

*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*

DAVID SKUY

*University of Toronto*

On 1 January 1862, the British enacted the Indian Penal Code, and within two decades most of India's law was codified.<sup>1</sup> Ironically, England still awaits a criminal code, and the vast majority of English law remains uncoded, in the form of statute or common law. Hindu and Muslim law was rarely included in these Indian law codes, so the entire codification process represented the transplantation of English law to India, complete with lawyers and judges. A modest historiography has investigated the effect codification had on Indian society; or as Marc Galanter theorized, what happened to India's indigenous law as a result of the formation of a modern Indian legal system.<sup>2</sup> However, Galanter's question implicitly assumed that England's legal system was modern. That assumption has resulted in a misleading interpretation of the Indian Penal Code. An alternative perspective exists. By studying the state of English law in the eighteenth and nineteenth centuries, it becomes clear that English law prior to the late Victorian period was not modern in any true sense. By understanding the process that shaped the form and content of the Indian Penal Code we will see that the Code does not represent Britain's attempt to modernize India's criminal law, but rather its

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<sup>1</sup> By 1882, India's commercial, criminal, and procedural law was completely codified.

<sup>2</sup> Indigenous law refers essentially to Hindu and Muslim law. Marc Galanter, 'The Displacement of Traditional Law in Modern India,' *Journal of Social Issues* 24 (1968): 69.

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enactment reflected developments in England that led to a massive overhaul of England's criminal justice system; in effect, defects in England's legal system motivated the codification of Indian law. And the fact that only India ended up with a criminal code illustrates that imperial powers were often able to do in their colonies what they were unable to do at home. Until we appreciate the motivation behind the codification of Indian law, our understanding of the ramifications of the codification process and answers to Galanter's question will remain incomplete and inadequate.

Despite the fact that we do not have a clear picture of how India's indigenous legal systems worked prior to the British period, most historians assume Indian law was primitive compared to English law. Not surprisingly, that assumption was commonplace among nineteenth-century British intellectuals and jurists. These men would have laughed at suggestions that India's indigenous legal systems were worth preserving. James Stephen<sup>3</sup> characterized India's legal system prior to codification as governed by the whim and caprice of innumerable rulers and a mass of village communities. Summarizing the views of his peers, Stephen felt the destruction of indigenous Indian law was legitimate to establish the Rule of Law,<sup>4</sup> and native laws and customs not directly repealed would inevitably be overwhelmed by the social revolution ushered in by the 'new regime of peace, law, order, unrestricted competition for wealth, knowledge, honours, and education . . .'.<sup>5</sup> Speaking on behalf of the East India Company and the Utilitarians, James Mill wrote that India's traditional legal systems had to disappear in order to service the needs

<sup>3</sup> A remarkably prolific jurist and legal reformer, described recently as a 'cyclopean builder, who hurled together huge blocks of rough-hewn law', James Stephen served as an Indian Law Commissioner from 1870 to 1879. During his tenure, Stephen was responsible for passing the Indian Limitation Act, 1871, a revised Criminal Procedure Code, 1872, and the Indian Contract Act, 1872. See K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge: Cambridge University Press, 1988).

<sup>4</sup> A fundamental principle in English jurisprudence, the Rule of Law requires that the same law applies to all people; the regular law must supersede arbitrary or discretionary power. In the 1950s, a group of prominent historians concluded that the Rule of Law was the greatest single benefit India received from the introduction of English legal ideas. Other benefits included a hierarchical court structure that was staffed by an independent and impartial judiciary, a system of appeals, and a body of trained lawyers. For a summary of that conference, see K. Lipstein, 'The Reception of Western Law in India,' *International Social Science Bulletin* 9 (1957): 87, 88, 91.

<sup>5</sup> Smith, pp. 134–5.

of a modern society based on competitiveness and the protection of individual rights and freedoms.<sup>6</sup>

Modern scholarship reflects these nineteenth-century views. While the destruction of India's indigenous legal systems is lamented from an anthropological standpoint, most historians believe that the British really had no choice if India was to modernize. Ignoring the historical forces that drove the codification process, these scholars accept without question that Indians benefited from the introduction of English law, and that perception has greatly influenced how we now characterize India's indigenous legal systems. Bernard Cohn felt that attempts to modernize India lead inevitably to their destruction. For proof Cohn pointed to the Government of India Act of 2 August 1858, which proclaimed Victoria the monarch sovereign of India. The Act promised Indians the right to enjoy equal and impartial protection under the law, with due regard paid to ancient rights, usages, and customs. Cohn identified two promises implicit in that promise: first, Britain recognized that India was diverse in culture, society, and religion, and accepted responsibility for protecting that diversity; and second, Britain would work towards the amelioration of India's social and material well-being. In order to fulfill the first promise Britain had to protect India's traditional 'feudal' society; but, in order to fulfill the second, she would have to modernize India

<sup>6</sup> In practical terms, efforts to modernize India's legal system prior to codification focused primarily on ways to facilitate revenue collection, but Mill meant all areas of the law. Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959), pp. 68–9. Stokes felt that Mill's economic theories had a negative impact on India, particularly the application of Ricardo's theory of rent; see Eric Stokes, 'The Land Revenue Systems of the North-Western Provinces and Bombay Deccan, 1830–80: ideology and the official mind,' in *The peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge: Cambridge University Press, 1978), pp. 90–119. The last two decades have produced a number of works that show how British reforms were fundamentally motivated by the desire to increase revenues. Eugene F. Irschick attributed the imposition of British institutions and values in South India to frustration with revenue collection; see 'Order and Disorder in Colonial South India,' *Modern Asian Studies* 23, 3 (1989): 459–62. For a detailed and persuasive study on the impact of the 1822 land settlement in Uttar Pradesh see Asiay Siddiqi, *Agrarian Change in a Northern Indian State, Uttar Pradesh, 1818–1833* (Oxford: Clarendon Press, 1973). For a similar study on Bengal see Ratnalekha Ray's *Change in Bengal Rural Society* (Manohar, 1979) or Bernard Cohn's article 'Structural Change in Indian Rural Society, 1696–1885,' in *An Anthropologist Among the Historians* (Oxford: Oxford University Press, 1987). Finally, Kenneth Ballhatchet's still relevant study of Western Indian politics in the nineteenth century traces the relationship between revenue collection and political and legal changes: *Social Policy and Social Change in Western India, 1817–1830* (London: Oxford University Press, 1957).

by introducing changes that would inevitably lead to the destruction of this feudal order, of which Hindu and Muslim law were a part.<sup>7</sup> D. A. Washbrook applied Cohn's thesis to property law. He found an inherent contradiction between traditional Hindu law, based on status rather than equality, and the introduction of free market principles, which required the free movement of goods and labour. The preservation of customary and religious norms was a strong barrier to market freedom, so they were ultimately done away with.<sup>8</sup> Galanter dismissed pre-British law in India as primitive because it lacked the following elements of a modern legal system: written records and professional pleaders; an appeal system with superior and inferior courts; *stare decisis* or a precedent system;<sup>9</sup> and, the Rule of Law or a single set of legal principles.<sup>10</sup> Similarly, Lloyd and Susanne Rudolph found no traces in India of the elements that characterized the 'universalism and impersonality of modern western legal systems.'<sup>11</sup> Such views are not restricted to western scholars. Motilal Setalvad, a former Chief Justice of India, praises the introduction of British law without reservation. And B. N. Pandey echoed Galanter's criticisms adding that Hindu law was based on superstition and reflected arbitrary religious beliefs.<sup>12</sup>

Thomas Babington Macaulay left for India in 1834 empowered by Parliament to draft a criminal code for India.<sup>13</sup> Prior to leaving he summed up the principle upon which the proposed code would be

<sup>7</sup> Cohn, 'Representing Authority in Victorian India,' pp. 632–4.

<sup>8</sup> D. A. Washbrook, 'Law, State and Agrarian Society in Colonial India,' *Modern Asian Studies* 15 (1981), pp. 652–5; Irschick, p. 462.

<sup>9</sup> The rule of *stare decisis* held that judges of inferior courts were bound by the decisions of superior courts. Theoretically, *stare decisis* ensured that similar cases were judged alike.

<sup>10</sup> Galanter, pp. 66–7.

<sup>11</sup> Lloyd and Susanne Rudolph, 'Barristers and Brahmans in India: Legal Cultures and Social Change,' *Comparative Studies in Society History* 8 (1965): 25.

<sup>12</sup> Motilal Chimanlal Setalvad, *The Common Law in India* (London: Stevens & Sons Limited, 1960), pp. 52–3; B. N. Pandey, *The Introduction of English Law into India: The Career of Elijah Impey in Bengal 1774–1783* (London: Asia Publishing House, 1967), pp. 19–25.

<sup>13</sup> The Charter Act of 1833 created the Indian Law Commission to rectify perceived deficiencies in India's legal system then operating in territories under the Company's control. With the help of James Mill, who canvassed on his behalf, Macaulay was appointed to the Commission and set sail for India soon after. For its first task, the Commission decided to codify India's criminal law. Forced to write the bulk of the Code himself due to the illness of his fellow Commissioners, it took Macaulay until 1837 to finish. George Otto Trevelyan, *Life and Letters of Lord Macaulay* (Oxford: Oxford University Press, 1978), p. 244; Stokes, *Utilitarians*, p. 191.

based as follows: ‘The principle is simply this; uniformity when you can have it; diversity when you must have it; but, in all cases certainty.’<sup>14</sup> It seems that no work on Macaulay is complete without that statement, probably because it encapsulates so elegantly the basic criticism of Indian law. It also provides a standard for a modern legal system. Yet, even if we accept that India’s indigenous legal systems or the East India Company’s system failed to meet that standard when Macaulay arrived in India, what remains unanswered, at least by those historians who quote Macaulay so frequently, is whether English law passed that same standard. My research indicates that prior to the passage of the Indian Penal Code in 1862 England’s criminal justice system clearly did not.<sup>15</sup> In short, Bernard Cohn and his fellow historians have characterized India’s indigenous legal systems as primitive for failing to meet a standard that English law failed as well. Led by the British Parliament, in the form of three substantial revisions of the statutory law, by intellectuals, in the works of Bentham, Mill and the Utilitarians, and by two Royal Commissions, in thirteen reports and two draft criminal codes, England’s criminal justice system was completely overhauled from 1820 to 1860. Clearly, English jurists, politicians and intellectuals in the nineteenth century did not consider their criminal justice system to be modern. Yet, it appears that historians interested in the impact of English law on India have ignored the state of English law in England. We will see that the Indian Penal Code did not represent Britain’s attempt to modernize India’s primitive criminal justice system; but rather, reflected Britain’s attempt to modernize its own primitive criminal justice system.

A few words need be said about the primary sources used in this study. The most important sources for determining the state of

<sup>14</sup> Thomas Babington Macaulay, *Complete Works of Thomas Babington Macaulay*, (London: Longmans, Green and Co., 1898), XI, p. 579. Cited infra as the ‘Government of India Speech’, Macaulay made this statement to the House of Commons on 10 July 1833. He added that he did not believe it was possible for all Indians to live under the same law, although that would be desirable. See also, Stokes, *Utilitarians*, p. 219, and Richard Lariviere, ‘Justices and Pandits: Some Ironies in Contemporary Readings of the Hindu Legal Past,’ *The Journal of Asian Studies* 48, no. 4 (November 1989): 761.

<sup>15</sup> Carolyn A. Conley’s local study of the criminal law in Kent, England from 1859 to 1880 largely supports my own findings. Conley found that even by the second half of the nineteenth century England’s criminal justice system had not yet become regularized and uniform despite earlier reforms. Carolyn A. Conley, *The Unwritten Law: Criminal Justice in Victorian Kent* (New York: Oxford University Press, 1991).

English criminal law in the nineteenth century were the reports of two English Law Commissions. The first Royal Commission sat from 1832 to 1845, and published eight reports. The second Royal Commission was convened in 1845 and during its five-year tenure published five reports.<sup>16</sup> Both Commissions completed a criminal code, in 1843 and 1848, respectively. Relying on Royal Commission reports is problematic because of the difficulty in determining their practical significance. Royal Commissions are notorious for producing lengthy reports that are never read. To that end, the significant statutory changes and related parliamentary debates from 1820 to 1861 have been studied; and my review suggests that the Royal Commissions had a measurable impact on actual legislation. An Indian Law Commission existed during this period as well. In 1847 and 1848, the Commission published two lengthy reports on the Indian Penal Code; these reports were particularly useful because the Indian Penal Code was compared at length to the 1843 English Code. Naturally, I examined the Indian Penal Code, both Macaulay's 1837 version and the final version enacted in 1862.<sup>17</sup> Finally, Macaulay was a prolific speaker and writer, and his speeches and writings relating to his Code provided additional useful information.<sup>18</sup>

### **The Indian Legal System Prior to Codification**

Indian law prior to codification consisted of a complex array of Parliamentary Charters and Acts, Indian legislation (after 1833), East

<sup>16</sup> The first Royal Commission published reports on punishments (Second Report, 1836), juvenile offenders (Third Report, 1837), and offences against the person and property (Fourth Report, 1839; Fifth Report, 1840). The first report, published in 1834, discussed in general terms problems with the criminal law. The seventh report (1843) combined the previous reports with some additions to form a completed criminal code. The eighth report (1845) was a code of criminal procedure. The second Royal Commission revised the work of the first Commission. Its fourth report, published in 1848, was a second draft criminal code. A final report was a procedural code.

<sup>17</sup> Subsequent amendments to the Indian Penal Code were not reviewed. It would be useful though to see if India's criminal law continued to mirror English reforms after codification.

<sup>18</sup> The draft criminal codes prepared by the two English Royal Commissions will be referred to as the 1843 Code and the 1848 Code, respectively. Macaulay's draft of the Indian Penal Code is called Macaulay's Code or the 1837 Indian Code. The final Indian Penal Code is similarly called the 1862 Indian Code or simply the Indian Penal Code. The Indian Penal Code was enacted in 1860, and was originally to come into effect May 1, 1861; however, for reasons unknown the date for its implementation was delayed to 1 January 1862.

India Company Regulations, English common law, Hindu law, Muslim law, and many bodies of customary law.<sup>19</sup> Important legal thinkers in the nineteenth century, such as Macaulay and James Mill, pointed to this legal mixture to support their position that India desperately needed law codes. Macaulay voiced this view in Parliament during the debate over the Charter Act of 1833: '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 supplied.'<sup>20</sup> Mill vociferously criticized India's penal system under the British: 'Clearness, certainty, promptitude, cheapness, with penalties nicely adapted to the circumstances of each species of delinquency; . . . in all these, without one exception, the penal law set up by the English in India is defective to a degree that never was surpassed . . .'<sup>21</sup> Indian judges exercised undue judicial discretion because there were three sources of law, Hindu, Muslim and British, and no clear guidelines were in place to instruct judges how these different legal systems were to interact. Moreover, British judges were forced to rely on Hindu and Muslim legal assistants (pundits and maulvies) to research legal questions. British judges complained that these native jurists manipulated their traditional sources to justify a decision that suited their own private purposes; pundits had an especially terrible reputation for being untrustworthy and corrupt.<sup>22</sup> Macaulay noted that judicial discretion was also a problem under English law; however, that evil was mitigated by a higher standard of morality, the existence of legal tradi-

<sup>19</sup> Galanter, p. 68.

<sup>20</sup> Government of India Speech, p. 579.

<sup>21</sup> James Mill, *History of British India* (London: J. Madden, 1840–48), vol. 5, pp. 474–5.

<sup>22</sup> During his stay in India Sir William Jones expressed concern over the pundits' honesty. He believed they manipulated the sastric texts to justify virtually any decision. J. Duncan Derrett, *Religion, Law and the State in India* (London: Faber and Faber, 1968), pp. 244–8. Macaulay cited Jones' opinion to Parliament as proof that pundits could not be trusted; Government of India Speech, pp. 581–2. To a large degree the Pundits' untrustworthy reputation grew because they often ignored the classical texts to reflect actual customary practices. However, they did so to satisfy English magistrates who preferred written laws to ambiguous customary laws of which they had no knowledge or understanding. Rudolph, p. 35; Derrett, pp. 267–8. See also Lariviere, 'Justices and Pandits,' pp. 757–69. Lariviere denies that the British intentionally subverted India's traditional law. He argues that the British did not want to interfere with Hindu law, so they turned to the pandits and the sastric texts for the law. In fact, the pandits abetted the British misunderstanding by insisting that the Vedas were a complete and perfect source of revealed law, applicable to all Hindus. *Ibid.*, pp. 759–60.



tions grown over the centuries, the presence of popular institutions such as Parliament, the ever-watchful and critical eye of a learned legal community, and finally the use of reported cases.<sup>23</sup> A few years after Macaulay completed his Code, a Supreme Court justice recommended its enactment simply because it represented the ‘only means of providing for the wants of a population which has no one system of jurisprudence applicable to all . . . the best justification of it is to be found in the necessity of some system, and the absence of any satisfactory one.’<sup>24</sup>

All of these men were justified in saying India lacked a written, uniform set of criminal laws and principles. My thesis is that uniformity was not missing simply because of a weakness in traditional Indian legal systems or because of the haphazard manner in which the East India Company administered its territories. Simply put, England did not have a written, uniform set of criminal laws and principles either; therefore, we must reevaluate the significance of Macaulay’s and Mill’s criticisms of India. To begin, then, a quick sketch will be made of the criminal justice system that awaited Macaulay when he arrived in Calcutta in 1834 as a member of the Indian Law Commission.

India’s court system was continually reorganized from the late eighteenth century to the declaration of the Raj. However, these changes did not provide Indians with the uniform justice Macaulay and Mill believed so essential to India’s modernization. The lack of uniformity was hardly surprising, given that government officials in the Presidencies, the East India Company as a whole, the British Parliament, and English intellectuals all played a role in constructing colonial India’s legal system.

The East India Company created courts as early as 1726. Over the next fifty years, these Company courts presided over the Presidency Towns and factories subordinate to Presidency Towns, applying a combination of English law and Company Regulations.<sup>25</sup> Through-

<sup>23</sup> ‘There is everything which can mitigate the evils of such a system.’ Government of India Speech, p. 581.

<sup>24</sup> Parliamentary Papers, Report on Indian Penal Code, 1847–48, XXVIII.1, p. 9.

<sup>25</sup> Setalvad does a good job of summarizing the history of English law in India: Setalvad, pp. 8–23. B. N. Pandey covers the same material in slightly more detail, but in a more confusing fashion; Pandey, pp. 1–38. For an interesting local study see B. L. Verma’s study of the legal history of the province of Ajmer. In all essential areas, Ajmer’s court system mirrored developments in the Presidency towns and their respective mofussil courts. B. L. Verma, *Development of the Indian Legal System* (New Delhi: Deep & Deep Publications, 1987), pp. 18–28.



out this early period, the British claimed to be uninterested in legal matters involving natives. By Letters Patent of 1753, the Presidency courts were instructed to permit natives to settle their own disputes, unless the natives asked for their assistance. British claims aside, the non-interference policy reflected the limits to British power and the Company's preoccupation with profit, rather than a healthy respect for Hindu or Muslim law.<sup>26</sup> And in 1765, when the Company became Diwani of Bihar, Bengal and Orissa, the need to regulate legal matters for Indians and Europeans living within Company territory became overwhelming, and within a decade an English-styled court system was established.

The Court structure continued to evolve throughout this period. Bentinck restructured the Bengali justice system from 1828 to 1831, covering civil and criminal courts, the police, and the revenue office; and similar restructuring occurred in the Madras and Bombay Presidencies;<sup>27</sup> but for the most part people living in territories under British control enjoyed access to the same types of courts.<sup>28</sup> However, substantive and procedural rules in those courts varied greatly. All three Presidencies passed their own penal Regulations, so punishment was rarely uniform. Hindu, Muslim, and English law was applied in the same court by the same judge. Indian and English judges were generally poorly trained, and most English judges had little knowledge of India. In his introductory report on the Penal Code, Macaulay severely criticized the local penal Regulations; minor crimes often called for the same punishment as major crimes,

<sup>26</sup> Despite increasing British involvement in Indian legal matters, Lipstein and Setalvad consider non-interference in local customs to be the official British policy unless involvement was required to ensure the 'progress of the natural line of advancement and the development of Hindu society.' Lipstein, p. 90; Setalvad, p. 17. Larry Preston's study of British interference in the life of a wealthy family near Poona suggests the British did not practice noninterference as much as they preached. Larry Preston, *The Deys of Cincvad* (Cambridge: Cambridge University Press, 1988).

<sup>27</sup> Stokes, *Utilitarians*, pp. 142–3. In 1827, Mountstuart Elphinstone passed a criminal code for Bombay. Elphinstone hoped to reduce the influence of local Hindu law, both written and customary, by providing a comprehensive and consistent criminal code. Instead, he merely produced a digest of British regulation law. Macaulay praised Elphinstone's Bombay Code for at least trying to codify the law; however, he considered it to be a useless precedent for his code. He also noted that the Bombay code was introduced without a whimper from the population, so little protest was anticipated when the Indian Penal Code was passed; Thomas Babington Macaulay, 'Introductory Report to the Penal Code', in *Complete Works of Thomas Babington Macaulay*, vol. XI, p. 10 (cited infra as Introductory Report to the Penal Code).

<sup>28</sup> See Stokes, *Utilitarians*, pp. 142–3.

important legal principles were often not followed, and many important classes of offences were ignored completely.<sup>29</sup>

Two Acts passed by the British Parliament soon after the Company became Diwani of Bengal shaped the course of India's legal system until the 1860s. Corruption and near bankruptcy forced Parliament to pass the Regulating Act of 1773. As part of the plan to control Company officials, the Act established a Supreme Court in each Presidency, with power to appoint judges vesting in the Crown, not the Company; only barristers with five years at the English bar could sit on the bench, although no specific knowledge of India was required.<sup>30</sup> The Supreme Court had complete jurisdiction over residents in the Presidency Towns. In 1781, Parliament passed the Act of Settlement which established a system of courts for the mofussil, known as the Adalat courts. Staffed by Indian administrators with little or no training in English law,<sup>31</sup> and under Company control, the Adalat courts were independent of the Supreme Courts, and so a dual court system was established. To Macaulay the dual court system represented Indian law at its worst. First, two court systems operating side-by-side, resulted in obvious administrative duplication and inefficiencies. Second, Macaulay felt that without clearly defined jurisdiction, judges would be unable to act decisively, so 'while two equal powers [act] in opposite directions, the whole machinery of the state stand[s] still.'<sup>32</sup>

Not only was there a dual court system, but it seems clear that Hindu and Muslim criminal law continued to operate, albeit often without direct British participation or permission. Neither the Regulating Act nor the Act of Settlement specified when or even if Hindu, Muslim, or English law was supreme. Motilal Setalvad suggests that the Supreme Courts applied English law and Company Regulations, the Adalat criminal courts in Madras and Bengal generally applied Islamic law, a legacy of the Mughal Empire, and the Bombay Presidency applied Hindu law; but he added that English law was substituted if the local British government considered any particular rule

<sup>29</sup> Introductory Report on the Penal Code, pp. 8–11. For example, all three Presidencies had a different punishment for perjury.

<sup>30</sup> The Act was originally intended to be a transitory measure to bridge the gap between 1773 and the running out of the Company's Charter in 1780; however, the Supreme Courts continued until 1862. Pandey, pp. 30–5; Setalvad, pp. 19–23.

<sup>31</sup> Lipstein felt that the Indian Codes were needed to assist the poorly trained Indian judges. Lipstein, p. 91.

<sup>32</sup> Government of India Speech, pp. 577–8. The reason for the existence of two court systems is explained *infra*.

offensive to British notions of crime and punishment.<sup>33</sup> Eric Stokes and J. Duncan Derrett disagreed entirely, finding that by 1835 Islamic law was overlaid by British Regulations.<sup>34</sup> Whatever the case, Macaulay was appalled by a justice system that incorporated three distinct systems of law, and his principle of uniformity necessitated that one system of law became paramount. Ultimately, he chose English law; and I believe he did so not because it was the most modern, but rather because it was the only system of law he understood.

Reform of India's legal system throughout the nineteenth century was never limited to the internal decisions of the East India Company or the British Parliament. English intellectuals, particularly the Utilitarians, exerted a tremendous influence. In *The English Utilitarians and India*, Eric Stokes suggested that Macaulay adopted Bentham's and Mill's principles of codification and drafting techniques and applied them to construct a criminal code tailored to India's special needs. Naturally, the Utilitarian influence lessened at the detail level, but the overwhelming 'informing spirit' of the Indian Code belonged to Bentham and his disciples.<sup>35</sup>

Codification was originally intended to remedy defects in English law. Only by codifying the common law would justice be 'efficient, swift, intelligible, and available.'<sup>36</sup> Bentham and Mill envisioned a series of codes on every area of the law; so instead of relying on caselaw and independent digests, the entire corpus of legal knowledge would be written down in one source, in a concise, easy to read form. Moreover, codification would end the corruptive monopoly enjoyed by the legal profession. The common man would no longer have to depend on profit-hungry lawyers and magistrates to protect

<sup>33</sup> Setalvad, pp. 24, 119–20. Elphinstone noted in 1822 that Muslim criminal law was virtually a dead letter in Bombay, such that a judge had to create law for virtually every new case. In Ajmer the British simply adopted Marathan criminal law. Panchayats were permitted to continue, on a limited basis. The panchayats had no authority to decide criminal cases, but the Superintendent of the province could order them to collect evidence. And prior to the passage of the Indian Penal Code, traditional (local) Hindu criminal punishments were generally used, including penance (*prayashchitta*), restitution, and ordeals. At the same time, the Superintendent had the right to overrule any panchayat decision. Verma, pp. 160–5.

<sup>34</sup> Stokes and Derrett felt that the discontinuance in 1832 of the fatwa, the written opinion of a Muslim law officer, marked the end of the general application of Islamic law, although neither distinguished between civil and criminal law. Stokes, *Utilitarians*, p. 223; Derrett, p. 318.

<sup>35</sup> Stokes, *Utilitarians*, pp. 225, 233.

<sup>36</sup> *Ibid.*, pp. 70–1.

his rights. This cure-all approach, typical of the Utilitarians, led naturally enough to speculation on the effect law codes would have on India. With the passage of the Charter Act and the establishment of the Indian Law Commission, Mill hoped that all Indians would soon enjoy the benefits of a common code of laws: ‘the state of things at which it [the law commission] aims in prospect is when a general system of justice and policy and a code of laws common (as far as may be) to the whole people of India . . . shall be established throughout the country.’<sup>37</sup> Given that the Utilitarians were the moving force in England’s codification movement, it should come as no surprise that the Indian Penal Code was imbued with a strong utilitarian flavour. In 1887, Whitley Stokes, an English barrister and member of the Indian Law Commission, wrote that Macaulay’s Code reflected to the letter the form of code Bentham himself would have written for India.<sup>38</sup> He identified the following Benthamite practices that found their way into his Code: the use of separate chapters for various classes of offences, numbered paragraphs, precise definitions of terms followed by the consistent use of those terms to the exclusion of any others, the allocation of separate paragraphs for each distinct idea or proposition, and the use of the third person masculine singular to denote either sex or number of persons.<sup>39</sup>

With a dual court system, a bewildering mixture of Hindu, Muslim and English law, untrained judges, and overlapping jurisdictions, it is small wonder that Macaulay decided to ignore India’s existing legal structure when drafting his code. He considered India’s legal system in 1834 to be so seriously flawed that it had to be discarded and a new system created to take its place. That new system would be based on Bentham’s principles, the most important of which was codification. As his first task, Macaulay chose to codify the criminal

<sup>37</sup> Dispatch No. 44 of December 1834, by the Board of Directors of the East India Company; cited in Rudolph, p. 43. See also the ‘Essay on the Influence of Time and Place in Matters of Legislation’, in which Bentham speculated on the modifications necessary to transplant his system of law codes to Bengal, and other evidence cited in Stokes, *Utilitarians*, p. 51.

<sup>38</sup> Whitley Stokes, *Anglo-Indian Codes*, vol. 1 (Oxford: Clarendon Press, 1887), pp. xxiii.

<sup>39</sup> Macaulay favoured many Benthamite principles of procedure as well: oral pleadings, jurisdiction of courts based on issue not pecuniary amounts, appeals on questions of law only, and no new evidence admissible on appeal. See Stokes, *Utilitarians*, pp. 199–210. These principles may not seem that startling, but a review of English law and statutes prior to the mid-nineteenth century will quickly prove how revolutionary they were.

law. Although opinions differ as to why the criminal law was first,<sup>40</sup> it seems clear that events in England made it the most logical choice. By the time Macaulay arrived in India, English criminal law had been at the forefront of a reform movement for half a century. By understanding the English law reform movement we will see that Macaulay's Penal Code was rooted in the English experience, and not in India's supposed primitiveness.

### English Law Reform

Law reform attracted a great deal of attention in the nineteenth century.<sup>41</sup> And for the first half of the century, reformers concentrated most of that attention on the criminal law, mainly because they considered it a black mark on English jurisprudence.<sup>42</sup> The pioneers of Victorian criminal law reform, men such as Sir Samuel Romilly and James Mackintosh,<sup>43</sup> attacked what they believed to be a destructive, vicious, harsh, and inefficient body of law. The object of their wrath was the Bloody Code; the 200 statutes that punished virtually every criminal act with death.<sup>44</sup> During the fight to reduce the number of capital statutes, Bentham and Mill conceived and articulated their legislative techniques; and it was during this period that many of the Indian Penal Code's procedural and substantive elements were developed. In fact, the Indian Penal Code's substant-

<sup>40</sup> Stokes suggests Macaulay chose the criminal law first because he thought it would be the easiest to codify, not the most important. After the Penal Code, he planned to draft a code of criminal procedure, followed by the more difficult area, civil law. Stokes, *Utilitarians*, p. 221.

<sup>41</sup> From 1815 to 1860 there were well over sixty law commissioners. See W. S. Holdsworth, *A History of English Law* (London: Methuen & Co. Ltd., 1952), vol. 13, p. 272.

<sup>42</sup> Stokes, *Utilitarians*, p. 221.

<sup>43</sup> A leading lawyer in Chancery Court, Romilly (b. 1757) became the most important figure in the movement to reform the Bloody Code in the first two decades of the nineteenth century. A prolific writer, Romilly wrote an astonishing number of articles supporting his views. He was also a great admirer of Bentham and wrote a series of articles advocating law codes. James Mackintosh (1765–1832) continued Romilly's reform campaign. A leading liberal political thinker and a Whig MP, Mackintosh also served as President of the Bombay Supreme Court from 1803 to 1811. See Holdsworth, pp. 272–85.

<sup>44</sup> By the turn of the century, some 750 statutes related to the criminal law. Nearly 400 additional Acts related to proceedings before Justices of the Peace. Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (London; Stevens & Sons Limited, 1848), 1, p. 575, note 25.

ive and procedural elements were derived from a long process of English criminal law reform, starting from the end of the Napoleonic Wars and continuing to the 1860s. During that period Victorian law reformers completely revised England's criminal law. Bentham was not the most significant 'informing spirit' of the Indian Penal Code, as Eric Stokes suggests; that honour must go to the English legal community's response to the state of English criminal law in the first half of the nineteenth century.

The number of capital statutes ballooned in the eighteenth century to over 200. Reformers were horrified that many of these offences were too minor or obsolete to warrant the death penalty. For example, theft in a shop under five shillings was a capital offence, as was stealing a tree.<sup>45</sup> We now know that the increase in the number of capital offences was misleading because only a small percentage of those sentenced to death were actually executed. Moreover, there were never 200 distinct capital offences. Eighteenth-century legislators interpreted offences narrowly, with each statute relating to a specific criminal act rather than a species of crime. The result was a proliferation of statutes that often dealt with the same class of offence; some twenty separate capital statutes involved the protection of trees from theft or willful damage.<sup>46</sup> Moreover, recent work has shown that the Bloody Code was a killing machine in theory alone. Only the most heinous crimes were punished by death.<sup>47</sup>

<sup>45</sup> Until Robert Peel's reforms in the late 1820s, Romilly was relatively unsuccessful in convincing Parliament to reduce the number of capital offences in the Statute books. His most important accomplishments included repealing capital statutes for theft in a shop under 5 shillings, theft in a dwelling-house under 40 shillings, and theft from a vessel in a river under 40 shillings. Obsolete offences that carried the death penalty included Egyptians remaining within the British Isles for over one month, maliciously killing or wounding cattle, and cutting down or destroying growing trees. Radzinowicz, pp. 549–50. The 1819 Select Committee on Criminal Laws compiled a long list of obsolete statutes; see *ibid.*, pp. 548–9.

<sup>46</sup> Clive Emsley, *Crime and Society in England 1750–1900* (London and New York: Longman Group UK Limited, 1987), pp. 203–4. Emsley found that from 1775 to 1815 approximately 20 percent of those sentenced to death were executed; that percentage was lower than in the seventeenth century. Physical punishment in England was also far less brutal than on the Continent. Emsley, pp. 202–14. Holdsworth estimated that only 5 percent of those sentenced to death were actually executed; Holdsworth, p. 280.

<sup>47</sup> Douglas Hay, 'Property, Authority and the Criminal Law,' in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, eds Douglas Hay, et al. (London: Allen Lane, 1975), pp. 17–64; J. M. Beattie, *Crime and the Courts in England, 1660–1800* (Princeton: Princeton University Press, 1986), p. 433; and E. P. Thompson, *Whigs and Hunters. The Origin of the Black Act* (London, 1975); Bruce Lenman and Geoffrey

Judges interpreted statutes strictly to avoid capital sentences,<sup>48</sup> and juries were reluctant to convict if the accused faced the death sentence.<sup>49</sup>

Despite the fact that most criminals sentenced to death were pardoned, the perception that the Bloody Code really deserved its nickname was enough to attract the attention of the leading law reformers of the early Victorian period. And although humanitarian concerns were important, reformers were primarily upset by the disorderly nature of English criminal law, what Romilly called ‘a lottery of justice.’<sup>50</sup> The Bloody Code met with disapproval because it was inefficient, and not simply because it was cruel. The solution recommended by the 1819 Select Committee on Criminal Law was greatly to reduce the number of capital statutes. The Select Committee felt that unless a serious crime was involved, prosecutors were reluctant to proceed, witnesses were reluctant to give evidence, and juries were reluctant to convict. By mitigating the severity of the law, the Select

Parker, ‘The State, the Community and the Criminal Law in Early Modern Europe,’ in *Crime and the Law: The Social History of Crime in Western Europe since 1500*, eds V. A. C. Gatrell, Bruce Lenman, and Geoffrey Parker (London: Europa Publications Limited, 1980), p. 14. See Martin Wiener’s work, cited *infra*, for a good bibliography on the subject.

<sup>48</sup> Beattie, p. 430, 475–6.

<sup>49</sup> Hay, pp. 62–3. The purpose behind the Bloody Code has been a subject of some controversy. Douglas Hay suggested that the use of capital punishment, or the Doctrine of Maximum Severity, was not to execute every person convicted of a capital crime, but rather to create a system of vertical patronage whereby the ruling class could alternatively use terror, in the form of the death penalty, or mercy, in the form of a pardon, to deter criminal behavior and maintain public peace. ‘The benevolence of rich men to poor, and all the ramifications of patronage, were upheld by the sanction of the gallows and the rhetoric of the death sentence. . . . When patronage failed, force could be invoked; but when coercion inflamed men’s minds, at the crucial moment mercy could calm them.’ Hay, p. 62. George Rudé agreed with Hay that undue severity was mitigated by the prevalence of pardons. George Rudé, *Criminal and Victim: Crime and Society in Early Nineteenth Century England* (Oxford: Clarendon Press, 1985), pp. 114–15. E. P. Thompson added that the Rule of Law blunted the grossest manifestations of class exploitation. Thompson, pp. 264–5. Recently, however, Hay’s thesis has been attacked, and for the most part discredited. For a devastating analysis of Hay, see John H. Langbein, ‘Albion’s Fatal Flaw,’ *Past and Present*, 98 (1983): 96–120. Langbein argues that the criminal law and its procedures served the interests of people who suffered as victims of crime, and those people were overwhelmingly non-elite. Langbein, p. 97. Beattie agreed with Langbein. He found no evidence of an upper class conspiracy in his definitive study of criminal law in Surrey. See Beattie, pp. 8–10, 430–49.

<sup>50</sup> Martin Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (Cambridge: Cambridge University Press, 1990), pp. 52–67.



Committee hoped to increase the number of convictions by providing secondary, or alternative, punishments to death.<sup>51</sup> In short, no offender should be sentenced unless the justice system was willing to carry out that sentence.<sup>52</sup> Anti-reformers defended the aristocratic and paternalistic image of justice, focusing on actual court practice and the extensive use of mercy; reformers focused on the theoretical severity of the Bloody Code and proposed a new era of impersonal and predictable justice in which judicial discretion played a reduced role.<sup>53</sup>

An important perception widely accepted by the Victorians in the first half of the nineteenth century provided a tremendous groundswell of support for the reformers. People were convinced that crime was increasing at an uncontrollable rate. An accusing eye was cast towards the arbitrary nature of a criminal justice system that failed to provide an effective deterrent to criminals. Most current research suggests that no crime wave really existed; dramatic increases in conviction rates reflected improved methods of record keeping<sup>54</sup> and the new police force<sup>55</sup> far more than the existence of a growing crim-

<sup>51</sup> Hansard, Parliamentary Debates (1st Series) 49:777–846 (cited *infra* as Hansard, followed by volume and page number); Holdsworth, pp. 283–4; Radzinowicz, pp. 547–50. Beattie considers the broadening of secondary punishments, particularly transportation and imprisonment, in the seventeenth and eighteenth century, to be far more significant in the history of punishment than the increase in the number of capital offences. Beattie, p. 450.

<sup>52</sup> Holdsworth, pp. 279–80; Wiener, pp. 52–67; Emsley, pp. 202–14; Radzinowicz, pp. 497–9. Robert Peel stated in 1827 that Parliament had to ‘correct the state of English law whereby people were sentenced to death, without ever intending to carry out the sentence.’ Hansard (2nd Series), 16:635, 22 February 1827 (Commons).

<sup>53</sup> Emsley, p. 222.

<sup>54</sup> Prior to 1810, no reliable national crime statistics were published, so crime remained a personal matter between victims and offenders. With the publication in 1810 of the number of arrests for indictable crimes in England and Wales back to 1805, crime became a national issue and the criminal a national bogeyman. The new crime statistics clearly fueled the movement for the reform of the Bloody Code in the 1820s. Emsley, p. 19. Beattie found that the increase in crime in the eighteenth century was an important stimulus to changes in the criminal law, as more capital offences were included in the Bloody Code and secondary punishments became common. Beattie, pp. 14–15.

<sup>55</sup> The Peel Act of 1829 established the London police force; Acts in 1835, 1839, and 1856 created county and borough police forces. A series of Acts passed between 1847 and 1855 greatly expanded the summary jurisdiction of magistrates. Naturally, the combined effect of these Acts was skyrocketing conviction rates. Wiener, p. 50. Over time people simply accepted the crime rate as another social problem, like disease, poor housing, or poverty, and by the 1850s the crime rate was seen as an inevitable feature of an industrial society. See David Philips, *Crime and Authority in Victorian England: The Black Country 1835–1860* (London: Croom Helm Ltd., 1977), pp. 13–24, 289. See also Gatrell, Lenman and Parker, p. 45.

inal class.<sup>56</sup> Yet, despite the fact that violent crimes were quite rare,<sup>57</sup> the myth of a crime wave became entrenched. Crime became a familiar literary device in works of popular fiction, like Charles Dickens' *Oliver Twist* and the Newgate novels, and a regular feature in daily newspapers.<sup>58</sup>

The perceived crime wave added to fears regarding the state of England's moral health. The existence of prostitution,<sup>59</sup> juvenile crime, urban decay, and criminal classes suggested that England's moral fibre was weakening. In a perceptive work on criminal law reform in the Victorian period, Martin Wiener noted that the reform of criminal policy served the immediate goal of controlling crime, but more important to the Victorians was the development of public character by reinforcing a new structure of values. Led by the Utilitarians' theories of criminal behaviour, law reformers hoped that the criminal law could be scientifically structured to reform the offender, while at the same time provide a strong deterrent to those contemplating criminal action.<sup>60</sup> 'Most crime thus signaled not only a generalized social disorder, but one particularly linked to defective self-management. Its remedy would increasingly be seen as involving efforts at reforming and developing the characters of offenders and potential offenders.'<sup>61</sup>

Between 1826 and 1830, in the face of fierce criticism of the Bloody Code and near hysteria over the growing crime rates, Parliament passed the Peel Acts,<sup>62</sup> some eight statutes that consolidated and amended over 200 statutes.<sup>63</sup> Legal historians, most notably

<sup>56</sup> Emsley, p. 72.

<sup>57</sup> Larceny constituted 80 percent of all crimes. Emsley, pp. 36–41; Philips, pp. 283–7.

<sup>58</sup> People were especially terrified of offences against the person, like assault and murder. The Ratcliffe Highway murders of 1811, where several people were murdered at knife point, enthralled the reading public for months. Emsley, pp. 36–42.

<sup>59</sup> For an insightful look at the relationship between Victorian prostitution and Victorian conceptions of morality, see Judith Walkowitz's *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge University Press, 1980).

<sup>60</sup> Wiener, pp. 38–9, 48–9.

<sup>61</sup> Wiener, p. 49.

<sup>62</sup> The eight statutes are collectively known as the Peel Acts, so-called because Sir Robert Peel promoted their passage.

<sup>63</sup> The first statute, passed in 1826, consolidated certain criminal procedures dealing with bail and the duties of justices of the peace and coroners. It contained very little new law, but at least a jumble of procedure was in one place. See 7 George IV, c. 64. Four new Acts were passed in 1827. The first made all felonies non-capital offences unless expressly stated otherwise. Two Acts consolidated and amended the law of larceny and malicious injury to property. The fourth dealt with

W. S. Holdsworth, have suggested that the passage of these Acts represents an important new epoch in the history of English criminal law. And without question the Peel Acts reduced the number of capital offences, consolidated the law in a few areas, and specified new secondary punishments for the offences no longer considered capital in nature. However, to suggest the Peel Acts represented a dramatic departure from the primitive nature of the Bloody Code is simply unjustified by the Acts' substantive and procedural elements. The 1819 Select Committee had recommended the consolidation of the criminal law, and Peel apparently agreed; he called for the general reform of the criminal law 'which had hitherto created so much error and confusion in our courts of justice'.<sup>64</sup> As stated above, the reduction in the number of capital offences was the focus of the law reformers, and clearly the Peel Acts did so; however, the death penalty was still prominent; and in terms of consolidating and simplifying the criminal law, the Peel Acts were a failure. The Peel Acts did little more than list related offences into a few statutes.<sup>65</sup> Little attempt was made to clarify definitions and streamline procedure. Words and phrases and drafting technique were not consistently used in the same manner. Punishments were specified for particular offences without any apparent reason. Some of the punishments simply defy logic. Stealing and killing a horse, cow or sheep was a capital offence; stealing a deer from an enclosed ground was a simple felony; and, child-stealing carried the same sentence as stealing a deer.<sup>66</sup> The Peel Acts passed after 1827 gave a judge the discretion to sentence an offender to prison with or without hard labour, but the earlier Acts carried no such provision.<sup>67</sup> Each Act included its own procedure, even though the procedures were generally the same.

an obscure provision dealing with the criminal compensation to victims during a riot. See 7, 8 George IV, c. 28–31. In 1828, an Act was passed to consolidate and amend offences against the person. See 9 George IV, c. 31. And in 1830 two statutes did the same for forgery and coinage offences. See 11 George IV and 1 William IV, c. 66 (forgery) and 2 & 3 William IV, c. 34 (coinage).

<sup>64</sup> Hansard (2nd Series), 16:633 (Commons).

<sup>65</sup> The limited scope of the reforms reflected a fundamental resistance among English law-makers and jurists to change long-standing judicial practices. Even reformers like Peel promoted a conservative approach. He called on his fellow MPs to 'Remove the rust and impurity that the law acquired over time without destroying the substance.' Hansard (2nd Series), 16:642, 22 February 1827 (Commons).

<sup>66</sup> 7 & 8, George IV, c. 29, ss. 25, 26; 9 George IV, c. 31, s. 21. Simple felonies were generally punished by transportation of seven years or a short prison term. In the case of male offenders, whipping was usually added.

<sup>67</sup> 9 George IV, c. 31.

The Act relating to larceny, while a haphazard collection of laws, did manage to express the law in relatively clear and readable English. On the other hand, the Act dealing with malicious injury to property simply listed specific punishments for specific types of goods; no attempt was made to extract general principles or rules from the lists of offences.<sup>68</sup> The Peel Acts represented the first concerted legislative attempt in the nineteenth century to reform the Bloody Code; yet, as Macaulay set sail for India, he left behind a criminal system that still largely reflected notions of justice from the eighteenth century, a far cry from the assumed modern criminal justice system.

Disappointed but not disillusioned, the Utilitarians continued to campaign for further reforms. Bentham and his disciples felt England's justice system would remain an archaic reminder of an earlier age until the law was codified. Wiener relates this push for codification to the link between criminal law and morality: 'The tendency of Victorian legal change was toward establishing a more uniform and non discretionary body of laws and an explicit system of gradations of offenses and penalties in closer correspondence with accepted moral rules.'<sup>69</sup> And while morality certainly played a role, Wiener ignored the internal dynamic of English law reform. After the Peel Acts, even the most conservative jurist agreed that the Bloody Code was flawed; and while some argued against codification,<sup>70</sup> no one argued that justice would not be better served by more precisely defining terms, consolidating statutes according to class of offence, streamlining procedures, repealing obsolete statutes, or making the punishment fit the crime. In the face of growing pressure, Parliament appointed a Royal Commission in 1832 to prepare a draft criminal code for England. The Royal Commission's first report, published in 1834, identified the problems with England's criminal law that the proposed code would rectify; for my purposes,

<sup>68</sup> 8 George IV, c. 29.

<sup>69</sup> Wiener, p. 65.

<sup>70</sup> The principal argument against codification was that it stunted the natural development of the common law. Instead of legal principles tested and scrutinized by numerous judges in a variety of factual situations, law codes reflected the opinion of its drafter. Sir E. J. Gambier, Chief Justice of the Madras Supreme Court, rejected the concept of a criminal code for India because law codes destroyed the process inherent in the common law whereby time and experience determined what laws were in the best interests of society: 'I have always thought that such a body of law should be modified by those additions and alterations alone of which . . . experience has evinced the utility or the need.' Report on Indian Penal Code, p. 4.

it provides a critical analysis of England's criminal law at the same time Macaulay drafted his Code.

The reasons Macaulay and his fellow law reformers believed India needed a criminal code have already been touched upon: judges did not have a uniform set of rules and legal principles upon which to base their decisions; and Hindu and Muslim law simply lacked the necessary ingredients of a modern legal system. And these weaknesses have led modern historians to accept that India needed British law as part of the modernization process. However, we have seen that prior to the passage of the Peel Acts, the English themselves did not consider their own criminal law to be modern.

How then did the Royal Commission rate England's criminal justice system in the 1830s? The Commission's first report opened by stating that transcribing the common law and unwritten law as it currently existed<sup>71</sup> was impossible because neither provided uniform rules or principles on any consistent basis.<sup>72</sup> The reported judgments and text books of authorities were declared 'defective in the statement of general rules.'<sup>73</sup> The decisions themselves conflicted more often than not: 'numerous instances regards the law as uncertain and undefined in consequence of conflicting decisions.'<sup>74</sup> Moreover, the caselaw was not located in any one place, nor was law reporting dependable enough to trust any one case; the importance of particular decisions often depended upon the judge's reputation or the law report the case was reported in.<sup>75</sup> Decisions were dispersed through law reports from the earliest annals, including Crown cases, Cases of the King's Bench or of Nisi Prius, and the Courts of Chancery.<sup>76</sup>

<sup>71</sup> The Commissioners distinguished between the common law, comprised of the decisions of law courts, and the unwritten law, comprised of legal texts and digests of cases with commentaries. Legal texts and digests were often used by lawyers and judges, and so were an important part of English law. The Royal Commission intended to include both in the proposed criminal code.

<sup>72</sup> Parliamentary Papers, Royal Commission on Criminal Law, First Report, 1834, p. 4.

<sup>73</sup> First Royal Commission, First Report, p. 3.

<sup>74</sup> *Ibid.*

<sup>75</sup> The Royal Commissioners were not enamoured with the efficiency of Britain's law report system: 'sometimes omission of particular facts in a report leads to mistakes as to the effect of decisions.' First Royal Commission, First Report, pp. 2–3.

<sup>76</sup> Some modern scholars disagree with the Royal Commission's assessment of English criminal law in the nineteenth century. Bruce Lenman and Geoffrey Parker praised post-feudal English law for its distinctive uniformity: '... the law dispensed by the king's courts at Westminster, by his itinerant justices in assizes, and by his justices of the peace in the quarter-sessions, was the same for every person and in every place.' See Gatrell, Lenman and Parker, pp. 11–48. For a similar view, see

The Royal Commissions' first report quickly dispelled any notion that the Peel Acts had ended the need for additional reforms. Unimpressed by recent changes, the Commissioners noted that Parliament continually legislated on a piecemeal basis. Old statutes were not repealed when contradicted by new legislation, and new statutes often contradicted common law principles.<sup>77</sup> Enactments regarding a class of offence were often dispersed among several statutes, which made it extremely difficult and time-consuming to find the law. Even worse, statutes failed miserably in providing a uniform set of definitions. To illustrate the point, five different definitions of larceny were listed from five reputable legal digests.<sup>78</sup> Further, statutes were generally passed to deal with a specific set of circumstances. And naturally, once those circumstances changed, the statute became obsolete. However, because older statutes were rarely repealed, the books were rife with obsolete statutes. Similarly, common law principles often related to a set of circumstances that no longer existed. And the disorganized state of the common law made it nearly impossible for legislators to ensure that statutory law did not contradict common law principles. The fundamental problem was that many of these old laws and principles were neither wholly retained nor wholly abolished, which meant that a significant body of law was no longer relevant to the needs of contemporary society.

As noted above, Macaulay may have thought that England's legal system had built in devices that automatically checked unreasonable judicial discretion,<sup>79</sup> but the Commissioners remained unconvinced. Countless decisions failed to refer to any general rules or prin-

R. C. van Caenegem, *The Birth of the English Common Law* (Cambridge: Cambridge University Press, 1973).

<sup>77</sup> 2 & 3 Will. IV, c. 123 abolished the death penalty for forgery except for wills, the power of attorneys, and stock transfers. Another statute made it a capital offence to forge a life annuity. Therefore, forging a life annuity was capital, but forging a perpetual annuity was not. First Royal Commission, First Report, p. 29.

<sup>78</sup> First Royal Commission, First Report, p. 8. Some definitions of larceny required an intention to profit, while others required only an intention to deprive the owner of his property. Over the next decade the Commissioners tinkered with the definition. Their inability to agree on one definition illustrated the extreme difficulty in writing a code in the first place. The Commission finally agreed upon the following definition: 'Theft is the wrongfully obtaining possession of any moveable thing which is the property of some other person and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or dealt with it as the property of some person other than the owner.' See First Royal Commission, Third Report, 1847.

<sup>79</sup> See note 23, *supra*.

principles.<sup>80</sup> Judges of inferior courts were poorly-equipped to interpret legal decisions, either for reasons of education or simple incompetency, and most did not have the resources to survey the vast array of legal decisions and texts. As a result, errors were constantly corrected on appeal.<sup>81</sup>

In keeping with the tradition begun by Romilly and Mackintosh, the Law Commissioners focused on the law of punishment, an area seen as needing drastic and immediate reform. In a report published in 1836, the Royal Commissioners complained that despite the reduction in the number of capital crimes, and contrary to common sense, punishments rarely fit the crime: '[the] scarcity of distinctions defining the gradations of guilt . . . constitutes a remarkable character of the criminal law of this country. Crimes bearing little moral resemblance to each other are, by sweeping definitions, frequently classed together without discrimination as to penal consequences.'<sup>82</sup> The report concluded by proposing a new system of sentencing designed to restrict judicial discretion and impose an acceptable degree of consistency.<sup>83</sup>

The reports of the first Royal Commission stimulated a limited Parliamentary effort to reform the criminal law.<sup>84</sup> In 1837, after relatively little debate,<sup>85</sup> Parliament quickly passed eight Acts

<sup>80</sup> First Royal Commission, First Report, p. 4.

<sup>81</sup> First Royal Commission, First Report, pp. 4, 26. The Commissioners blamed the inferior judiciary for forcing the Secretary of State to constantly intervene to reduce capital sentences to some lesser punishment. The solution was to ensure that judges knew exactly what punishment was required in each circumstance. The Commissioners either ignored or failed to realize that the extensive use of pardons for capital crimes had long been a part of English law, and in fact such intervention made an otherwise brutal criminal justice system somewhat acceptable to the public and legal jurists.

<sup>82</sup> First Royal Commission, Second Report, 1836, p. 19.

<sup>83</sup> First Royal Commission, Second Report, pp. 36–7. The proposed new system is discussed *infra*.

<sup>84</sup> This was not the first time that a parliamentary report stimulated limited reforms. In 1775, the House of Commons Committee on the Criminal Laws wrote a report severely criticizing the criminal justice system. The report led to at least 14 bills over next two years; however, few of the bills became law, nor did they represent a coherent program. The Committee's recommendations were incorporated in some statutes, such as the Disorderly Houses Act, 25 Geo II, c. 36 (1752). Beattie, pp. 520–5.

<sup>85</sup> The Acts were passed through both Houses in slightly over four months. One Lord expressed great surprise that both sides of the House supported the bills. Hansard, 38:1790, 4 July 1837 (Lords). See also *ibid.*, (3rd series), 37:709–33, March 23, 1837 (Commons); 38:907–26, 22 May 1837 (Commons); 38: 252–9, 24 April 1837 (Commons); 38:1773–90, 4 July 1837 (Lords).



designed to bring the criminal law 'into a more regular and methodical shape.'<sup>86</sup> The Acts covered specific classes of crimes, such as forgery, offences against the person, and burglary, as well as the punishments of transportation and the death penalty.<sup>87</sup> However, important reforms were sidetracked because MPs focused on whether or not reducing the number of capital offences contributed to an increase in crime.<sup>88</sup> Instead of addressing the problems identified by the Royal Commission, the 1837 Acts merely further reduced the number of capital offences and amended or repealed certain sections of the Peel Acts.<sup>89</sup> On the positive side, the 1837 Acts used language that was clearer and easier to interpret. However, little effort was made to define terms and establish consistent principles. Judicial discretion in sentencing remained virtually unlimited, and despite the reduction in the number of capital offences, the death penalty remained prominent.<sup>90</sup>

As was the case with the Peel Acts, the 1837 Acts failed to provide England with a criminal justice system that met the standards Macaulay demanded for India, a system uniform in procedure, with precisely and clearly defined offences written in plain language, and a single, written source of law. And for the next 24 years no significant legislation regarding the criminal law was passed.<sup>91</sup> By 1848 the Royal Commission had published two crim-

<sup>86</sup> Hansard (3rd Series) 37:710 (Commons).

<sup>87</sup> 7 Will IV & 1 Vict. c. 84 (forgery), c. 85 (offences against the person), c. 86 (burglary), c. 87 (robbery and theft), c. 88 (piracy), c. 89 (arson), c. 90 (transportation), c. 91 (capital punishment).

<sup>88</sup> Although some MPs were convinced that reducing the number of capital offences would weaken the deterrent value of the law, the majority felt otherwise: 'the severity of punishment did not repress crimes. The most effectual mode of repressing them was to combine moderate punishments with a steady and strict administration of the law.' Hansard (3rd Series) 38:1780, 4 July 1837 (Lords).

<sup>89</sup> In support of the 1837 Acts, Lord Russell stated in the Commons that the difference between the number of persons executed and sentenced was so great that it was impossible to distinguish between those who deserved mercy and aggravated cases that did not. He asked why robbery was a capital offence when since 1832 only three convicted robbers had been executed. Hansard (3rd Series), 37:710–11, 23 March 1837 (Commons). According to Russell's figures, 523 people were sentenced to death and 34 executed in 1835. And in the same year, 193 burglars were sentenced to death, but only one perished on the scaffold.

<sup>90</sup> For example, while burglary without violence was no longer a capital crime, breaking and entering over £5 was still punishable by death. 7 Will. IV & 1 Vict. c. 86.

<sup>91</sup> A trio of statutes passed in 1848, known as the John Jervis' Acts, outlined the jurisdiction, duties, and powers of magistrates. The Acts were necessary owing to the enormous increase in the number of cases. Other procedural matters were also

inal codes, but despite repeated pleas from law reformers Parliament expressed little interest in turning either into law.<sup>92</sup> A new Royal Commission was formed in the late 1850s to examine the state of the statute books. As part of that process, between 1856 and 1858, the Statute Law Commission drafted eight criminal bills that proposed to fix problems with the Peel and 1837 Acts. Soon after, in February of 1861, the government introduced the Criminal Law Consolidation and Amendment Act (England and Ireland), which passed through both houses in six months, again after little debate.<sup>93</sup> The 1861 Acts were based primarily on the Statute Law Commission's eight draft bills, but they also reflected the work done by the two earlier Royal Commissions.<sup>94</sup>

Some legal historians suggest that while the 1861 Acts did not constitute a criminal code, they held out the promise of one in the future.<sup>95</sup> Yet, to the men who believed so passionately in the codification movement, the 1861 Acts must have been another grave disappointment. Certainly, the statutes were more readable and better organized than their predecessors. For the first time, similar offences were organized under section headings.<sup>96</sup> A common format was followed, with definitions at the beginning of each section, followed by a description of the offence and the punishment. Procedural matters were covered at the end of each Act, although this involved some repetition as virtually the same procedure applied in each. Taken together, however, the 1861 Acts were still a far cry from the comprehensive criminal codes prepared by the two Royal Commissions. A number of areas

dealt with, including the right of an accused to cross-examine, the right to bail for minor offences, and the right to counsel. Edward Jenks, *A Short History of English Law* (Boston: Little, Brown and Company, 1922), p. 340.

<sup>92</sup> James Stephen drafted his own criminal and evidence code, but neither passed after several attempts. Smith, pp. 75–83.

<sup>93</sup> Lord Brougham praised the House of Lords for passing the bill so quickly. He noted that politicians must at times 'trust the work of a few skilled persons.' Hansard (3rd Series) 163:1377–1378, 21 June 1861 (Lords). Five separate statutes were included: larceny, malicious damage to property, forgery, coinage, and offences against the person. See 24 & 25 Vict. c. 96–100.

<sup>94</sup> Hansard (3rd Series) 161:441–442, 4 February 1861 (Commons). In addition, the Statute Law Revision Act, 1861 repealed and amended over 700 old or obsolete statutes, in whole or in part, including all of the Peel Acts. 24 & 25 Vict., c. 101. The vast majority of the repealed statutes were from the time of George III (1770–1818).

<sup>95</sup> See for example Jenks, p. 341.

<sup>96</sup> 24 & 25 Vict., c. 96 (larceny) had 123 sections listed under 17 section headings.

remained unconsolidated. As opposed to the five classes of offences covered by the 1861 Acts, the 1848 Code organized 24 areas of the criminal law, all in one volume. And while many of Bentham's drafting techniques were incorporated, Bentham's fundamental objective had been to construct codes for every area of law, not to pass well-worded statutes for each class of offence.

Douglas Hay's view that the Bloody Code represented a system of vertical patronage that enabled the upper classes to maintain social order has now been largely supplanted by Beattie's more realistic, albeit less dramatic, portrayal of English criminal law in the eighteenth century. Significantly, the most devastating argument against Hay, first presented by John Langbein, is that English criminal law was simply too primitive to be an effective tool for an upper class conspiracy: 'English criminal law was primitive in matters of offence definition, especially the general part, that set of notions about criminal responsibility that cuts across all criminal offences (for example, degrees of culpability, the law of attempts, aiding and abetting, capacity, and most of the affirmative defences).'<sup>97</sup> The findings of the two Royal Commissions suggest that little had changed by the mid-nineteenth century. By 1862, then, when the Indian Penal Code became law, did England have a corpus of substantive or procedural law that met Macaulay's standard for a modern criminal justice system? Was there 'uniformity when you can have it, diversity when you must, but above all certainty'? Frankly, if we apply the same standard historians have used to conclude India's indigenous legal systems were primitive, then the answer is no. Most of the shortcomings identified by the first Royal Commission in 1834 still remained. And if the improvements made in the two decades prior to 1862 are ignored, then England's criminal law seems even more primitive.<sup>98</sup> Historians studying the ramifications of the introduction of English law on Indian society should take note that English law for much of the nineteenth century was not inherently modern.

<sup>97</sup> Langbein, pp. 117–18.

<sup>98</sup> Many of the most famous tenets of English criminal justice were only developing by the beginning of the nineteenth century. For example, in 1800 almost 70 percent of all Old Bailey defendants were not represented by counsel. The presumption of innocence and the right to remain silent were not firmly established until the 1820s. And only after the first few decades of the nineteenth century was there a significant corpus of evidentiary rules; before that, the use of evidence rested almost entirely on the whim of the trial judge. See Beattie, pp. 341–76.

### The Indian Penal Code in Perspective

So far I have argued that if India's criminal justice system in the first half of the nineteenth century was primitive, then so was England's. Therefore, it is misleading to assume that India's indigenous legal systems were primitive merely because the British decided to pass the Indian Penal Code. Even if one ultimately decides that the Code represented a superior form of criminal justice, that does not prove that Muslim or Hindu law was not capable of operating in the nineteenth or twentieth century. To appreciate the significance of the Indian Penal Code, we must first understand that the Code reflected the needs and ideas appropriate to England's criminal justice system, not India's. In short, the Code's substantive and procedural provisions were motivated by shortcomings in England. The Indian Penal Code represents the transplanting of English law in India, not because Indian law was primitive, but because English law needed reform. Once the Indian Penal Code is placed within its proper historical perspective, it becomes quite clear that India was rarely a factor in determining the Code's form or content.

To illustrate that point, the Indian Penal Code and English law will be compared in three areas: structure and organization, substantive law, and punishments. The Benthamite influence on the Indian Penal Code's structure and organization, which Eric Stokes identified as proof that Macaulay created a code uniquely suited to India, was just as evident in the draft English codes; and therefore, we must reevaluate the revolutionary image of Macaulay's methods. A more detailed look at the Indian Penal Code's substantive law will demonstrate that despite Macaulay's self-proclaimed originality the law in his Code was based on English legal principles. Finally, a study of punishments reveals no appreciable difference between punishments in the Indian and English codes. The law of punishment is particularly important in this case because so much of England's reform movement centered around it. John Clive may be correct when he states that the Indian Penal Code had a humane form of punishment by nineteenth-century standards, but he failed to mention that this form of punishment was developed to address circumstances in England, not India.<sup>99</sup>

<sup>99</sup> John Clive, *Macaulay: The Shaping of the Historian* (New York: Alfred A. Knopf, 1973), p. 449.

*Structure and Organization*

The Indian Penal Code has met with near universal approval. It has been called ‘the perfect code’, ‘marked by its broad-mindedness and humanity’, which has given ‘India a rational and humane system of criminal law.’<sup>100</sup> Even its critics believe it introduced a vastly superior body of law compared to what existed earlier.<sup>101</sup> Perhaps the strongest testimony to the Indian Penal Code’s worth is that it remains in force, in amended form, to this day. But did it represent a new methodology, one specially suited to remedy the primitive state of Indian criminal law? If one answers yes, then that identical methodology was used by the Royal Commissions when they produced their draft codes for England. Without a doubt, the structure and organization of the Indian and English codes was virtually identical. Criminal offences are divided into chapters according to classes, such as offences against the state, offences against public justice, and offences against the public tranquillity.<sup>102</sup> Each offence, along with related lesser offences, was defined, followed by the appropriate punishments and exceptions.<sup>103</sup> In fact, the Indian and English codes matched so closely in structure and organization that 16 out of 24 chapter headings in Macaulay’s Code corresponded almost exactly to chapter headings in the English codes;<sup>104</sup> and the offences con-

<sup>100</sup> Setalvad, p. 132; Lipstein, p. 92; Clive, p. 474.

<sup>101</sup> P. Jegatheesan, *Law and Order in Madras Presidency, 1850–1880* (Delhi: B.R. Publishing Corporation, 1987), p. 127.

<sup>102</sup> The chapter headings listed above were in the Indian Penal Code. The corresponding titles for the English Codes are as follows: Treason and Offences against the State, Offences against the Public Administration, and Offences against the Public Peace. In 1834, the Royal Commission noted that the present classification of crimes had to be changed before changes in punishment and procedure could be effected. First Royal Commission, First Report, p. 31.

<sup>103</sup> For example, in Macaulay’s Code, under the chapter ‘Offences Affecting the Human Body’ a murderer was defined as ‘whoever does any act . . . with the intention of thereby causing . . . the death of any person, and does by such act . . . cause the death of any person, is said to commit the offence of voluntary culpable homicide.’ Another section specified that murder was punishable by death, transportation for life, or rigorous imprisonment for life. Lesser crimes like manslaughter or negligence causing death were also defined and the punishments specified. Exceptions to murder, such as self-defence or duty of care, were included either in the same chapter or in another chapter called General Exceptions. The English codes utilized the identical format.

<sup>104</sup> All the codes had nearly the identical number of chapters: the 1837 Indian Code had 24 chapters, the 1862 Indian Code had 23, and the 1843 and 1848 English codes had 24.

tained in chapters without exact matches in the English codes were generally covered elsewhere under different headings.

In fact, the Indian and English codes differed in structure and organization in only one significant way; the English codes did not include Illustrations.<sup>105</sup> Illustrations were hypothetical fact situations that showed how a particular section operated.<sup>106</sup> The Royal Commission attached notes to their draft codes, and hypotheticals were naturally used in the notes to clarify certain points, but the Royal Commissioners never seriously contemplated including Illustrations in the actual code.<sup>107</sup> Setalvad has suggested that the Illustrations represent a distinctive legislative method. However, his position is simply untenable. Illustrations in a criminal code made sense only for India at that time. India did not have a formal body of caselaw, so hypothetical factual situations served the same function as English common law. England's enormous body of common law made the use of Illustrations redundant. The Illustrations were particularly useful for judges in India because it took approximately fifteen years or so after the Indian Code was passed for a sufficient body of caselaw to develop. Until that time, judges were forced to substitute the Illustrations for real cases.<sup>108</sup> After independence, existing case law made Illustrations redundant.

<sup>105</sup> The following is an example of an Illustration Macaulay included under the definition of murder: 'A. lays sticks and turns over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z., believing the ground to be firm, treads on it, falls in, and is killed. A. has committed the offence of voluntary culpable homicide.'

<sup>106</sup> Setalvad argued that the illustrations formed part of the Indian Code's substantive law, and he pointed to the courts' extensive use of them in making decisions and also by those drafting later codes. Setalvad, p. 130. The Indian Law Commission in 1847 claimed that Macaulay never intended the Illustrations to form part of the substantive law. Their function was to 'serve precisely the same purpose as examples in grammar; and as of examples in grammar or in any science it is not to be supposed that they ever supersede or vary the rule they are intended to illustrate.' Report on Indian Penal Code, p. 12.

<sup>107</sup> Macaulay included a series of notes applicable to each chapter in which he explained the meaning of a particular phrase or the use of a specific punishment, often summarizing arguments for and against. Not forming part of the formal code, that is, not enforceable by law, the notes were included to help subsequent generations understand the philosophical justifications for each chapter. The 1862 Indian Code did not have notes. The Royal Commissioners attached notes to their draft codes, but legislative practice suggests the notes would not have been included in an actual code. The first Royal Commission recommended that a criminal code include notes to explain fine points. See First Royal Commission, First Report, p. 32.

<sup>108</sup> Setalvad claimed that judges continue to use the Illustrations to support their decisions. Setalvad, p. 130. However, even before independence, an Indian court

*Substantive Law in the Indian Penal Code*

For good reason Eric Stokes credited the Utilitarians with inspiring the Code's structure. Bentham's work on law codes anticipated much of Macaulay's Code, even down to the notes. In fact, Bentham believed the notes should form part of the actual code. However, too much emphasis has been placed on the Code's form; and while structure contributes to a code's effectiveness, the most important aspect is the substantive law. Well-defined terms, Illustrations, and notes naturally assist a judge in a murder trial; however, the definition of murder is certainly the starting point. Structure aside, one must know if omitting to act under certain circumstances amounts to murder, negligence, or no offence at all.<sup>109</sup> Strangely, modern historians continue to emphasize Macaulay's utilitarian-inspired innovations. They credit Macaulay for giving India a modern, enlightened criminal code,<sup>110</sup> but gloss over the source of its substantive law. Yet, both Macaulay's and the 1862 Indian Codes mirrored England's substantive criminal law.

Macaulay claimed his work was completely original; in his mind, the 1837 Indian Code represented criminal law constructed solely for India, and no other legal system provided a useful precedent. Macaulay dismissed Hindu or Muslim law out of hand, feeling that Hindu criminal law had long since been dominated by Muslim law, and Muslim law had been overtaken by English Regulations; and in regards to the latter, Muslim law was 'certainly the last system of criminal law which an enlightened and humane Government would be disposed to revive.'<sup>111</sup> Considering that Macaulay's stay in India was limited to three years in Calcutta and his linguistic abilities, though impressive, did not include any of India's native tongues, the rejection of Hindu and Muslim law merely reflected patriarchal and racist views that were common in the nineteenth century.

ruled that Illustrations could not control the plain meaning of words in a statute. *Satya Priya Ghoshal v. Gobioda Mohum Roy Chowdhury* (1909), 14 C.W.N. 414.

<sup>109</sup> Under Macaulay's Code, failure to act was not a punishable offence unless the person was under a legal duty to act. A jailor is under a duty to feed a prisoner and failure to do so constituted murder; on the other hand, if that same jailor refused to give a beggar food after work, and that beggar died of starvation, no murder was committed.

<sup>110</sup> Setalvad, 120–65; Stokes, *Utilitarians*, pp. 189–233; Clive, 449–53.

<sup>111</sup> Introductory Report to the Indian Code, pp. 5–6. See Derrett pp. 226–69 for the most complete description of how the British destroyed traditional Hindu law by placing unwarranted reliance on ancient Hindu texts.



If Hindu and Muslim law provided little assistance to Macaulay, then what about English law? Macaulay had practiced at the English bar and was well read on a wide variety of legal subjects. It would be reasonable to assume Macaulay would import much of England's substantive criminal law into an Indian code. Yet, Macaulay denied absolutely that his Code was based on English law. He declared that English law could not be transplanted in India, not only because English law was 'framed without the smallest reference to India', but more importantly because English law was 'so defective that it can be reformed only by being entirely taken to pieces and reconstructed'.<sup>112</sup> Again, it is important to point out that Macaulay did not consider English law to be modern according to his standards. Moreover, such a claim of originality was typical among jurists, judges, and legislators in the nineteenth century,<sup>113</sup> but as will be shown, modern scholars, even admirers of Macaulay, have not accepted it.

Despite Macaulay's professions to the contrary, his contemporaries did not consider his Code a revolutionary departure from English law. Macaulay's Code was submitted to Supreme Court judges in Bombay, Calcutta, and Madras. Their comments were forwarded to Charles Hay Cameron and Daniel Elliot, Indian Law Commissioners, who issued two exhaustive reports in 1847 and 1848. In the 1848 report, the two Commissioners compared the 1837 Indian Code to the Royal Commission's 1843 Code, with the intention of amending the former whenever it differed from the latter;<sup>114</sup> however, no unacceptable differences were found and the 1837 Indian Code's implementation was recommended with relatively few amendments.<sup>115</sup> Reacting to Macaulay's claim that his Code was not based on any existing legal system, Hay and Cameron reported that with certain tolerable exceptions, the Indian Code departed very little from substantial principles of English law. Macaulay's claims of originality

<sup>112</sup> Introductory Report on the Indian Code, pp. 11–12.

<sup>113</sup> Wiener, p. 53.

<sup>114</sup> 'We would recommend attention generally to the observations of the English Criminal Law Commissioners on the manner in which the definitions and rules of the Criminal Law ought to be expressed . . . ' Report on Indian Penal Code, p. 16. The Indian Law Commissioners were constantly comparing the Indian Penal Code to the English codes. See generally, *ibid.*, pp. 11, 12, 16; First Royal Commission, First Report, pp. 98, 105, 108.

<sup>115</sup> Second Report on Indian Penal Code, 1847–1848, XXVIII.117, pp. 113, 219. Amendments to Macaulay's Code were generally minor, often involving semantics or the raising or lowering of fines.

were rejected out of hand: 'The novelty . . . is more imaginary than real, and is to be found more in form than in substance.'<sup>116</sup>

Most modern writers agree that the Indian Penal Code mirrored English law for the most part.<sup>117</sup> Lipstein described the Code as 'a systematic exposition of English law.'<sup>118</sup> Curiously, Macaulay's admirers go to great pains to point out that Macaulay's Code was based on universal principles of jurisprudence, rather than transplanted English law.<sup>119</sup> At the same time, there is no doubt that the majority of his Code reflected English jurisprudence. How can a Code based on English law be praised for not imposing English law on India? Granted some sections of the Indian Code applied only to India. A few provisions in a small chapter in Macaulay's Code related to caste.<sup>120</sup> The 1862 Indian Code deleted those provisions, but it did make it a criminal offence deliberately to wound the religious feelings of any person by uttering any word, making any gesture, or placing any object in the sight of any person.<sup>121</sup> The law of defamation was also adapted to accommodate India's religions. Saying someone drank alcohol was defamatory if the individual was a

<sup>116</sup>Report on Indian Penal Code, p. 10. For example, the Indian Code punished a negligent 'illegal omission of duty' causing death. English law used the term 'unlawful omission' to describe the same offence. Different expressions were used, but the Indian Law Commissioners considered them synonymous. Second Report on Indian Penal Code, p. 45.

<sup>117</sup>Setalvad, pp. 142–65; Clive 452–3; Lipstein, p. 92. I did not find a detailed comparison of English law and the Indian Penal Code. Setalvad provided the best comparison among my sources. He noted several places that the Indian Code adopted English legal principles; for example, exemptions from liability were the same: mistake, ignorance, accident, consent, and criminal capacity (infancy, insanity, drunkenness, coercion). Defences to the charge of homicide, such as self-defence, inadvertence, and legal duty were available under the Indian Code and had a long history in English jurisprudence. In fact, a recent Indian Law Commission reported that India's system of criminal courts was substantially similar to the English system. Setalvad, pp. 137–65. Setalvad relied on Sir Ronald K. Wilson's 'Comparative Tables of English and Indian Law' written at the turn of the century. Wilson found 86 variations when comparing the two systems, although many differences were traceable to the fact India had a criminal code and England did not. Unfortunately, Wilson's work was not available to me.

<sup>118</sup>Lipstein, p. 92.

<sup>119</sup>Clive, pp. 447, 453; Stokes, *Utilitarians*, p. 227.

<sup>120</sup>Parliamentary Papers, 'Penal Code,' 1837–38, XL1, s. 284. In a chapter called Offences Relating to Religions and Caste, an intentional act causing someone to lose caste was punishable by a prison term of six months, a fine of up to 2,000 rupees, or both. Macaulay's Code included more sections on caste than the 1862 Indian Code, but in overall terms caste played a very minor role in both.

<sup>121</sup>Indian Penal Code, 1862, s. 298.

Muslim; likewise, writing that you saw a Hindu kill a cow was equally actionable; and neither of those situations constituted a defamatory action under English law.<sup>122</sup> At the same time, the 1848 English Code included a chapter on Offences against Religion and the Established Church; and just as with the Indian Code, destruction of Church property and the disturbance of religious assemblies were criminal acts.<sup>123</sup> In 1848, at least, England and India had draft criminal codes that protected religion through the criminal law. Macaulay did not include offences against religion and caste simply because he respected Hindus or Muslims. English law had a tradition of treating offences against religion as criminal acts. Macaulay simply adopted that tradition and applied it to India, making those changes dictated by common sense.<sup>124</sup>

Obviously, English law did not deal with caste, so Macaulay created new law in that area. But the fact remains that most of the substantive law in the 1837 Code was English law digested according to Benthamite principles. Macaulay's admirers distinguish between form and substance in order to back up their claim that Macaulay did not simply copy English law. Stokes maintains that the key element of the Indian Code was Macaulay's attempt to create something new, to establish a new brand of criminal law based on Bentham's methods.<sup>125</sup> Macaulay's approach, and not the actual provisions in the Indian Code, were the important thing. John Clive was vastly impressed by the mere fact that Macaulay accommodated caste in his Code. Both men suggest that Macaulay adapted his Code in order to satisfy certain Indian conditions. Yet, by their own admission, the form of the Code was dictated by Bentham. Macaulay did not invent the concept of a criminal code; he was not the first to attempt one; he was not even responsible for popularizing the drafting principles we see in his Code. In fact, at virtually the same time, a Royal Commission was sitting in London drafting a criminal code for England based on the same principles.<sup>126</sup> The form of the Indian Code was not adapted for India *per se*; Macaulay believed Bentham's drafting principles to be superior to those currently in use

<sup>122</sup>Clive, pp. 456–7.

<sup>123</sup>Second Royal Commission, Fourth Report, pp. 70a–70b.

<sup>124</sup>Richard Lariviere has noted that until 1857 the legal issues the British considered to be best dealt with by Hindu law, such as inheritance, marriage, and caste mirrored the practice of England's ecclesiastical courts. Lariviere, pp. 757–9.

<sup>125</sup>Stokes, *Utilitarians*, p. 226.

<sup>126</sup>The Royal Commission produced its first report in 1834.

in England; he never took the trouble, nor frankly did he have the time or linguistic capabilities, to learn Hindu or Muslim legal drafting techniques. One may praise Macaulay's solutions to particularly difficult legal problems;<sup>127</sup> however, those solutions do not prove that Indian law was primitive. They merely illustrate Macaulay's ingenuity of mind and skilful judicial reasoning based on English principles; the only principles Macaulay knew.

### *Punishments*

The early Victorian reformers focused on reducing the number of capital offences in the statute book. And while humanitarian concerns motivated these reformers to protest against imposing the death penalties for certain minor acts, such as theft under £5, what really bothered them was that penalties were not being enforced. The reluctance on the part of the Crown to prosecute capital crimes, the tendency of juries not to convict, and the frequent use of pardons offended the reformers' belief that law must be uniform, rational, and nondiscretionary. The number of capital offences ceased to be the central focus of the reform movement by the 1840s, despite the rise in the number convicted of capital offences and a significant abolition movement.<sup>128</sup> For the remainder of the century, reformers concentrated on the purpose and form of punishment; and with the widespread acceptance of new theories on criminal reform and deterrence, led again by Bentham, a new regime of punishments was implemented. That regime was by and large adopted by the Royal Commissions in their draft codes and by Macaulay in his Code. Instead of punishing a vast number of offences with death, the new approach provided a wide range of punishments, known as secondary punishments. Secondary punishments, like transportation, imprisonment, and fines were explored in terms of their ability not only to deter crime, but also to reform criminal behaviour.<sup>129</sup>

<sup>127</sup>Clive, 458–9.

<sup>128</sup>Emsley, p. 223. Emsley believes the death penalty issue faded from the reform movement after the Peel Acts, but in the Parliamentary debates on the 1837 Acts the issue remained front and centre.

<sup>129</sup>A variety of secondary punishments existed early in the seventeenth century, such as fines, whipping, imprisonment, and public exposure in stocks or pillory. Those punishments were applied at the court's discretion. In 1718, as a result of judicial dissatisfaction with the poverty of choices regarding sentencing, transportation to America was formally introduced as a regular punishment for noncapital

The new regime of punishments that came into vogue around the same time Macaulay and the first Royal Commission began their work was based on one simple premise: the punishment must fit the crime. A tremendous amount of time and energy went into determining the exact form of punishment appropriate to each particular crime. To understand the importance of punishment we must return to Martin Wiener's work on the Victorians' conception of crime. We have discussed how reformers like Bentham wanted the law to be based on clearly stated rational principles. Wiener argued persuasively that behind the codification movement stood two fundamental beliefs that operated together: people must be treated as rational beings, and crime is irrational. Although this perhaps oversimplifies Wiener's views, in effect he argued that people were held strictly liable for their actions because they were rational beings. If crime was irrational, then those who broke the law had to be conditioned to understand rational behaviour. Once a criminal truly understood the irrationality of his actions, he would cease acting in a criminal manner: the criminal would be reformed. Crime then was not a signal of general disorder, but an example of defective management. Controlling crime involved changing the character of offenders and potential offenders, and to do so England needed to replace the unsystematic and overly flexible punishments endemic to the eighteenth century's criminal justice system with more defined and impersonal and predictable punishments.<sup>130</sup>

Transportation was the most popular alternative to the death penalty. It increased dramatically from 1815 to the early 1830s when some 3,500 convicts were shipped to Australia. However, the Select Committee on Transportation, 1837–1838, questioned its deterrent value because the punishment was so far away.<sup>131</sup> That fuelled a wave of opposition to transportation in the 1840s, and by 1850 transporta-

offences. Correctional houses existed from the seventeenth century. Beattie, pp. 456–504.

<sup>130</sup>Wiener, pp. 48–9. Houses of correction became an increasingly popular method of punishment for those considered to be persons of questionable character, such as, vagrants, prostitutes, unmarried women with children, and servants who disobeyed masters. From the start, imprisonment, often with hard labour, involved a moral component relating to a desire to reform behaviour, more so than transportation which was generally seen merely as an alternative to hanging. Beattie, pp. 492–500.

<sup>131</sup>Beattie stated that the deterrent value of transportation was questioned even before the American Revolution of 1776 ended transportation to America. Beattie, p. 544.

tion virtually ceased.<sup>132</sup> The number of convictions continued to rise during this period, so alternative methods of punishment were needed. In addition, by the 1840s, most law reformers believed that transportation prevented criminal reform because the offender was not subjected to conditions designed to change his behaviour. Increasingly, the solution was seen as prison, a perfect vehicle for creating the structured environment necessary to rehabilitate the criminal; and in the second third of the nineteenth century the penitentiary system expanded rapidly. Bentham's Penopticon stood as a model for prison construction; an inmate's time in prison was to be regulated every second of the day, not as a form of punishment, but to enforce the rigid, nonviolent discipline required to change criminal behaviour. What developed was the separate system: solitary confinement and silence, and hard labour. Alone, without contact from fellow inmates, a prisoner could reflect on his criminal past, and eventually realize the evil of his ways.<sup>133</sup> Besides the obvious deterrent value of hard labour, this punishment was designed to inculcate prisoners with a solid work ethic. Bentham hoped to use prison labour to make prisons self-sufficient, even profitable; he envisioned the entire penitentiary system run by private enterprise. However, using prison labour for profit was condemned because prison was supposed to teach criminals the irrationality of their behaviour. Reforming was spiritual, not educational. As a result, labour became increasingly pointless: walking on treadmills, picking oakum in cells, or shifting cannonballs from one spot to another and back again.<sup>134</sup>

Not surprisingly, these ideas were reflected in the English codes. The first Royal Commission identified lack of regular gradations of punishment as a fundamental imperfection of English criminal law.<sup>135</sup> If the State expected the criminal to act rationally, then clearly the law itself must be rational. Rational behaviour would not be learned from a system in which offenders were sentenced to

<sup>132</sup>Emsley, pp. 224–9. Another factor in the decline of transportation was the increasing protest from Australia.

<sup>133</sup>The Victorians believed that solitary confinement was a tremendously powerful punishment, feared by inmates more than virtually any other form of prison discipline. Based on the first Royal Commission's recommendation, Parliament legislated that solitary confinement could never last more than one month at one time or more often than three months in one year. See 7 Will. IV & 1 Vict., c. 85, s. 8; 24 & 25 Vict., c. 96, s. 119.

<sup>134</sup>Emsley pointed out that many prisons continued to exploit prison labour to produce profitable goods. Emsley, pp. 226–7.

<sup>135</sup>First Royal Commission, Seventh Report, 1843, p. 97.

death, but never executed; nor would the law be respected if the same class of crimes were not punished uniformly, or lesser crimes were punished more harshly than serious ones.<sup>136</sup> Criminal acts had to be met with punishments in each case because ambiguity removed certainty from the law; and certainty was a fundamental component of a modern legal system. Moreover, a rational system required that each and every punishment fit each and every crime; how else could a wide range of criminal behaviour be reformed?

In their second report, the first Royal Commission developed a model for sentencing that became the standard for all subsequent reports and for the second Royal Commission. Four basic punishments were included: death, transportation, imprisonment and fines. Capital punishment was limited to a small group of serious offences, so secondary punishments were imposed for the vast majority of offences.<sup>137</sup> Endless possible variations existed by changing the length of a sentence or the amount of a fine, and by combining the three secondary punishments. To imprisonment the possibilities of hard labour or solitary confinement were added.<sup>138</sup> The use of fines was greatly expanded, despite the fact that this increased judicial discretion.<sup>139</sup> The Commissioners revelled in tinkering with different combinations of punishments;<sup>140</sup> every report seemed to offer a new scheme; and by the time they were finished, the 1848 Code had eighteen distinct classes of punishments.<sup>141</sup>

<sup>136</sup>Hansard (3rd Series), 38:1783, 4 July 1837 (Lords).

<sup>137</sup>In 1836, a Royal Commission report recommended limiting capital offences to eight specific crimes: high treason; murder; attempted murder, with actual injury to persons; burning a building or ship, with danger to life; piracy, with injury to person; burglary, aggravated by violence; robbery, aggravated by violence; and rape or violation of a female under 10. First Royal Commission, Second Report, pp. 32–3. The Report included a long list of offences currently punishable by death; see Appendix Six.

<sup>138</sup>By 1849, the Royal Commission specified the crimes for which hard labour or solitary confinement could be added. Second Royal Commission, Fourth Report, p. 212.

<sup>139</sup>The first Royal Commission expressed hope that such discretion would be limited by maximum penalties. First Royal Commission, Second Report, p. 36. Fines were included in the 1861 statutes, but not nearly as often as in the English codes.

<sup>140</sup>Endless hours were spent discussing whether theft under £5 should be punished by transportation for 7 years, imprisonment under three years, a combination of both, or some other punishment, like a fine. In the Commissioners' minds, the most difficult task was to distinguish between serious crimes, such as theft by professional thieves, and petty crimes of the same nature, such as theft by a poor boy of oranges from a stall. First Royal Commission, Second Report, p. 3.

<sup>141</sup>Second Royal Commission, Fourth Report, pp. 67–9. For example, class three was transportation for seven years to life; class seven was transportation for seven to fifteen years or imprisonment up to three years; class fourteen was imprisonment



We do not know if Macaulay saw this model before he finished drafting his Code.<sup>142</sup> However, there can be no question that Macaulay adopted virtually the same model, and he enthusiastically embraced the use of nonviolent prison discipline to reform criminal behaviour. Even the length of prison sentences for particular offences was generally the same.<sup>143</sup> Even if we accept that Macaulay did not see the first Royal Commission's report, the Indian Law Commissioners in 1847–48 certainly did; and though they did not accept every one of the Royal Commissioners' findings, the overall approach was endorsed.<sup>144</sup> Each offence was given a particular punishment from a large list of possibilities. The death penalty and transportation remained. Fines were provided for virtually every crime.<sup>145</sup> The separate system was adopted. Incarceration could be with or without hard labour. Solitary confinement was also permitted, but under the 1862 Indian Code only if the sentence included hard labour. Both the 1861 English Acts and the 1862 Indian Code specified nearly the same limits on the length of time a prisoner could be confined at one time or in one year.<sup>146</sup> And the Indian Law Commissioners expressed great confidence that difficult, monotonous labour and strict prison discipline would greatly reduce the need for long prison terms.<sup>147</sup>

under one year, a fine, or both. Each offence in the English codes carried a specific class of punishment. Over the years, the Commissioners came up with a number of different hierarchies, although no single scheme seemed significantly superior to the others.

<sup>142</sup>The second report was published in 1836, one year before Macaulay completed his code.

<sup>143</sup>In one area that was not true. Both Codes provided that imprisonment could be substituted for transportation. But while the English codes generally equated one year in prison to three to five years of transportation, the Indian Code treated them equally; so transportation for fifteen years in England would be commuted to a five or three year prison term, but remain a fifteen year term in India. Second Report on Indian Penal Code, pp. 97–8.

<sup>144</sup>Second Report on Indian Penal Code, pp. 91–113.

<sup>145</sup>The 1862 Indian Code followed Macaulay's Code by specifying that where no sum was expressed, the amount of a fine was unlimited, but 'shall not be excessive.' Indian Penal Code, 1862, s. 63. Macaulay recommended the practice because not all criminals were affected equally by the same fine. 1837 Code, Note A, p. 33.

<sup>146</sup>The 1837 and 1861 Acts stated that solitary confinement could never be more than one month at a time or more than three months in one year. The 1862 Indian Code also limited solitary to three months in one year, but lowered the duration at any one time to fourteen days. Indian Penal Code, 1862, s. 73.

<sup>147</sup>'Prepare such a code of prison discipline as, without shocking the humane feelings of the community, may yet be a terror to the most hardened wrong-doers.' Indian Penal Code, 1837, Note A, p. 26. The Indian Law Commission recommended that prison sentences be shortened once Macaulay's terrifying prison discipline was operational. Second Report on Indian Penal Code, p. 98. A comprehensive study of

Punishments in the Indian Code differed in a few minor instances from those in the English Codes; in fact, these slight differences suggest that the Indian and English codes were virtually the same. The least important difference was that banishment from ‘the territories of the East India Company’ was included only in the Indian Code; however, it was restricted to crimes of treason, and obviously such a punishment made no sense in an English code.<sup>148</sup> The second difference involved the use of transportation. Transportation figured prominently in the 1837 Acts, with the length of terms varying from seven years to life, but the 1861 Acts did not include it as a punishment. The Indian Codes provided for transportation, with terms from seven years to life, but it was generally restricted to punishing very serious crimes, particularly dacoity related.<sup>149</sup> The difference existed because England stopped transporting criminals after 1850. This state of affairs meant that presumably a British citizen could be transported for a crime in India, but not for one committed in England. The issue of transporting Indians to another British colony raised further complications. Macaulay believed it was an extremely effective punishment because Indians feared transportation far more than Europeans because of the mystery that surrounded the fate of the transported convict beyond the Black Water: ‘other punishments were more painful to endure, but none so dreaded.’<sup>150</sup> Noting that many Indians had freely shipped themselves to Mauritius and the West Indies and then returned to India, the Indian Law Commissioners expressed some doubt that Indians truly feared transportation more than death or hard labour.<sup>151</sup> It would be interesting to know how often transportation was actually used in India under the Indian Code. Macaulay recommended commuting long prison terms to banishment from the territories of the East India Company for

Indian prison discipline during the British period remains to be done. Jegatheesan claimed that Europeans were given the least arduous tasks, such as coir mat-making and shoe and boot making, while Indians were forced to work in textiles and construction. However, jail officials were careful not to offend caste feelings. Brahmins were generally cooks, and never forced to clean streets or make shoes. Jegatheesan, pp. 165–7.

<sup>148</sup>Second Report on Indian Penal Code, p. 99.

<sup>149</sup>Second Report on Indian Penal Code, p. 97. For a discussion on British attempts to control dacoity crime, see Sandria B. Freitag, ‘Crime in the Social Order of Colonial North India,’ *Modern Asian Studies* 25, 2 (1991): 227–61 and Radhika Singha, ‘“Providential” Circumstances: The Thuggee Campaign of the 1830’s and Legal Innovation,’ *Modern Asian Studies* 27, 1 (1993): 83–146.

<sup>150</sup>Indian Penal Code, 1837, Note A, pp. 24–5.

<sup>151</sup>Second Report on Indian Penal Code, p. 97.

British citizens who committed serious offences. He felt that a large British prison population would weaken the prestige of English rulers.<sup>152</sup> The 1837 Code provided for the banishment of those ‘not both of Asiatic birth and of Asiatic blood’. Hay and Cameron rejected this provision, feeling it unfairly discriminated against Indians; and the 1862 Indian Code permitted the government to substitute a different sentence for an existing one if it deemed necessary, so the result was the same. On the other hand, the 1862 Indian Code provided that if Europeans or Americans were sentenced to transportation under seven years, then the Court should substitute imprisonment.<sup>153</sup>

The final significant difference between punishments in English and Indian Codes related to the use of whipping or flogging. Macaulay did not include whipping in his Code. His reasons for excluding it illustrates the Victorian attitude towards crime and punishment that informed so much of the Indian Code. To offenders who cared about their reputations, whipping was too cruel; to hardened criminals the punishment was ineffective. More importantly, as the efficacy was based on the shame of the criminal, the punishment was too arbitrary to be applied with precision. Macaulay was unsure whether juvenile offenders should be whipped, but decided in favour of it since whipping did not stigmatize them like adults and they were more used to it from school and home. Significantly, Macaulay added that while whipping juveniles was desirable in England because prisons were such corrupting places, the reforms in Indian prisons contemplated by the Code alleviated that problem, so perhaps juveniles could be safely imprisoned without destroying their moral fibre. The Indian Law Commissioners expressed an inclination to reject whipping altogether, except to be used, as done in England, as a ‘signal mark of ignominy.’<sup>154</sup> The Indian Code as enacted in 1862 did not include whipping as a punishment, but by an amendment in

<sup>152</sup>‘It would be cruel to subject an European for a long period to a severe prison discipline, in a country in which existence is almost constant misery to an European who has not many indulgences at his command. If not cruel, it would be impolitic. It is unnecessary to point out . . . how desirable it is that our national character should stand high in the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition by the Courts of Justice, and engaged in the ignominious labour of a gaol.’ Indian Penal Code, 1837, Note A, pp. 27–9.

<sup>153</sup>Indian Penal Code, 1862, s. 56.

<sup>154</sup>Indian Penal Code, 1837, Note A, pp. 42–5; Second Report on Indian Penal Code, p. 94.

1864, whipping returned as a punishment in itself or in addition to some other penalty.

Whipping was included in the Peel Acts; but, at the same time, reformers began to doubt its effectiveness for the same reasons that Macaulay did not include it in his Code. The first Royal Commission recommended keeping it as a useful cumulative punishment, but the 1848 Code banned it.<sup>155</sup> In 1861 Parliament restricted whipping to boys under sixteen years of age, as it was still seen as a better alternative to exposing a juvenile to the corrupting influences of prison.<sup>156</sup> Significantly, England limited whipping to juveniles, but then felt driven to amend the Indian Penal Code to include the whipping of adult males. Jegatheesan claimed that the English had to bring whipping back because the jails became flooded by men who were formerly whipped and not incarcerated. According to his statistics, adults were commonly whipped for petty crimes like theft and criminal trespass, and that in such cases whipping was the only punishment.<sup>157</sup> Racism probably accounts for continued whipping in India. Whipping is both demeaning to the victim and cost effective for the enforcer, and therefore it suited imperial purposes.

The similarities in form and content between the English codes and the Indian Penal Code are so self-evident that it is difficult to understand why historians persist in emphasizing the differences. In virtually every respect, the substantive and procedural elements in the Indian Code were first developed in England to address English needs. In short, the Indian Penal Code was really a code for England that reflected changes in English criminal law reform, and not the needs of the Indian people; therefore, in order to understand how the introduction of the Indian Code affected Indians, one must begin with English law.

### Conclusion

Why did the Indian Penal Code take a quarter of a century to become law? Macaulay's Code underwent only slight revisions by subsequent

<sup>155</sup>A few years earlier, the use of the pillory was banned. Hansard (1st Series) 32:803–5; Holdsworth, p. 268. In 1817, public whipping of females was abolished. 57 Geo. III, c. 75.

<sup>156</sup>Hansard (3rd Series) 161:443, 446, February 4, 1861 (Commons).

<sup>157</sup>Jegatheesan, pp. 157–9. The number of whippings and convictions per year rose massively during the famine years of 1877–78.

Indian Law Commissioners, so it clearly was not a flawed document. The 1857 Rebellion is generally seen as the principal catalyst for the passage of the Indian Penal Code and the codification period in general.<sup>158</sup> Simple chronology favours this view, as the British passed a series of law codes within a decade of the Rebellion's end. Some see the codification period as part of an overall British strategy to pacify the Indian people. By remedying the most glaring defects in the legal system, presumably the Indians would be less likely to revolt. While the Rebellion certainly contributed to the codification process in that it led directly to the declaration of the Raj, the Rebellion does not fully explain why the Indian Penal Code was passed in 1862. The purpose of the Indian Code was to give India a modern legal system, not to pacify the population. And even if the Indian Code did away with the worst defects in India's legal system, there is little evidence that these defects contributed to the outbreak of the Rebellion in the first place.

In my view, the missing element is the English criminal law reform movement in the nineteenth century. We have seen how Indian law reform mirrored developments in England: court reforms in the 1820s and 1830s in India occurred while the Peel Acts were passed; Macaulay wrote a criminal code for India while a Royal Commission wrote one for England; Macaulay submitted his Code to Parliament the same year Parliament passed the 1837 Acts; the Indian Law Commission reviewed Macaulay's Code in 1847–48 just as the second Royal Commission finished its draft criminal code; and a few months before the Indian Penal Code became law, the British Parliament passed the 1861 Acts. In substantive and procedural terms, the Indian Penal Code reflected developments in English law. So to answer the question of why there was such a long delay in enacting the Indian Penal Code, one need only examine developments in England. Moreover, the delay in passing the Indian Penal Code is not really that long if one considers those developments. I have argued that Macaulay began to write a code for India because England's legal institutions had begun to reform English criminal law, and not because of the state of Indian law. Only when the Bloody Code began to disappear was English jurisprudence sophisticated enough to stimulate a penal code like Macaulay's. Only by the 1850s was England in a position to enact its own criminal code, so the delay to this point in the passage of Macaulay's Code should come as no surprise.

<sup>158</sup>Jegatheesan, pp. 126–7; Clive, 463–70; Verma, p. 169.

Therefore, we are left with only a decade during which it is reasonable to assume Britain could have passed the Indian Penal Code, and perhaps only during this period is it fair to say that the Rebellion ended British indifference.<sup>159</sup>

I began this paper by asking why historians accept that English law was superior to India's; or stated another way, why Britain was assumed to have a modern system and India's indigenous legal systems to be primitive in comparison. Historians are keen to study the ramifications of the introduction of British law to India; and a consensus of opinion seems to exist that the imposition of British law eventually destroyed India's indigenous legal systems.<sup>160</sup> That consensus, however, ignores two more fundamental questions: did England have a modern legal system, and exactly what does English law mean? We have seen that England's criminal law was certainly not modern in any real sense prior to the last third of the nineteenth century; and the English reform movement completely determined the procedure and substance of the Indian Penal Code; therefore, when the British introduced their criminal justice system to India in 1862, India received a set of legal principles within a particular form that reflected the needs of English society after the 1830s. How can we determine the effect the introduction of English criminal law had on India unless we understand the state of English criminal law at the time of its introduction and the history behind it. Certainly, the fact that so much of the English criminal law reforms were designed to address the shortcomings of the Bloody Code impacts on the issue.

Why do historians of India seem to disregard the history of English law? Perhaps the fact they are not lawyers or specialists in the field has led them to accept English law at face value; that is, they interpret the law theoretically, rather than trying to understand how it really worked. English law is infused with words and institutions that have existed for hundreds of years and that might lead one to assume that English law has not changed. As shown in this study, such assumptions are completely wrong; England's criminal justice system in 1750 had little in common with its counterpart in 1850 and virtually nothing in common with what exists today.

What remains to be done is to reach an understanding of how India's indigenous legal systems worked; once that is accomplished, we can objectively compare English and Indian law at a certain

<sup>159</sup>Clive, p. 463.

<sup>160</sup>See Galanter, Lipstein, Cohn, and Rudolph.

period. I strongly suspect that before Britain imposed its own criminal law, India's people were ruled by a criminal justice system that was no more primitive than that of their colonial rulers.

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