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ORIGINAL ARTICLE

General Will or Public Order? The Debate on Criminal Justice Policy in Early Colonial Himalaya, 1815–1816

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Abstract

When the British East India Company (EIC) conquered the West Himalaya region in the 1810s, it faced a critical challenge commonly encountered by colonial empires: determining the extent of intervention in intracommunity criminal matters among colonized subjects. This article examines the archived correspondence of colonial officials regarding this challenge and scrutinizes the various arguments made for and against intervention. It shows that the alterity of the subject population was strategically employed by both sides of the debate, who simultaneously promoted contradictory agendas: for those advocating intervention, alterity rendered involvement in criminal matters necessary and just, whereas those averse to intervention employed the very same notion to justify the opposite stance. This dual usage is explained by exposing the contemporary ideas about criminal justice that underlay each of these positions: that criminal law should represent the general will of society, and that it must be executed by a centralized power so as to maintain public order. While these two tenets are commonly perceived as supporting one another, the analysis reveals their decoupling in colonial settings. The debates of EIC officials thus demonstrate how the colonial setting distorts ideas foundational to modern criminal law systems, casting doubt over whether they were ever truly in harmony to begin with.

Introduction

In 1816, shortly before winter had set in and precisely one year after the British East India Company (EIC) had made its first territorial conquests in the

Both authors contributed equally to this manuscript.

Himalaya, Lieutenant William Walker wrote a letter to his superior from the isolated mountain fort of Kotgarh, then the farthest point of British military presence on the imperial frontier. Lamenting "the recurrence of another murder in the district," Walker updated his commander about a recently discovered body, stripped naked and beaten to death "by blows inflicted with stones and a stick".[1] The body was found at the side of the road traversing Khumarsain, one of the numerous little chiefdoms surrounding Walker's outpost. Inquiries with the residents of a nearby village revealed that the victim was a trader from beyond British territory who had entered the EIC's domains with the hope of selling his goods at a fair near the Tibetan border. The trader halted at the village to collect a debt from a local blacksmith (*lohar*), "the money demanded being a share of stolen property" that the two had acquired by theft some years before.[2] A scuffle ensued, forcing the villagers to intervene and separate the parties. The trader's cadaver was found shortly after, by which time the blacksmith—by now a suspect—had fled beyond the imperial boundary of the Sutlej River, where "all attempts to apprehend him must be unavailing."[3]

Upon receiving the lonesome officer's letter at the regional command center of Subathu, Captain Robert Ross, Assistant Political Agent for the Protected Hill States, took to writing his own report on the state of affairs in the hills. Addressing the next echelon in the chain of command, Ross cited Walker's missive about "the foul crime of murder" with a view to raise awareness to the ubiquity of criminal acts in the region.[4] Professing embarrassment for having "to deliver and equally to entertain opinions injurious to a whole race in the illiberal generality," Ross proceeded to share his thoughts as to why these "atrocious" crimes were so persistent. The mountain folk, he explained, were "imbued with the malignant passions in a degree, which […] is so with but few other races of men" with "every man's hand [being] against his neighbour" and "murder, rapine, and every other description of violence […] of almost daily occurrence".[5]

The letters cited above exemplify the challenges faced by colonial officials during the initial encounter with Himalayan societies between the Mahakali and Sutlej Rivers, an area corresponding with present-day Uttarakhand and southern Himachal Pradesh (Shimla and Sirmur Districts). Having fought in battles that took place in this region, then the westernmost front of the Anglo-Gorkha or Anglo-Nepal War (1814–16), these officials were delegated to "settle" the areas that they had helped wrest from the Gorkhas.[6] In the course of these activities, Ross and his peers conducted regular tours between villages, listed

[1] British Library, Asian and African Studies, India Officer Records (hereafter IOR), F/4/572/13999, *Records of the Board of Commissioners for the Affairs of India, Board's Collections*, "Question as to what type of judicial administration should be used in the British possessions in the Simla Hills - cases of murders committed in Jaunsar and Keonthal etc.", Nov 1815–May 1818, Walker to Ross, 12 November 1816, f. 109. Unless otherwise specified, correspondences cited in this paper are from this file only.

[2] Ibid, f. 108.

[3] Ibid, f. 110.

[4] Ibid, Ross to Ochterlony, 30 November 1816, f. 70.

[5] Ibid, f. 71–74.

[6] On the war between British India and Nepal, see John Pemble, *Britain's Gurkha War: The Invasion of Nepal 1814–16* (London: Frontline Books, 2008). For an illuminating study of low- to mid-level EIC

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the names of their headmen, assessed potential revenues, and so forth.[7] Still struggling to find their bearings in an unfamiliar landscape, the frontier officials were bewildered by the welter of criminal acts that they encountered and the seeming lack of local mechanisms necessary to tackle them. As the mounting reports on criminal activities that they filed indicate, these officials repeatedly solicited instructions as to how to deal with these phenomena. The moralistic?theoretical? [to contrast with "operative"] opinions and operative suggestions that were expressed during these deliberations epitomize a quintessential dilemma of colonial empires regarding newly conquered populations; namely, to what extent should the empire be invested in intracommunity criminal matters. It is the deliberations regarding this question and their relation to contemporary notions of criminal justice that concern this paper.

Typical of colonial encounters, the question of intervention, its extent, and its method, was predicated on the alterity attributed to subject communities. In the files on hand, alterity manifested in recurrent allusions to the newly conquered underlings' supposedly innate inclination towards crime. This was compounded by the particular complexities of the Shimla Hills geopolitical makeup. Having come under the authority of the expansive empire of Gorkha Nepal at the close of the eighteenth century, the relatively compact area between the Yamuna and Sutlej Rivers contained numerous political entities, from "tribal" confederacies to miniscule lordships (*thakurais*) and slightly larger kingdoms (*rajyas*).[8] Under the EIC, these entities were confined to clearly defined borders with a limited degree of autonomy (indirectly ruled states), dividing political entities that were previously enmeshed to varying degrees. This tapestry was further complicated by the existence of small pockets of areas that were directly ruled by the EIC; namely, Subathu, Kotgarh, Jaunsar-Bawur,

officials during this period, see James Lees, *Bureaucratic Culture in Early Colonial India: District Officials, Armed Forces, and Personal Interest under the East India Company, 1760–1830* (London: Routledge, 2019).

[7] The earliest Settlement Report of the region is available in manuscript form at the British Library, see IOR F/4/571/13998(2), *Bengal Secret Consultations*, Appendix to Collection no. 10, 1819/20: "Statistical and Geographical Memoir of the Hill Countries situated between the Rivers Tamas (or Tonse) and Sutlej, compiled by Lieut. Robert Ross".

[8] Gorkha expansion west of the Mahakali River began in 1791, reaching the Shimla Hills in 1803, and was then pushed back by the EIC in late 1814. For useful reviews of the area's modern history, see Aniket Alam, *Becoming India: Western Himalayas under British Rule* (Delhi: Cambridge University Press, India Pvt Ltd, 2007), Chaman Lal Datta, *The Raj and the Simla Hill States* (Jalandhar: ABS Publications, 1997), Arik Moran, *Kingship and Polity on the Himalayan Borderland: Rajput Identity during the Early Colonial Encounter* (Amsterdam: Amsterdam University Press, 2019), and Chetan Singh, *Himalayan Histories: Economy, Polity, Religious Traditions* (Albany: State University of New York Press, 2018). On the contribution of colonial policies to the creation of "Tribal" and "Hindu" identities in the hills, see Arik Moran, "God, King and Subject: On the development of composite political cultures in the Western Himalaya, circa 1800–1900," *Journal of Asian Studies* 78(3) (2019): 577–600; on the political potency of these categories today, see Nilamber Chhetri, "Elusive identities, enduring demands: the Haatis' struggle for recognition in the trans-Giri region, Himachal Pradesh," *European Bulletin of Himalayan Research* 60 (2023), DOI: https://doi.org/10.4000/ebhr.1305.

and, from 1823, Shimla.[9] The variety of legal regimes and juridical institutions in the Shimla Hills buttressed the frontier officials' casting of local society as inherently prone to criminal acts, endowing the perception of the region and its people as substantially [qualitatevly?] different.[10] Under these circumstances, the application of the criminal justice systems then current in the subcontinent to the hills was deemed inadequate, prompting frontier officials to dwell upon the desired extent of intervention in intracommunity criminal affairs.[11]

The link between alterity and imperial intervention corresponds to a substantial body of scholarship on European colonial empires. As numerous historical and anthropological accounts have shown, ascribing alterity to colonized societies was key to justifying political dominance over them.[12] Omnipresent in colonial discourse, alterity was used to rationalize a variety of policies as per the contingencies prevailing at particular times and places. In certain instances, it could justify the overriding of local customs to create a centralized legal regime, while in others it could be enlisted to avoid involvement by upholding local institutions. In this article, we examine a case in which the notion of alterity was used to promote two contradictory agendas at one and the same time. For those advocating intervention, alterity rendered involvement necessary and just, whereas for those averse to intervention, alterity underlined the need to refrain from imposing imperial justice on local communities.

We propose that the examination of this dual usage of alterity reveals an unresolved tension between contemporary, abstract principles of criminal justice that were embedded in the colonial officials' arguments regarding punishment. Resonating with jurisprudential discourse associated with the European Enlightenment, the arguments for- and against intervention in intracommunity criminal affairs corresponded with two distinct tenets of modern criminal law: that criminal law should represent the *general will* of

[9] The impetus for claiming these tracts was primarily strategic. Subathu served as headquarters, Kotgarh protected the frontier, Jaunsar-Buwar was conceived as a buffer between British India and Tibet, while the future capital of the British Raj at Shimla began as a hill station for convalescent soldiers. On indirect rule, see Michael H. Fisher, *Indirect Rule in India: A Study of the Residency System* (Bombay: Oxford University Press, 1995).

[10] For a review of the political and jurisprudential history of the Shimla Hills under colonialism, see Datta, *The Raj and the Simla Hill States*. On the legal mechanisms of "Tribal" polities, see William S. Sax, *In the Valley of the Kauravas: A Divine Kingdom in the Western Himalaya* (New York: Oxford University Press, 2024), and idem, *God of Justice: Ritual Healing and Social Justice in the Central Himalaya* (New York: Oxford University Press, 2009).

[11] The criminal justice system in British India then featured a mixture of EIC regulations and Islamic law. Indian judges presided over the lower courts, while British officials served as judges in the higher courts. This hybrid system lasted until the Indian Penal Code Act of 1860, on which see Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010) and Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998).

[12] For prominent examples, see Kolsky, *Colonial Justice in British India*; Benjamin D. Hopkins, *Ruling the Savage Periphery: Frontier Governance and the Making of the Modern State* (Cambridge, Mass.: Harvard University Press, 2020); Cathy Evans, "Heart of Ice: Indigenous Defendants and Colonial Law in the Canadian Northwest," *Law and History Review* 36 (2018): 199–234.

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society, and that it necessarily be executed by a centralized power so as to maintain *public order*.[13] Advocates of the two positions voiced different ideas about what criminal law should do; the non-interventionists argued that the law should reflect the will of the populace it purported to govern, while the interventionists claimed that it should allow a centralized government to impose public order.

In the Occidental model of modern states, the tenets of general will and public order were envisaged as supporting one another insofar as the sovereign's duty to maintain public order was perceived as an extension of the general will. However, in the colonial setting, the notions of general will and public order could no longer hold together. The alterity attributed to colonial subjects undermined the sovereign's claim to represent the general will. Similarly, the notion that upholding public order faithfully reflected popular sentiment was compromised by the discrepancy between rulers and subjects. As a result, the two tenets that underlay the understanding of criminal justice systems in the Euro-American realm were disjoined. Reflecting back on the metropole, the decoupling of these tenets in the colonies highlights tensions that are inherent to the making of criminal justice systems in modern states. The rift between the foundational tropes of general will and public order that we explore in the colonial setting thus raises questions as to whether these two ideals were ever truly in harmony to begin with.

Our analysis of the debates concerning criminal justice policies in the early colonial Himalaya proceeds in four parts. The first part reviews previous studies on the engagement of European colonial empires with the punishment of subject communities, its relation to their perceived alterity, and the intertwining of the principles of general will and public order in Euro-American legal systems. The next two sections explore the arguments of EIC officials in the early colonial Himalaya for- and against intervention, respectively, and the ways in which the fundamental tenets of general will and public order were embedded within them. We conclude with a discussion of the implications that our findings hold for the theorization of criminal justice systems under both colonial empires and contemporary nation-states.

Criminal Law in Empire: The Role of Alterity

In her discussion of legal systems in colonial empires, Lauren Benton highlights an essential feature of colonial legal systems: that the boundaries between local customary law and the law of empire were always contested and subject to negotiation. Benton identifies the initial encounter between conquering powers and future subjects as a formative moment involving "strategic decisions about the extent and nature of legal control".[14] Imperial strategies ranged between a

[13] Anthony J. Draper, "Cesare Beccaria's influence on English discussions of punishment, 1764–1789," *History of European Ideas* 26.3–4 (2000): 177–199.

[14] Lauren A. Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002), 2.

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complete imposition of the legal apparatus of empire on conquered societies, to the retention of most, if not all, local legal institutions. The boundary between the law of empire and local customary laws thus emerges as a fundamental feature of imperial rule.

The continual efforts to delineate the boundaries between imperial law and customary law are readily apparent in the case of criminal justice.[15] To be sure, matters pertaining to imperial interests—chiefly, revenue and security, both of which impacted political stability—were entrusted to imperial authorities. However, approaches to intracommunity crime varied. In certain cases, intracommunity criminal matters were handled by local institutions and customary laws; in other instances, criminal justice was wrested from local institutions and exclusively handled by empire. In practice, the intervention of empires in intracommunity criminal affairs was subjected to different arrangements and modifications that drew from both approaches, resulting in various configurations of plural legal orders.[16]

In a broad sense, the expansion of Euro-American empires was characterized by a transition from a minimalist or non-interventionist approach toward increasingly interventionist models, concomitant with the rise of modern imperial formations over the eighteenth and nineteenth centuries. If the earlier phase of Euro-American dominance had focused exclusively on resource extraction, the colonial states that developed therefrom propagated a more expansive understanding of sovereignty and subject-formation, urging greater intervention in intracommunity criminal matters.[17] In British India, for example, the mercantile agenda that had guided the British EIC since its foundation (in 1600) metamorphosed into a sustained engagement with local societies as the "Company State" came to the fore (c. 1750–1850s). By the time the British Crown integrated the subcontinent into its dominions (in 1858), the imposition of "civilized behavior" among the Indian populace had become a key

[15] Keally McBride, *Mr. Mothercountry: The Man who Made the Rule of Law* (Oxford University Press, 2016).

[16] For a useful introduction, see John Griffiths, "What Is Legal Pluralism?" *The Journal of Legal Pluralism and Unofficial Law* 18 (1986): 1–55. On legal pluralism in imperial settings, see Lauren Benton and Richard J. Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York: NYU Press, 2013). For representative studies, see Benton, *Law and Colonial Cultures*; Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Cambridge, MA: Harvard University Press, 2016); Barry Godfrey, Clive Emsley, and Graeme Dunstall (eds), *Comparative Histories of Crime* (Devon: Willan Publishing, 2013); and, most recently, the special issue on legal pluralisms in *Law and History Review* 41.2, May 2024.

[17] For examples of these processes in and outside of British India, see Godfrey et al. *Comparative Histories of Crime*; Sandra den Otter, "Law, Authority and Colonial Rule," in *India and the British Empire*, ed. Douglas M. Peers and Nandini Gooptu (Oxford: Oxford University Press, 2012), 168–90; Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford, CA: Stanford University Press, 2012), which discusses Egypt under British rule; Paul G. McHugh, "A Pretty Gov[ernment]!": The "Confederation of United Tribes" and Britain's Quest for Imperial Order in the New Zealand Islands during the 1830s," in Benton and Ross, *Legal Pluralism and Empires*, 233–58; Singha, *A Despotism of Law*; For a useful theorization of "Colonial Governmentality", see David Scott, *Refashioning Futures: Criticism after Postcoloniality* (Princeton, NJ: Princeton University Press, 1999), 23–52.

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feature of imperial rule.[18] This shift was reflected in a progressive escalation of the British Indian regime's intervention in criminal matters, which gradually blurred the boundaries between imperial- and customary law systems.

Certainly, the British Empire's growing preoccupation with criminal justice was neither absolute nor linear. In some cases, the Empire kept local criminal institutions intact while maintaining an external influence over their affairs. In the indirectly ruled Nizamat of Hyderabad, for example, British authorities encouraged local rulers to mete out harsh punishment for *dacoit* activity,[19] despite having no formal jurisdiction within their territories.[20] In other cases, the empire introduced changes to customary law that transformed local legal traditions to better align with the imperial agenda. In Nigeria, for instance, British authorities adopted Islamic law as the official criminal codex of state in an ostensible nod to public sentiment. However, this process also saw a transformation in the content of the Shari'a to ensure that it be amenable to the interests of Empire.[21] Relatedly, in the domain of gender-based practices, imperial intervention in customary law could be exceptionally limited, effectively forsaking colonial women subjects altogether.[22]

Regardless of the particular policy adopted toward intervention, its justification would invariably rest on a discourse that emphasized the *alterity* of colonial subjects. Officials construed the differences between colonizers and colonized across various spheres to embolden and substantiate their position of dominance vis-à-vis conquered societies. These differences were reified through legal codifications that imposed divergent rules and procedures for each community.[23] Over time, British authorities nuanced this perception, developing a scale of alterity, in which different colonized populations were entitled to varying degrees of legal, political, and social freedoms.

In British India, discourses about alterity served a range of criminal law policies according to the contingencies of different historical junctures. Alterity thus justified both the minimal intervention in intracommunity criminal affairs that characterized early phases of colonial expansion *and* the increased

[18] Michael Mann, "State Formation in India: From the Company-State to the Late Colonial State," *The Routledge Handbook of the History of Colonialism in South Asia*, ed. Harald Fischer-Tiné and Maria Framke (Abingdon: Routledge, 2021), 36–47; McBride, *Mr. Mothercountry*. On the colonial construction of local legal regimes as despotic, see Nasser Hussain. *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2019).

[19] Equivalent terms for *dacoit* include armed robber, bandit, or highwayman.

[20] Eric Lewis Beverley, "Frontier as Resource: Law, Crime, and Sovereignty on the Margins of Empire," *Comparative Studies in Society and History* 55 (2013): 241–72.

[21] Rabiat Akande, "Secularizing Islam: The Colonial Encounter and the Making of a British Islamic Criminal Law in Northern Nigeria, 1903–58," *Law and History Review* 38 (2020): 459–93. See also Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (Chicago, IL: University of Chicago Press, 2016).

[22] Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–1857," *Journal of Asian Studies* 69 (2010): 1093–1117. On the intersecting agendas of Britons and Bengali elites during the campaign against *sati* ("widow immolation"), see Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley, CA: University of California Press, 1998).

[23] On the legal artifices required to sustain a separate justice system for colonizer-offenders in India, see Kolsky, *Colonial Justice in British India*; den Otter, "Law, Authority and Colonial Rule".

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intervention policies that are associated with later stages of imperial rule.[24] The casting of particular regions as frontiers also impacted the way alterity was used. For example, framing frontier communities as "tribal" often served as a pretext for reducing intervention, a policy that Benjamin Hopkins associates with "frontier governmentality" practices.[25] Similarly, in other parts of the British Empire, such as Canada, certain groups of indigenous subjects were deemed "primitive" and therefore "unfit" for the Enlightenment model of criminal justice—that is, not rational actors who could be held morally responsible for their deeds.[26] What these studies ultimately suggest is that the shifting uses of alterity corresponded with particular variables of time and place.

While alterity features prominently in the exchanges between EIC officials that are examined in this article as well, the details of their correspondence reveal that it could be used to promote contradictory agendas in a single historical instance. Thus, instead of supporting a single stance towards intervention in intracommunity criminal affairs, officials in the early colonial Himalaya enlisted alterity to simultaneously call for intervention and non-intervention. For proponents of intervention, alterity rendered involvement in criminal matters both practical and morally justified, whereas those opposing it, used the difference attributed to local societies to argue that intervention was not only impractical but also immoral. The simultaneity of these divergent deployments of alterity, manifesting as they do within a single historical instance, reveals that such variations are not solely contingent on temporal or spatial variables. Rather, the application of alterity to the different stands taken in this debate seems to have stemmed from an altogether different domain.

As we propose below, the ambiguous usage of alterity rested on two distinct tenets of criminal jurisprudence: that punishment should reflect the *general will* of the community; and that it should be executed by a centralized power to maintain *public order*. In other words, the grounds for abstaining from, or intervening in, local criminal affairs echoed contemporary principles of *representation* and *governance*, respectively. These ideas, which can be traced

[24] The institutional reforms of Warren Hastings in the late eighteenth century and the progressive increase in intervention that followed throughout the nineteenth century consistently used alterity as an organizing principle of interventionist policies. For an overview of the colonial state and Hastings' contribution, see Mann, "State Formation in India"; on later proponents of this approach, from Thomas Babington Macaulay to John Stuart Mill, see Elizabeth Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law and History Review* 23 (2005): 631–83; and McBride, *Mr. Mothercountry*.

[25] Benjamin D. Hopkins, "The Frontier Crimes Regulation and Frontier Governmentality," *The Journal of Asian Studies* 74 (2015): 369–89; and the more comprehensive study of "frontier governmentality" in idem, *Ruling the Savage Periphery*. For an instructive example from the northeast of India, consult Sanghamitra Misra, "The Customs of Conquest: Legal Primitivism and British Paramountcy in Northeast India," *Studies in History* 37 (2021): 168–190.

[26] Cathy Evans, "Heart of Ice". On the history of rational choice in criminal law, see Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford: Oxford University Press, 2016).

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back to the Enlightenment, remain foundational to our understanding of criminal law to this day.[27]

The notion that criminal law should represent, and consequently affirm, the shared values of the community is commonly associated with the revolutionary ideals of the second half of the eighteenth century. According to this understanding, the normative source for matters of punishment lies in the people, their values, and their morals. This tenet sprang from understandings of popular sovereignty that were highlighted in the American Revolution, when the Enlightenment aspiration toward self-governance was realized through practical measures and institutions.[28] Complementing this idea was the notion that the authority to execute punishment was best placed in the hands of a single executive power. The emphasis here was on the need to regulate public life, establish a state monopoly on violence, and create what Lindsay Farmer has referred to as the "civil order" or "the King's peace."[29] As Joshua Stein illustrates, this understanding of what should constitute criminal law can be traced back to William Blackstone, whose attempts to codify common law in eighteenth-century England emphasized the vertical, centralized component of *criminal* law as a key parameter for distinguishing between public and private wrongs.[30] While this "myth of modern law" is extensively criticized in the literature on legal pluralism,[31] for contemporaries of the early nineteenth century it served as an organizing principle for the design of modern punishment.

These two guiding principles—that punishment should reflect the general will of the community, and that the administration of punishment should be entrusted to a centralized authority—converged in contemporary legal thought. In the case of Britain and its colonies, these ideas and their associated schemes of stadial development traveled to colonies and settlements across the

[27] On the genealogy of current criminal law principles, see Markus D. Dubber, ed. *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014); Lacey, *In Search of Criminal Responsibility*; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016).

[28] Christopher L. Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to *Lochner*," in *Police and the Liberal State*, ed. Markus D. Dubber and Mariana Valverde (Stanford, CA: Stanford University Press, 2008), 33–53; Peter Fitzpatrick, *The Mythology of Modern Law* (London and New York: Routledge, 1992)

[29] Marc O. DeGirolami, "James Fitzjames Stephen: The Punishment Jurist," in Dubber, *Foundational Texts in Modern Criminal Law*: 183–98; Dubber and Valverde, *Police and the Liberal State*; Farmer, *Making the Modern Criminal Law*. See also David Thacher, "Olmsted's Police," *Law and History Review* 33 (2015): 577–620.

[30] Thus, "the kingly state should have a monopoly over violence, a level of control unattainable in a society that treated assaults as private matters. The king and his proxies had to intervene … to make a symbolic statement asserting their control over violence." See Joshua Stein, "Privatizing Violence: A Transformation in the Jurisprudence of Assault," *Law and History Review* 30 (2012): 423–48 (quotation from p. 429).

[31] Fitzpatrick, *The Mythology of Modern Law*. See also Caroline Humfress, "Legal Pluralism's Other: Mythologizing Modern Law," *Law and History Review* (2023): 1–14.

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globe, where they assumed various forms and guises.[32] In the aftermath of the Age of Revolutions, these tenets conjoined to propagate the idea that criminal state apparatuses should be centralistic precisely in order for them to embody the democratic principle of representation through effective governance.[33] The attested gap between these ideals and their implementation across Euro-American spheres notwithstanding, our findings indicate that, in colonial settings, these two tenets drifted apart, which is why, as we find in our analysis, they could be used to promote entirely divergent visions of empire.

Alterity Justifies Intervention

For some of the officials involved in the debate regarding criminal justice policies, the dismal situation of crime in the Shimla Hills called for increasing British intervention. They justified this approach on both moral and practical grounds. The moral argument was that it was the duty of the sovereign to uphold justice for the good of its subjects, whereas the practical argument concerned the superiority of EIC methods of enforcing criminal justice over local means. In short, the officials depicted mountain society as both morally corrupt *and* incapable of administering justice on its own, rendering colonial intervention both moral and effective. In both cases, these arguments were underlined by attributing *extreme* alterity to mountain society relative to other groups in the subcontinent. The interventionist approach thus rested on the framing of criminal law as a tool of governance that is vested in the hands of a single sovereign, whose task is to uphold a civil order by controlling the conduct of public life.

Alterity engenders a moral justification for intervention

The officials stationed on the frontier linked the prevalence of crime to a seemingly innate moral inferiority among the hill people, whom they characterized as fickle and disloyal. A good example of this may be found in the communications of Captain Geoffrey Birch, Resident at the court of the princely state of Sirmur, who shared the burden of settlement activities with the Assistant Political Agent for the Protected Hill States stationed in Subathu, Captain Robert Ross. Seeking to mitigate this essentialist etiology by adopting an apologetic tone, Birch nonetheless expressed this sentiment in a missive to the Resident in Delhi, Charles Metcalfe: "I am sorry to observe the character of the inhabitants of the hills is represented to me as being treacherous and sanguinary and the most severe examples have failed to check their atrocities

[32] On the intellectual genealogy of these ideas, their centrality to British Indian officialdom, and their relation to the Scottish Enlightenment, see Martha McLaren, *British India & British Scotland: Career Building, Empire Building and a Scottish School of Thought on Indian Governance* (Akron, Ohio: University of Akron Press, 2001). For an astute assessment of how these ideas were implementated, see Jack Harrington, *Sir John Malcolm and the Creation of British India* (New York, NY: Palgrave Macmillan, 2010).

[33] Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993).

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when the least temptation of plunder or revenge is presented."[34] The flawed morals of the subjects, he explained, were reflected in the equally immoral criminal mechanisms that the inhabitants of the hills had developed. "Native justice," Birch detailed, was "to take blood for blood, to deprive a thief of his eyes, to punish other crimes at their discretion by cutting off the nose, hands or fingers, or by confinement or the lash." These severe measures extended to the domestic sphere, where "the authority of husbands over their wives was almost unlimited, and for infidelity they were at liberty to put them to death as well as the seducer and all his accomplices."[35] Customary criminal justice was thus irrational, despotic, driven by emotions and in direct contradiction to the then-prevalent rationalist Benthamite vision of proportional punishment.

In the same vein, the Secretary to the Governor-General in Calcutta echoed the Benthamite principle of proportional justice by urging the officers on the frontier to instruct "the [local] Chiefs about punishment" when confronted with "defects" in customary law, that is, whenever "a mischievous disproportion [was found] between the nature of the punishment and the degree of atrocity belonging to the offence."[36] Conveniently, the unbridled power attributed to local leaders rendered intervention both morally mandated and simple to effect, since "in most cases, the will of the Chief or of some sort of public assembly constitutes the criminal law of the place."[37] The task of intervention would thus be "comparatively easy, being no more than to urge … the due infliction of punishment justly awarded for crime."[38]

The radical difference attributed to the natives (savage), their morals (abhorrent), and their execution of justice (flawed) played a central part in justifying the officers' call for intervention. Writing from the regional headquarters in Subathu, Captain Robert Ross opined that the immorality of native criminal justice customs resulted in "much practical evil" that rendered the periodic "interference of British authorities in the judicial functions of the hill chiefs […] essential to the cause of Justice."[39] Intervening in criminal cases would thus "curb the vicious propensities of their subjects" so as to "prevent or to secure the punishment of those atrocious offences to which they are so prone."[40] In this manner, intervention would uphold the colonial power's obligation to maintain justice among the colonized "savages."

The multiplicity of communities bearing "jealous and rancourous animosity"[41] toward each other was harnessed to support the notion of mountain society as inherently different, providing further justification for intervention. Since local customary law varied between specific communities, it could not

[34] Birch to Metcalfe, 4 November 1815, f. 15. Birch is here referring to the population in Jaunsar-Bawar, an ostensibly egalitarian "tribal" region that had been wrested from Sirmaur and placed under the direct administration of the EIC.

[35] Birch to Ochterlony, 14 November 1816, f. 92.

[36] Adam to Ochterlony, 28 December 1816, fs. 119–120.

[37] Ibid., fs. 119–120.

[38] Ibid., f. 119.

[39] Ibid., Ross to Ochterlony, 30 November 1816, f. 80.

[40] Ibid., Adam to Ochterlony, 28 December 1816, f. 121.

[41] Ibid., Ross to Ochterlony, 30 November 1816, f. 75.

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guarantee impartial justice in cases involving individuals from different communities. To explain the problems this entailed, Ross relayed the details of a case in which a Gorkha foreigner had been murdered in one state (Keonthal) by the resident of another (Kothour), while the murderer's suspected accomplice resided in a third (Patiala). With the case potentially being of interest to three different jurisdictions, all of which were supposedly subject to EIC authority, Ross raised a series of rhetorical questions relating to the consequences of criminal justice being left in the hands of local rulers:

> Can Putteala [Patiala] or Kothour [Kotur] take cognizance of an act committed within the jurisdiction of the Kyoonthul [Keonthal] Rana [ruler], or can the latter adjudge subjects of those states? Besides, what individual in the whole hills, feels sufficiently for this unfortunate friendless foreigner [the victim], or for the cause of Justice to take trouble or incur odium for the sake of either? … How are they to be tried? By courts constituted for the purpose of natives of Kothaur and Puttiala [sic], Kyoonthul, respectively? The brothers and friends of the delinquents [are] indifferent to the deceased as a stranger if not prejudiced against him as a Gurkha. If so, what measures are competent to me to clear these Tribunals of corruption or partiality?[42]

Ross pleaded to be allowed to intervene. Were the fate of the perpetrator to be left to the local rulers' discretion, he asked:

> … must a British officer, after proceeding thus far, stand by and suffer a person much less likely to be impartial and with reference to the average rate of intellect among the hills chiefs, it will be no great presumption to add, less qualified to judge than himself to release a murderer or order an innocent person to execution?[43]

In essence, Ross was unwittingly echoing an idea that numerous scholars have pointed to as central to modern criminal justice: the consolidation of a uniform set of values on all parts of the body-politic residing in a territory.[44] The highly fragmented nature of indigenous rule, then, could be remedied by the imperial power's recourse to an interventionist model in regard to criminal justice.

Alterity engenders a practical justification for intervention

Apart from the moral concerns raised by the alterity of the hill people, EIC officers frequently cited the ineptitude of indigenous criminal justice systems to justify colonial intervention. Among the numerous cases mentioned in Ross's

[42] Ibid., fs. 78–79.

[43] Ibid., f. 79.

[44] Dubber and Valverde, *Police and the Liberal State*; Farmer, *Making the Modern Criminal Law*; George P. Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000).

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report on the prevalence of homicide in the hills,[45] was an investigation into the aforementioned murder of a Gorkha soldier that illustrated this point to a fault. The investigation of this crime had been entrusted to the local "manager" of a sub-district (*pargana*), who acted on behalf of the local queen (*rani*) in whose territories the crime seemed to have been committed.[46] The manager's deposition, which was appended to Ross's letter, described the details of his mission.

In his deposition, the manager narrated how he had located a suspect on the basis of the testimony of "an old woman in Bijarty Village."[47] The woman had seen three men (the victim and two locals) traveling toward the spot where the body had been found. She identified one of the locals as Juthoo, a Brahminfrom a neighboring village. The manager proceeded to Juthoo's residence, where he found evidence of the crime: a shoe that paired with the single shoe that had been found on the body of the deceased. The manager then "immediately seized the accused, and desired him to make [a] confession." Juthoo, however, denied the accusation and placed the blame on the other person that the old woman had seen, a ceratin Kookmee. According to Juthoo, Kookmee had a double motive for committing the crime: he had borrowed large sums from the deceased that he was unable to repay, and he also wanted revenge for the latter's having had sexual relations with his sister. Juthoo claimed that Kookmee had confided in him about his plan to kill the deceased. However, since Kookmee could not be located, the manager had ordered Juthoo to be detained instead.

Perhaps it was the confinement of Juthoo without any convincing evidence against him; or perhaps it was the method of identification—locals pointing their finger at other locals; or maybe it was the inability to find Kookmee, the prime suspect. But, for Ross, the manner in which the case was conducted reflected the pressing need for the interference "of British authorities in the judicial functions of the hill chiefs" with a mandate "to apprehend, examine, and finally commit for trial subjects of the protected states." Wresting authority from the local chiefs would be the only way, according to Ross, to further the "good order and tranquility of these Hills."[48] Further emphasizing the incapacity of local chiefs to manage the situation properly, Ross reported that the manager who had had Juthoo detained requested that the detainee be delivered to the colonial authorities, "stating himself apprehensive lest he [Juthoo] should be rescued or escape from his own custody." To Ross, "nothing

[45] Ross to Ochterlony, 30 November 1816, fs. 69–89, quotation from f. 70.

[46] The manager Kisroo was appointed by the Keonthal *rani*. The victim was a Gorkha, not in British service, who had remained in the hills after the Anglo-Gorkha War. His alleged killer, Kookmee, was a member of the ethnic majority of the region (Khas); and the informant who gave the tip-off, the Brahmin Juthoo, witnessed the murder. Note how, by accepting the Brahmin's word over that of the alleged perpetrator, EIC personnel had implicitly reified social hierarchies familiar from the plains.

[47] "Deposition of Kisroo [the] manager [of the kingdom of Keuonthal] (on the part of the Kyoonthal Rannee) of Kulhang Purgunna in Kyoonthull in the affair of the Goorkha found murdered there," fs. 85–89.

[48] Ross to Ochterlony, 30 November 1816, f. 71.

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… could more strongly indicate unfitness to exercise judicial functions," especially given that the chief in this case was "superior in intelligence to most."[49]

Another impediment to the effective enforcement of criminal justice that was construed as part of the alterity of hill people was the "extreme subdivisions of the territory" (subdivisions that also presented the aforementioned moral challenges). According to Ross, the "multiple authorities within a very limited extent of country" rendered "the detection and punishment of the perpetrators [of crimes] in most cases impracticable."[50] On a different occasion, Ross echoed this sentiment by arguing that non-intervention in "each of the thirty petty states" would not only "defeat the attainment of substantial justice," but also create "much confusion and embarrassment."[51] The failings ensuing from the "extreme subdivision" of indigenous law systems were contrasted with the supposedly pacific administration of justice under the imperial power that had preceded EIC rule. Under the Gorkhas (1803–1815), Ross stressed, crime was effectively prevented precisely because it had been wrested from the hands of the local chiefs. While the effects of the Gorkha centralization of justice had persisted "for some time after the extinction of the Naipaul [sic] Government in these Hills," they were significantly eroded under the EIC, due to a "belief gaining ground [among the locals] that the detection and punishment of criminal offences will be left to their own imbecile chiefs and may therefore be easily evaded."[52]

In contrast to the incompetence of the local chiefs, the judicious application of colonial methods of justice in the region could, in certain cases, ameliorate the situation. This was clearly the case in the more "unruly" parts of the hills, where society was organized along a "tribal" model with communities lead by local headmen (*seana*s) rather than barons (*rana*s, *thakur*s) or kings (*raja*s). Just a few months into his post, Birch was already boasting to his peers and superiors of the positive effect of his policies on a group of local chiefs in a conspicuously unruly part of the hills (Jaunsar-Bawar, today part of Uttarakhand). In his initial engagement with the leaders, the officer explained to them that "being under the British Government, they [should] impress upon the minds of the inhabitants the necessity of refraining from all kinds of violence and outrage," and that, from now on, it was he who "would hear and decide upon cases of disputes." As a result, the chiefs and their subjects became "extremely orderly and obedient"—indeed, so obedient that he did not have any "occasion to employ a *sepahee* [Indian soldier] during the last year, and the revenue has been regularly paid and not a crime of any magnitude committed."[53] In this case, then, intervention by the colonial power was presented as a possible remedy for

[49] Ibid., f. 84. In a different case, Birch voiced a similar concern regarding the competence of local authorities to prevent escapes from detention, alluding to the insistence of a certain raja (king) that an offender be hung, lest he escape and the ruler lose face, see Birch to Metcalfe, 14 February 1816, fs. 40–41.

[50] Ross to Ochterlony, 30 November 1816, f. 75.

[51] Ibid., f. 82.

[52] Ibid., fs. 75–76.

[53] Birch to Ochterlony, 14 November 1816, fs. 94–95.

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the inefficiency of the indigenous criminal justice mechanisms concomitant with societies that were construed as fundamentally other.

The arguments cited by officials to support intervention in the punishment of criminal acts thus rested on the idea that the immorality and inefficiency associated with alterity could be remedied by applying colonial standards of criminal justice. In this approach, the effective governance of colonial subjects is attained by applying principles that conform with the rulers' perception of what is fair and just. This echoes a political imagery associated with Enlightenment discourse, in which the sovereign is posited as the sole administrator of justice, to be dispensed uniformly among all subjects. Connoted with the modern state, the uniform dispensation of justice by a central authority strengthens the state's grip on its subjects, abolishes community-based jurisdictions and legal cultures, and ultimately results in the primacy of the state by creating an all-pervasive civil order.[54]

Alterity Justifies Non-intervention

Alongside the pro-intervention approach, equally prominent in the primary sources we analyzed was the opposite view: that the very alterity of the hill population called for a hands-off policy toward intra-community criminal justice. The underlying premise of this approach was that criminal justice should reflect the concerns or "general will" of the community in question. As with the pro-intervention approach, officials justified *non-intervention* on both moral and practical grounds. The moral argument was that an empire cannot and should not attempt to represent the values of subject-communities. The practical reasoning was that it was impossible to conduct efficient criminal investigations without the willing participation of local societies and institutions. Both arguments rested on the supposed alterity of the hill people, rendering the application of British justice morally inappropriate (insofar as it failed to represent local values) and the recourse to EIC law enforcement techniques impractical (insofar as the officials and their soldiers were incapable of enforcing their will on the profoundly alien communities of the hills). The non-interventionist approach is thus concomitant with the perception of criminal law that holds that it should represent the values of a particular community and be executed by its members.[55]

Alterity engenders a moral impediment to intervention

Officers supporting the non-interventionist view often argued in their correspondence that the colonial system of justice would be morally illegitimate because it could not represent local values. Implicit in this argument was a premise that the people of the hills were qualitatively

[54] See Farmer, *Making the Modern Criminal Law*, and, more broadly, James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 2020 [1998])].

[55] Antony R. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018).

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"different" from those of the plains, who were better suited to benefit from EIC justice.[56] This was clearly the view of the Secretary to the Governor-General, who repeatedly called for upholding "the general principles so universally recognized and so essential to the preservation of the frame of political and civil society, those which vest in the local government the exclusive right of punishing its own subjects."[57] This, even at the cost of forgoing "the benefit of an example of severe retributive justice," lest the EIC "incur the embarrassment of virtually assuming a power which would rest on no legitimate foundation."[58]

Even when officers did acknowledge that a certain degree of intervention was necessary, they emphasized that legal proceedings should *appear* to reflect the morals of the community. Such proceedings "ought to be conducted by the chiefs or their administrative officers according to their own forms" so that EIC officers on the ground would not "take a direct part in the investigation."[59] In the same vein, whenever an EIC officer was required to intervene, "he should rely as much as possible on the personal influence and weight he may have established in the minds of the Chiefs and seldom recur to the authority of his official character"[60]—that is, to employ persuasion rather than coercion.

Refraining from intervening in matters of justice was depicted by the officers as a positive characteristic of imperial rule. According to Birch, this was readily apparent in the way the preceding empire that governed the hills had managed crime: "During the Gorkha government, all offences of the inhabitants toward each other appear to have been left to themselves to settle, unless they effected [affected] the revenue or their own authority."[61] Curiously, this reasoning effectively inverts the depiction of imperial rule in the very same file, wherein Ross had ascribed the successes of the Gorkha regime to its comprehensive regulation of local affairs (see page 14, above). Birch, however, extolls the sovereign's indifference toward intracommunity affairs, leaving its subjects to their own devices so long as this does not detrimentally affect imperial interests.[62]

It is interesting to note that the arguments against intervention were also linked to the colonial regime's reluctance to retain control over territories so decidedly alien to the rest of the subcontinent. In communications with the Resident in Delhi, the Governor-General of India expressed "great repugnance to the extension of the British Dominions within the Hills beyond" those that were strategically necessary, owing to "the practical difficulty and inconvenience which must attend the Government of distant and insulated

[56] Hopkins, *Ruling the Savage Periphery*; Misra, "The Customs of Conquest".

[57] Adam to Ochterlony, 28 December 1816, f. 120.

[58] Extract, Political Letter from Bengal, 3 January 1817, f. 10B.

[59] Adam to Ochterlony, 28 December 1816, fs. 121–22.

[60] Ibid., f. 122.

[61] Birch to Ochterlony, 14 November1816, f. 93.

[62] That the two officers could arrive at such strikingly incompatible appraisals of the regime that they had replaced—Birch arguing that the Gorkhas had avoided intervention and Ross arguing the opposite—attests to their considerable ignorance of the region and, ultimately, strengthens the claim that their deliberations about criminal justice policies echoed ideas imported from the officials' own, Euro-centric world.

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possessions."[63] It was precisely because the empire did not aspire to take control of the territory that it invoked a model of non-intervention: "It would be difficult to render the offences in question regularly answerable to our civil Judicature, since the subjects of the protected Chiefs do not stand in that relation to the British Government"—the relation being one that granted the EIC "the right of punishing public crimes."[64] This argument resonates with the idea that extending the criminal justice system of the EIC would imply a form of sovereignty that the British Indian Government was simply not interested in having.[65] In contrast, leaving the customary law intact would reflect a political configuration of self-governance that was more appealing, from the perspective of British rule.

Alterity engenders a practical impediment to intervention

To assist in the debate about criminal justice policies, the authorities in Calcutta solicited the opinion of William Traill, the official responsible for the neighboring mountain region of Kumaon. Traill presided over a territory with similar social and geographic characteristics to those found in the Shimla Hills.[66] Writing to the Secretary to the Governor-General, Traill observed that his experience would suggest that "the introduction of the criminal [EIC] code of regulations into these [Shimla] hills would certainly be premature," given "the nature of the country and manners of the inhabitants."[67] A particularly colorful expression of this sentiment—that EIC criminal justice mechanisms could not operate effectively in the Shimla Hills—can be found in a private letter from Lieutenant William Walker to his superior Robert Ross. Alongside his official report about the murder that had taken place near his outpost with which we opened this paper, Walker added a personal note that gave air to his numerous frustrations:

> My Dear Ross,
>
> What a detestable race these mountaineers are! And I am shocked beyond expression. For God's sake think of some remedy for this dreadful evil! But why do I mention a remedy, when in truth I am convinced it will be found remediless. Nothing short of a regeneration of the people can be effectual, and we must patiently submit to experience such wickedness, without the powers of preventing it. *The establishment of a regular police would be useless expense.* Had the supreme court and sudder-dewanny [court of law] been settling at Koteyghur [sic] surrounded with all their myrmydons [sic] *they*

[63] Adam to Metcalfe, 16 December 1815, fs. 23–24.

[64] Adam to Ochterlony, 28 December 1816, f. 117.

[65] As the Secretary to the Governor-General explicitly explained, "it is impossible for His Lordship in Council to sanction the extension of any jurisdiction derived from the British Government alone over the subjects of the protected hill States"; ibid., fs. 117–18.

[66] For a useful appraisal, see Mark Gordon Jones, *Custom, Law, and John Company in Kumaon*, PhD thesis (Australian National University, 2018), 151–82.

[67] Traill to Adam, 15 November 1816, f. 62.

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> *[still] could not have prevented what has taken place*. When a man determines to murder a fellow-creature what or who can prevent him?[68]

This stance was echoed by the EIC leadership in Calcutta. Reporting to the Board of Control in London, the colonial government asserted that "it would be equally impracticable and inexpedient to extend … the general code of regulation for the administration of criminal justice in those parts of our dominions where the character habits and manners of the people and their progress in civilization and the arts of life were so widely different."[69] The sheer distance between the colonial state and the societies that came under its authority, argued these officials, rendered intervention impractical.

In addition to its futility, intervention was also impractical because the colonizing powers, even if they did hope to intervene, were utterly incapable of doing so without willing local input. Virtually every investigation required the participation of locals to testify, explain, and interpret the myriad power relations and traditions of the parties in question. The communications of officials about criminal cases persistently reference collaborations with local law enforcement personnel and their interaction with local communities as informers, witnesses, and interpreters.

In the case that opened this paper, in which a traveling trader was suspected of murdering a blacksmith in British territory, the officer who reported on the events provided abundant detail about the part of locals in conducting the investigation. The body had been found by villagers, who were also able to identify the victim as a traveler who had passed through their settlement the day before, and it was local knowledge that led to the hypothesis regarding the purpose of the deceased's visit—to collect a debt from a previous criminal partnership with another blacksmith in the village. The villagers were also personally involved in the matter, having physically separated the trader and his future victim when the two came to blows—explaining to the former that such behavior was "not allowable within the limits of the British Jurisdiction" and "advising the litigants to settle the affair amicably."

The dependence on locals to conduct criminal investigations along the alien frontier zone is especially apparent in Walker's inability to ascertain the suspect's name. In his letter, he simply calls him "the criminal" or "the foreigner" to compensate for this lack of knowledge. He also laments the improbability of capturing the fugitive, though he "entertains the hope" of being aided, again, by locals, specifically the "Seekait Mahajens [traders from Suket] resident in the Bazar of this post."

In a different case, Birch recounted his extensive reliance on the administration of a local kingdom in investigating attacks on EIC *sepoy*s (soldiers). Acting on the advice of the Raja of Sirmaur, Birch assembled a group of law enforcement representatives from the kingdom and tasked them with locating suspects in the villages from which the perpetrators were said to have come. In practice, the witnesses who were asked to identify the aggressors

[68] Walker to Ross, 12 November 1816, fs. 112–13, emphasis added.
[69] Extract, Political Letter from Bengal, 11 December 1816, f. 6.

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failed to do so, offering to expose persons who were reputed to be "bad characters" in other villages instead. Frustrated, Birch "proclaimed throughout" the kingdom "that anyone harbouring or knowing the residence of any one of these men [the suspected attackers] and omitting to seize or inform on them, will, on its being discovered, be punished." In a later letter to Ross, however, Birch doubted whether their joint efforts to capture the fugitive would yield any results, "as natives have frequently a disinclination to give men up who for the crime they have committed are likely to be punished severely or with death."[70] This perception echoes the understanding that criminal justice cannot be administered properly without the legitimacy and practical help of locals.

The non-interventionist approach, associated with specific (often earlier) configurations of empire, thus rested on the idea that punishing others would be neither moral nor efficient. In this approach, being effective and moral meant adhering to a different notion associated with the Enlightenment—that of general will—where punishment reflects the shared will of the people. This resonates with a communitarian perception of the criminal justice system as representing the common values of the community. Under this perception, punishment is understood to represent the justified rage of the community against members who have deviated from their obligations toward the collective. A present-day version of this view is that criminal law ought to deal with what legal philosopher Anthony Duff calls "public wrongs"—conducts that violate the community's shared understanding of its most important values.[71] Here, the consent attributed to the community legitimates all aspects of law enforcement, judicial process, and punishment.

General Will, Public Order, and the Quest for Criminal "Justice"

A common maxim among scholars is that alterity was a discursive tool that justified the differential treatment of communities by the colonial state.[72] In the context of criminal justice, alterity was dexterously employed to justify a variety of approaches toward punishment. The communications regarding criminal justice policies in the early colonial Himalaya examined in this paper demonstrate that alterity could be used to support two diametrically opposing policies at one and the same time. This conflicting usage of alterity enables us to identify the ideological undercurrents that informed the different stands regarding criminal justice policies. As shown above, the arguments made in the course of these debates were saturated with ideas about legitimacy and justice then circulating in Europe, the reasonings for- and against intervention reverberating with the then nascent ideals of "public order" and "general will" as key to modern criminal justice systems.

[70] Birch to Metcalfe, 14 February 1816, f. 40.

[71] Duff, *The Realm of Criminal Law*, 41–42.

[72] Kolsky, *Colonial Justice in British India;* See also Hopkins, *Ruling the Savage Periphery*; Misra, "The Customs of Conquest"; Evans, "Heart of Ice"; Lacey, *In Search of Criminal Responsibility*.

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In Europe, the two notions were both complementary and intertwined. Having developed in tandem with the rise of the Enlightenment, "general will" and "public order" became the cornerstones of legitimate sovereignty, providing the state with new, secular foundations that would replace the religious sanction traditionally granted by the Church.[73] This movement went hand-in-hand with the development of a collective identity for the subjects of the king/state in the Euro-American sphere. The evolution of centralized criminal law systems within these processes epitomizes the convergence of these two ideas, the obligation of the state to maintain public order being understood as reflecting the general will of the citizenry.[74] With criminal acts construed as offences against the sovereign, rather than against the individual who had been wronged, the conflation of "general will" and "public order" came full circle.[75]

In the early colonial Himalaya, however, these intertwined principles appear to have unraveled. As the analysis above indicates, the co-constitution of the principles of public order and general will that underpinned criminal law in the Euro-American sphere could no longer be upheld in the colonial setting. Under the *a priori* dissociation between colonizing powers and colonized subjects (construed as inherently different), the upholding of public order necessarily entailed the centralization of punishment, resulting in the wresting of the right to punish from the hands of local communities. Conversely, the privileging of general will mandated that matters of punishment and justice were to be left in their existing form, that is, endorsing a customary law system that was inefficient, fragmentary, and unjust.

One possible reading of the dissociation between general will and public order in colonial settings presupposes an essential distinction between metropole and colony. The underlying premise of this reading is that alterity is endemic to the colonial setting, where it urges the development of criminal justice systems that are substantially different from those found in metropolitan spaces. Our case study may consequently be viewed as a particularly striking example of early colonial encounters, in which alterity disturbs the ideal of coherence between legal ideas generated in the metropole. This reading conforms with a dominant strand of scholarship about colonial empires, in which the alterity of colonial subjects predicates a perversion of metropolitan legal principles. If the colonial subject is, by definition, different

[73] See the now-classical formulation of this claim in Leo Gross, "The Peace of Westphalia, 1648–1948," *American Journal of International Law* 42 (1948): 20–41. See also Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia, SC: Columbia University Press, 2011); and Fitzpatrick, *The Mythology of Modern Law*. For a critical assessment of these processes, see José Casanova, *Public religions in the modern world* (Chicago: University of Chicago Press, 1994); Saskia Lettmaier, "Marriage law and the Reformation", *Law and History Review* 35.2 (2017): 461–510; On the problematics of the secularization thesis in the American context see Linda Przybyszewski, "Religious Liberty Sacralized: The Persistence of Christian Dissenting Tradition and the Cincinnati Bible War", *Law and History Review* 39.4 (2021): 707–736.

[74] Tomlins, "The Supreme Sovereignty of the State"; Alan Brudner, *Punishment and Freedom* (Oxford: Oxford University Press, 2009).

[75] Dubber and Valverde, *Police and the Liberal State*; Farmer, *Making the Modern Criminal Law*; Fletcher, *Rethinking Criminal Law*.

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from its rulers, then the notion of general will can no longer support the notion of public order. As a result, each of these notions comes to support a different policy, engendering conflictual—and at times profoundly confused—approaches towards criminal justice.

If, however, as Bernard Cohn famously argued,[76] "metropole and colony have to be seen as a unitary field of analysis," then the disjunction of the two tenets in the colonial context may be subjected to an alternative reading, which questions whether they were ever truly in harmony to begin with. Under this reading, the colonial experience (or configuration) highlights a crucial element of criminal justice policies in the metropole that is often covert in contemporary discussions about the legal apparatuses of the modern nation-state. Although the notion of a uniform citizenry played a key role in state formation in Enlightenment era-Europe, in practice, the processes of state centralization entailed a considerable engagement with questions of alterity. The morals and values of satellite communities, religious and ethnic minorities, autonomous institutions, guilds, and so forth necessarily had to cede to the Leviathan if a single nation-state, with universal mechanisms and efficient procedures, was to be built.[77] The colonial context underlines the tensions inherent to such nation-building processes, particularly vis-à-vis the possible setbacks and costs of transforming criminal justice into "the King's peace."[78]

Despite the appeal of Cohn's suggestions, there remain important differences to explore between the legal order found in the territorially expansive setting of European colonial empires and the current division of the world into clearly circumscribed territories between nation-states. Historically, European colonial empires were expansive entities with constantly shifting boundaries. As a result, they were consistently engaged with the conflict between upholding public order as centralized sovereigns and accounting for the general will of their subjects. In contrast, the borders of the nation-state are (usually) finite and should therefore, theoretically at least, be capable of instating a legal order that assuages the tensions between public order and general will. Demarcated by clear territorial boundaries, the modern nation-state (albeit the movement of peoples) has the ostensible power to create a uniform citizenry that would ultimately mitigate the tensions between general will and public order.

[76] Bernard Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1996): 4. See also Fredrick Cooper and Ann Laura Stoler, *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Oakland, CA: University of California Press, 1997).

[77] For the co-constitution of centralized criminal mechanisms and nation building, see Vanessa Barker, "Policing Difference" in *The SAGE Handbook of Global Policing*, ed. Ben Bradford, Beatrice Jauregui, Ian Loader and Jonny Steinberg (London: SAGE, 2016), 211–225; See also Farmer, *Making the Modern Criminal Law.*

[78] Taking this perspective further, studying the intricacies of the development of legal systems in the colonies, may shed new light on processes—discursive and practical—taking shape in the metropole. For useful reviews, see *Duff, The Realm of Criminal Law*; for a critique, see Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); David Garland, "Penality and the Penal State," *Criminology* 51 (2013): 475–517.

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However, in practice, nation-states are repeatedly confronted by problems that surfaced in Euro-American empires.[79] Whereas their commitment to public order stays intact, the assimilation of new communities or new members into the social body (e.g., immigrants) tends to undermine their capacity to speak for those who reside within their borders. That these tensions, which had animated the deliberations of British officials in the early colonial Himalaya, still permeate the discussion of criminal justice in modern nation-states, attests to the remarkable tenacity of the principles of modern criminal law to date.

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[79] The numerous legal conundrums that emerged with India's transition to independence are a case in point. On the challenges entailed in transforming the heterogenous body of citizens into a social body with clearly sanctioned legal rights, see Rohit De, *A People's Constitution* (Princeton: Princeton University Press, 2018); Rohit De and Ornit Shani, "Assembling India's Constitution: Towards a New History," *Past & Present* 263.1 (2024): 205–248; and Ornit Shani, *How India Became Democratic* (Cambridge: Cambridge University Press, 2017). For a broader exploration of this point, see Yael Berda, *Colonial Bureaucracy and Contemporary Citizenship* (Cambridge: Cambridge University Press, 2022).

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