books Ltd., 1986), 24-30.

> We regret that, in the present state of moral feeling among large classes of the people of India, we cannot regard this as a case out of all probability. We fear that parents in poor circumstances are too often to be found ready "to sacrifice the chastity of the female children" under circumstances very likely involve a rape, in a belief that they will be benefited by the connection thus formed with the persons able to provide for them. It seems to be proper, therefore, to guard the exception from abuse in this respect.

The "pecuniary benefit" to which the code and the report referred was attained after the fact and usually was the result of a marriage between "B. and Z." According to Islamic law, cases of personal injury could be resolved by a deed of agreement called a *razinamah*. In cases of rape this could include a promise of marriage from the accused to the offended, and probably attended with monetary compensation in return. Just as in the draft code, the courts sought to protect young women from being subjected to rape in an effort to marry them off. Most often a *razinamah* was offered when the girl was young, as acknowledgement of sexual activity, by consent or by force, damaged her chances of attaining a husband. A case referred to the Bengal Nizamat Adalat in 1828 was of the rape of an eight-year-old girl. The Judge reported that "from her tender age, it was not likely she should give any encouragement or inducement to sexual intercourse." A *razinamah* was offered by both parties in the case to have the girl married to the prisoner. The Court rejected the agreement and remarked that a "razeenamah in so heinous a crime is inadmissible."[112] In a similar case in 1851 the father of the eight-year-old prosecutrix entered a *razinamah* that contained a promise of marriage from the accused and was desirous that the case could be compromised. It was "of course" rejected and the accused found guilty.[113] Colonial institutions sought to eliminate forms of private justice, such as the *razinamah* represented, to establish their authority, and at the same time express their moral paramountcy through the protection of women.

There is, however, within the age of consent law an interesting tension between the protection of marriage in the name of women and the belief in the early sexual

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[112] BSNAR, 21 Apr., 1828. V/22/442. Vol. 3, 1827-30, 127.
[113] BSNAR, 28 Aug., 1851. V/22/447. Vol. 1:2, 1851, 1246.

maturity of Indian women that needed protection during the early years of marriage. References to the early sexual maturity of Indian women was made in comparison to the older ages of marriage, and presumed later ages of physical maturity in British women. The age of consent was, according to statute, two years younger in India than in England. One Judge in Bombay stated that the discrepancy existed "in consideration of the early age at which females in India arrive at maturity."[114] Colonial law, however, had no defined age of consent, though judges referred to both English law and statue for the Supreme Courts. Often physical maturity was established by the medical officer during the examination.

The belief that Indian women reached sexual maturity at a younger age than did British women could affect the testimony of medical officers. In a case of rape before the Sessions Court in Bengal in 1853 Dr. M. O'Sullivan testified that there was physical evidence that the seven year old prosecutrix had been penetrated, but that he couldn't say with any certainty "that it was forcibly effected. If the girl were a European he should say that she had not attended the age of puberty, but as to a native, he cannot give a decided opinion. Thinks that the prosecutrix is not above ten years of age."[115] The slippage between physical signs of maturity and age, sometimes regardless of one another and with reference to British women, produced inconsistent decisions from judges regarding an age of consent. In a case similar to the example which concerned the authors of the 1847 Report on the draft penal code, a man was convicted of raping a girl between the ages of eight and ten. Though not his wife, she was contracted to marry him and was living with him. The evidence of the medical officer confirmed that she had not attained puberty, even though her young age, according to the law of England, the Indian Supreme Court, and the 1837 draft penal code would have made her consent and physical maturity immaterial. The penalty in this case, probably due to their betrothal, was only two years.[116] Sometimes the judges' remarks indicate that age was a factor though, and that consent was immaterial. One Judge recorded in 1828 that "it little matters whether a

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[114] BSFAR, 31 May, 1828. V/22/558. Vol. 1, 1827-1846, 13.
[115] BSNAR, 7 June, 1853. V/22/449. Vol. 3:1, 1853, 744.
[116] MSFAR, 10 Feb., 1854. V/22/612. Vol. 4, 1854, 36-8.

girl of her age [ten] assented or not."[117] Another guilty verdict was passed in 1851 with the message that even if the girl, aged nine or ten, did consent "such consent is of no effect for that she is of such tender age is clearly shown."[118] Paradoxically, in some instances the youth of an Indian girl was used to suggest that it was unlikely that she willfully engaged in sexual activity. A Judge in Bengal in 1828 recorded his opinion that, based on the "tender age" of the prosecutrix, aged eight or nine, "it was not likely that she should give any encouragement or inducement to sexual intercourse."[119] Similarly a Judge in 1852 reported that the prosecutrix's "extreme youth, and particularly her childish appearance, renders it very improbable that she gave any encouragement to the prisoner."[120]

Often consent became immaterial with reference, not to age, but to physical maturity. A sessions judge in 1833 referred a case of the rape of an eleven-year-old girl to the Madras Foujdari Adalat "with reference to the tender age of the prosecutor's daughter, and the fact that she had not yet attained puberty, the question of whether or not the intercourse had taken place with her consent, was by Law immaterial."[121] The Judge's definition of "tender age" relied upon her prepubescent status rather than her actual age. This type of definition produced cases in which girls as young as seven were deemed mature and their consent material, and girls as old as eleven were deemed immature and their consent immaterial. A case before the Bombay Foujdari Adalat in 1854 involving a man of unknown age accused of rape upon a girl, eight or nine years old, resulted in the conviction of the prisoner, though her consent was deemed material. The Sadr Court stated that the circumstances under which she was found appear to negate the supposition of consent on her part. "Submission there might have been, not the actual consent necessary to exculpate the prisoner from the charge of rape."[122] The Sadr Court's conviction overruled the recommendation of the Sessions Judge, who felt that there was "no proof that she was not a consenting party.... I do not think that the girl's consent in

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[117] BSNAR, 14 May, 1828. V/22/442. Vol. 3, 1827-30, 147.
[118] BSNAR, 14 July, 1851. V/22/447. Vol. 1:2, 1851, 886.
[119] BSNAR, 21 Apr., 1828. V/22/442. Vol. 3, 1827-30, 127.
[120] MSFAR, 2 Nov., 1852. V/22/611. Vol. 2, 1852, 377-8.
[121] MSFAR, 6 Dec., 1833. V/22/610. 1826-50, 54-6.

this case, aged between nine and ten, is immaterial; and ... she appears to have been a consenting party."[123] The degree of latitude shown in the verdicts for cases involving girls of a young age suggests that the definition of the age of consent and the status of Indian female sexual maturity was still contested ground: a site of negotiation.

Judges did not always agree on verdicts, punishments, or on the practice of referring to English law. As the dialogue about Macaulay's code in the twenty-five years following its completion demonstrates, talking about a British hegemony on a macro level obfuscates competing voices within the colonial population. Judges' reports also reveal that at the point where prescribed sexual propriety meets reality through legal institutions, competing conceptions of honour, chastity and consent were negotiated according to circumstance and personality. Sadr Judges overturned Sessions Judges and occasionally each other as they attempted to ascertain the facts of the case, based on complex and imprecise methodologies. In a case before the Sadr Court in Bengal in 1853, it took the opinions of five judges, including that of the Sessions Judge, to convict the prisoner of rape. The Sessions Judge, T. Sandys, acquitted the prisoner because he could not believe that, given the location of the offence, *only* five witnesses heard or saw anything. Mr. Dunbar of the Nizamat Adalat concurred that it was difficult to believe that there were so few witnesses when the act was said to have been committed in sight of the village. Nor could he believe that the first two witnesses, both girls, could not drag the prisoner off the prosecutrix. A second Judge of the Nizamat Adalat, Mr. H.T. Raikes dissented from both of those conclusions. He was of the opinion that the evidence of the medical officer established the fact of rape. The third Sadr Judge, Mr. J. R. Colvin concurred with the Sessions Judge and Mr. Dunbar. Finally the prisoner was convicted based on the opinion of Mr. A.J.M. Mills who agreed with the verdict of Mr. Raikes.

Notions of gender and sexuality that developed within the metropole were renegotiated in the colonial courtroom. The idea of bourgeois respectability, and its definition of the domestic feminine through the virtues of chastity, modesty, submission and piety underwrote criminal definitions of rape that in practice had to seek out points of

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[122] BSFAR, 12 Apr., 1854. V/22/559. Vol. 1, 1854, 346-9.

accommodation with perceptions of the colonial feminine. The discourse of respectability had to accommodate a socio-religious structure remarkably different from the one for which it had been elaborated. Caste had to be reconciled with respectability. Belief in the early sexual maturity of Indian women had to be reconciled with competing legal definitions of the age of consent. And cultural differences in marriage practices had to be accommodated by the colonial law. Though the law was largely informed by a discourse of bourgeois respectability, it had to seek cultural bridges with the subject population through a sort of dialogue to render that law meaningful. In this way the law of rape was more a production than an imposition.

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[123] Ibid.

Conclusion: A Colonial Legacy

The definitions and circumstances of rape as they appeared in the Indian Penal Code in the year 1996 remained relatively unchanged since 1860. The age of consent has been raised from ten to sixteen and subsections have been added to address incidences of rape that result from the abuse of an official position in a jail, hospital, or the like. The crime itself is still defined with reference to the will and the consent of "her," and requires penetration to sufficiently constitute the act. The virtue and character of the woman remains a central concern of judges in passing a verdict and in sentencing. In 1989 the Supreme Court reduced the sentences of two police officers who had raped a woman in their care to a term less than the minimum. The Judges cited the fact that the woman had been found in the company of a boy and that the testimony of the medical expert had established that she was "used to sexual intercourse" to shed doubt upon her character.[1] The criteria upon which this judgement was based, both the letter of the law and the inferences about the character of the woman as it concerned the "degree" of rape, were stamped upon the Indian legal landscape in 1837. As such, they are a colonial legacy that continue to inscribe meaning upon the bodies of women and to enforce discourses that legitimate systems of patriarchy.

The Indian Penal Code was conceived in a period when colonial officials sought to resolve a paradox between emerging theories of intellectual, governmental and economic liberalism and the possession of an autocratically ruled Indian empire. The elaboration of a moral obligation to improve the condition of the Indian population manifested itself in institutional reform intended to liberate the moral environment from the clutches of despotic institutions. English education, reform aimed at the 'protection' of women, and the Indian Penal Code were imagined, with reference to ideas of Enlightenment progressivism, Utilitarian theories of institutional reform, and Evangelical prescriptions for moral reform, to be necessary for the progress of Indian civilization. Collectively, these ideas were concerned with the improvement of the character of the

[1] K. Kumar and Punam Rani, Offences Against Women: Socio-legal Perspectives (New Delhi: Regency Publications, 1996), 210-212.

individual, whether through institutional reform, social reform, or personal reform. The new morality that they defined was largely rooted in bourgeois ideas of respectability. Therefore, not only the purpose of the Code, but its content was largely defined by these ideas. They, in turn, had been largely produced with reference to constructions of race, gender, and class and were re-inscribed upon the subject population by the content of the Code.

Submission, modesty, chastity and piety were the hallmarks of bourgeois domestic femininity. Macaulay, raised in an Evangelical atmosphere, incorporated Evangelical moral philosophy into his conception of gender and sexuality. He expected his Queen to represent the virtues of feminine domesticity, his sisters to marry and abide by the Evangelical prescriptive literature on proper feminine behaviour, and his sister's choice of maid to accompany her to India to embody the proper signs of femininity that a woman of civilized British society should. Transgression of any one of these virtues by any woman was suggestive of an immoral and inferior character. Proof of a compromised femininity in cases of rape changed the parameters by which consent was defined. In the courtroom the character of the woman became the focus of the trial. Her chastity was proved by the extent of the physical injury, the tone and delivery of her evidence demonstrated her modesty, and proof of resistance – cries for help, the location of the crime, additional physical evidence – established her honour. If any one of these was absent from the courtroom, suspicion could be cast upon her character, and her will was assumed to have caused, if not welcomed, such a violation.

The code of bourgeois respectability emerged in the early nineteenth century as a means of self definition in reference to an 'other,' defined in terms of both class and race. Its assumptions and constructions of gender roles and their attendant and correlative sexualities were embedded in the Indian Penal Code through the person of Thomas Babington Macaulay and renegotiated through the practice of colonial law.

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