

LAW AND HISTORY IN THE ENGLISH UTILITARIAN IMAGINATION OF INDIA

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What is “history”? What is “law”? How do they interact with each other and to what effect? As an intellectual and legal historian of the nineteenth century United States, I have been studying the interrelationship of “history” and “law” from the perspective of the different kinds of time each embodies. After a long hiatus from working on South Asia, I offer this paper as a preliminary and tentative way of bringing some of the questions that have interested me in the Anglo-American context to the South Asian. This is also a first minuscule step towards what I hope will eventually be a book-length treatment of nineteenth century Western conceptions of Indian history and law.

For scholars of South Asia, questions of “history” and “law” have long been invested with significance. In the writings of Euro-American scholars going back at least two centuries, India has often been charged with lacking “history,” just as it has often been charged with lacking “law.”

Let me begin with the charge that India lacks a “history.” Within the logic of this charge, possessing a “history” is distinct from possessing a “past.” India lacks the former, although it possesses much of the latter. Although scholars such as Dipesh Chakrabarty have sought to “provincialize” Europe as the subject of history, to make a case for an Indian “history,” this Western sense of India’s lack of “history” continues to pervade writings on India by non-Indians and Indians.<sup>2</sup> It is important to make the further point that India’s lack of “history” is intimately associated in this Euro-American (and now also Indian) script with Hinduism. Thus, the writer Pankaj Mishra, in his recent book on Buddhism, states in an early chapter of the book: “I had little interest in Indian philosophy or spirituality, which, if I thought of them at all, seemed to me to belong to India’s pointlessly long, sterile and largely unrecorded past.”<sup>3</sup> For Mishra, India’s “past”—in contrast to Europe’s “history”—is, precisely, “pointless.” The idea can be mapped onto V.S. Naipaul’s decades-old comparison of Hindu temples with European cathedrals. According to Naipaul, the carvings on the facades of medieval Hindu temples

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<sup>2</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000).

<sup>3</sup> Pankaj Mishra, *An End to Suffering: The Buddha in the World* (New York: Picador, 2004), p. 5.

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represent laborious and painstaking work that ultimately amount to nothing more than dumb repetition. For Naipaul, Hindu temples do not embody a “concept” or “point”—the soaring towards the heavens, the drawing upwards of the eye—that European cathedrals do.

The second charge—also one with a venerable lineage—is that India lacks “law.” Whether “law” was placed in opposition to “Oriental despotism” or to India’s lack of state forms or to India’s religiosity or caste system, for many nineteenth century Western writers, India was also seen as singularly lacking in “law.” Put differently, India’s legal tradition, even as it was mined intensively by Orientalists, was seen as lacking a “law”-like character.

How should we think about India’s lack of “history” together with its lack of “law”? My object here is *not* to show that India’s past, India’s non-law and India’s temples, like Europe’s history, Europe’s law and Europe’s cathedrals, have a “point.” That would be a different, and entirely legitimate, project. My object is rather to come to terms with what it might mean *within the terms of the European critique* for the past to constitute a “history,” for a legal tradition to constitute “law,” in short, to possess a “point.” Here, I attempt this through an exploration of one influential rendering of India’s lack of “history” and “law,” namely James Mill’s famous early nineteenth century *History of British India*.

A few preliminaries are in order before I begin my discussion. Thanks to Uday Mehta’s *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought* (1999), we have been given sharply different pictures of Edmund Burke, on the one hand, and Mill and Bentham, on the other. Mehta argues persuasively that the proto-Romantic and conservative Burke had a far greater respect for Indian difference than did Mill and Bentham. Where Burke was willing to treat India’s difference as coeval and worthy of consideration, Mill and Bentham saw India’s difference in “historical” terms. For Mill and for Bentham, India’s present—in its law, religion, social practices, etc.—represented a superseded point on a “historical” continuum. Fitted into a “historical” schema, Indian difference was to be erased and India itself to be ushered into the modern world.

While this picture is undoubtedly true, matters—inevitably—are more complicated. To begin with, as I have argued elsewhere, any sharp distinction between

Burke and the Utilitarians from the perspective of attitudes to difference runs the risk of being overdrawn. Although Burke was undoubtedly more “respectful” of difference—whether the difference of the English past or the difference of the Indian present—the differences he cared for were not always ones we might appreciate or endorse. By contrast, Bentham, although he had no doubt that Indians would shed Hinduism if they were offered the right political and legal system, cautioned that changes should not be introduced violently and abruptly.<sup>4</sup>

But it is also important to emphasize that the difference between Burke and the Utilitarians was hardly confined to the India question. Both Burke and Bentham had sharply differing views with respect to the English politico-legal arrangements of their own day, specifically as they related to the English common law. In the eighteenth century, the English common law—a term that encompassed English constitutional and non-constitutional law--was an “unwritten” law. As pronounced by the common law judge, the English common law was said to represent the unbroken customs of the community. More importantly, it was possessed of what the intellectual historian J.G.A. Pocock has called a non-historical time. The common law claimed legitimacy because of its antiquity, the fact that it consisted of a repetition of practices over a long period of time. The very length of this period of time defied being specified chronologically. The common law’s origins were famously obscure: it went back to “time immemorial,” a time beyond “the memory of man.” It remained constant and yet, *in repetition*, changed constantly, thus managing to be simultaneously ancient and up-to-date. In the seventeenth century, the common lawyer Sir Mathew Hale described the temporality of the common law by invoking the familiar philosophical metaphor of the Argonauts’ ship. According to the metaphor, the ship sails away and returns with every bit of its timber changed. It has utterly changed, but nevertheless remains the same ship. In its ability to change and yet to remain the same, to collapse temporal distinctions among past, present and future, the common law encompassed the collective wisdom of multiple generations, stretching far back into the past and reaching far out into the future.

Edmund Burke embraced the common law and its peculiar non-historical temporality. Indeed, he used it to great effect in his 1790 counterrevolutionary polemic,

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<sup>4</sup> Kunal M. Parker, “The Historiography of Difference,” 23 *Law and History Review* 685 (2005).

*Reflections on the Revolution in France*. Against the ferocious effort underway in revolutionary France to separate “old” from “new,” the *ancien régime* from the new post-revolutionary order, Burke argues that the English constitution “is an immortality through all transmigrations,” never old, nor middle-aged, nor young. In its blurred temporality, the English legal and constitutional order, Burke argued, matched the order of nature itself.

By contrast, Bentham devoted his career to criticizing the English common law. The critiques began after he attended Sir William Blackstone’s authoritative lectures on the common law at Oxford in the 1760s. Advancing a Hobbesian, positivist notion of law as the command of the sovereign, Bentham argued that the common law was not law at all, but a body of *ex post facto* rules created by the common law judge. He criticized the common law for its vagueness, its obscurity and its unreliability. He scoffed at its pretension to have arisen in “time immemorial.” All laws could be assigned strict chronological origins, Bentham argued, and the common law was no exception. Most famously, he called for a replacement of the unwritten English common law by a body of written laws or codes. Stymied in England, Bentham offered his services to all manner of governments, from the new governments of the United States to the Russian Empire. But perhaps his greatest concrete success lay in the efforts of his disciples—the Mills and Macaulay—in effecting changes in India. India would become the laboratory for English Utilitarian thought.

I offer these comments in order to suggest that the difference in position between Burke and the Utilitarians on the subject of India was also, and in a very important sense, a difference over a central and hallowed feature of England’s own present. If the Utilitarians equated the present of India to Europe’s past, this was no less true of what they thought about central aspects of England’s present. In an important sense, judged from a Utilitarian perspective, England, like India, lacked both “history” and “law.” With that, let us turn to how Mill represents India.

The politics of Mill’s text are well known. In the late eighteenth and early nineteenth centuries, a debate was playing out in England and India over the precise direction that British policy should take in the newly acquired territories. This was a debate about working through native institutions versus imposing English forms,

*zamindari* versus *ryotwari*, Bengal under Cornwallis versus Madras under Munro. The policy of Clive and Hastings had been close to that of Burke insofar as it respected existing Indian political institutions. Hastings, in fact, had been committed to preserving the “ancient constitution” of Indians (this heavily-laden phrase alone speaks volumes as to Hastings’ common law constitutional sensibilities and is particularly ironic given Hastings’ subsequent plight at the hands of Burke).

By contrast, Mill adopts an aggressively anti-Indian, Anglicizing posture. By positing the civilizational inferiority of Indians, he argues against any romanticization of Indian tradition advanced by Sir William Jones, Edmund Burke and others. Indian institutions are to be swept away because of their backwardness. Advanced institutions—more advanced than those of England itself—are to be installed in their place. The *History of British India* got Mill a job with the East India Company. It became the key text for legions of colonial officials as they shipped out to India.

So where does the backwardness of India inhere for Mill? And where does the alleged forwardness of his own position—easily discernible by contrast to India—inhere?

Mill sets great store by the critical faculty, which, for him, is indistinguishable from the “historical” sensibility. Unable to read any Indian languages and never having been to India, he defended the *History of British India* from the criticisms that immediately met the work by arguing that he possessed instead the infinitely superior power of drawing distinctions. This was the power one needed to write a “critical” history. As he put it:

The powers of combination, discrimination, classification, judgment, comparison, weighing, inferring, inducting, philosophizing in short . . . are the powers of most importance for extracting the precious ore from a great mine of rude historical materials.<sup>5</sup>

An old India hand, mired in and led astray by his excessive knowledge of local details and conditions (rather like Naipaul’s Hindu temple builder), would not know—as Mill did—“the counteraction which the more general laws of human nature may receive from individual or specific varieties . . . .”<sup>6</sup> Mill’s ability to distinguish, in other words, was what fitted him to write India’s history.

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<sup>5</sup> James Mill, *The History of British India* (New York: Chelsea House, 1968), Preface, p. xxiii.

<sup>6</sup> *Ibid*, p. xxvii.

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If Mill's historical sensibility was premised upon his arrogated ability to draw distinctions, in his rendering, Indians' lack of historical sensibility had to do precisely with their inability to draw distinctions. Indians were unable to keep historical records (i.e. date things and hence render them different from one another), just as they seemed incapable of distinguishing between human and divine:

This people, indeed, are perfectly destitute of historical records. Their ancient literature affords not a single production to which the historical character belongs. The works in which the miraculous transactions of former times are described are poems. Most of them are books of a religious character, in which the exploits of the gods, and their commands to mortals, are repeated or revealed. In all, the actions of men and those of deities are mixed together . . . .<sup>7</sup>

In the contrast between Mill's representation of his own "critical"/"historical" sensibility ("combination, discrimination, classification, judgment, comparison, weighing, inferring, inducting") and Indians' lack of one ("mixed together"), we get a sense of what meaning in "history"—alternatively, the difference between "history" and a mere "past"—might consist. It inheres in the power of drawing distinctions (dating is only one instantiation of this power of drawing distinctions). This inability to draw distinctions might be what makes, to borrow Pankaj Mishra's phrase, India's past "senseless" while the corresponding ability imbues Europe's "history" with "sense."

So far, it would seem, Indians' lack of "history" has to do with their inability to draw distinctions. This same fatal defect also accounts for Indians' lack of "law." As Mill puts it:

Amid the imperfections adhering to the state of law among a rude and ignorant people, one is, that they preserve not their maxims of justice, and their rules of judicial procedure, distinct from other subjects. In the law books of the Hindus, the details of jurisprudence and judicature occupy comparatively a very moderate space. The doctrines and ceremonies of religion; the rules and practice of education; the institutions, duties, and customs of domestic life; the maxims of private morality, and even of domestic economy; the rules of government, of war, and of negotiation; all form essential parts of the Hindu codes of law, and are treated in the same style, and laid down with the same authority, as the rules for the distribution of justice. The tendency of this rude conjunction of dissimilar subjects is, amid other conveniences, to confound the important distinction between those obligations which it is the duty of the magistrate to enforce,

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<sup>7</sup> *Ibid*, Book II, p. 116.

and those which ought to be left to the suggestions of self-interest, and the sanctions of morality . . . .<sup>8</sup>

As the above excerpt suggests, for Mill, Hindu law, because it consists of “a rude conjunction of dissimilar subjects,” lacks the public-private distinction that was becoming so central to Anglo-American legal thought. But the important point is that Hindu law fails as “law” because it lacks the ability to distinguish not just between public and private, but between “law” and non-“law” (domestic life, education, religion, etc.). Even where Hindu “law” is segregated from non-“law,” it is fatally afflicted—as, for instance, in the case of the law of inheritance—with a lack of adequate differentiation, “that vagueness and ambiguity, the source of endless dispute, which distinguishes the laws of all ignorant people, and which forms a most remarkable feature in those of Hindustan.”<sup>9</sup>

But things get confusing. So far, we have been told that Indians’ lack of “history” and “law” lies in a failure to draw enough distinctions, their fatal predilection for mixing, for oneness or sameness. But the problem with India’s lack of “law”—and, we might imagine, its lack of “history”—is that Hindus also make *too many* distinctions, that they cannot mix, that they lack oneness or sameness. In the context of the doctrine of pledges, Mill writes, the Hindus have written down laws “with great minuteness and solemnity; a variety of cases are distinguished; and the receipt of pledges appears to have formed a component part of a comparatively numerous and important class of transactions.”<sup>10</sup> This is all to the good. In treating many items as separate and discrete, however, the Hindu law fails to see things as unified where things should be unified. Thus, Mill argues that the Institutes of Manu list under separate heads—and treat as essentially independent and utterly equivalent—many areas of law that should be unified under the heads of “civil” and “penal” or the “law of persons” and the “law of things.” Hindus spell out with incredible specificity a range of penalties “for every trifling wrong,” something that Europeans have long learned not to do.<sup>11</sup> They also needlessly distinguish among

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<sup>8</sup> *Ibid.*, Book II, p. 155.

<sup>9</sup> *Ibid.*, Book II, p. 170.

<sup>10</sup> *Ibid.*, Book II, p. 164.

<sup>11</sup> *Ibid.*, Book II, p. 184.

individuals in judging the acceptability of testimony.<sup>12</sup> This failure to unify is what marks the Hindus as civilizationally inferior to the ancient Romans.

Thus, if Hindus lack the ability to see things as different, which marks their law as non-law and their past as non-history, they also fail to see things as one, which equally marks their law as non-law and potentially their past as non-history. Hindus both mix too many things that should be separate and separate too many things that should be mixed. To resort to the American dictum about “missing the forest for the trees,” for Mill, Hindus have simultaneously far too much “forest” and far too many “trees.” What is one to make of this?

The human mind, for Mill, must be capable of “nice discriminations.”<sup>13</sup> It is not enough that discriminations be made. There could be not enough, or far too many. Or, as in the case of the Hindus, there could be simultaneously too many and too few. What matters about discriminations, however, is that they be “nice.”

But “niceness,” as a Utilitarian criterion for the judging of discriminations, does not seem particularly well articulated. Indeed, for a politico-legal philosophy premised upon precision, “niceness” is every bit as vague as the vagueness Mill frequently attributes to Hindu civilization. The same vagueness is true of the two attributes that Mill argues any body of law must possess in order for it to qualify *as* law: completeness and exactness. I will quote his definitions at some length to give you a sense of their murkiness:

- I. A body of laws may be said to be *Complete*, when it includes everything which it ought to include . . . .
- II. A body of laws may be said to be *Exact*; 1, when it constitutes nothing a right, and nothing an offense, except those things precisely which are necessary to render it *Complete*; 2, when it contains no extraneous matter whatsoever; 3, when the aggregate of the powers and privileges which ought to be constituted rights . . . are divided and subdivided into those very parcels or classes, which beyond others best adapt themselves to the means of securing the one, and preventing the other; 4, when it defines those classes, that is, rights and offenses, with the greatest possible clearness and certainty; 5, when it represses crimes with the smallest expense of punishment; and 6, when it prescribes the best possible form of

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<sup>12</sup> *Ibid.*, Book II, p. 190.

<sup>13</sup> *Ibid.*, Book II, p. 190.

a judicatory, and lays down the best possible rules for the judicial functions.<sup>14</sup>

Of course, in Mill's reading, the Hindu law utterly fails both definitions. But any lawyer—indeed, any non-lawyer—could tell you that Mill's definition of "law" is as meaningless, as productive of endless dispute, as anything an ancient Hindu text writer could have come up with.

There are further complications, contradictions, paradoxes. A large part of the Utilitarian program was premised, as I have suggested, on replacing England's *unwritten* law with *written* law. Unwritten law was a mark of backwardness. As Mill put it: "Prior to the art of writing, laws can have little accuracy of definition; because, when words are not written, they are seldom exactly remembered; and a definition whose words are constantly varying is not, for the purposes of law, a definition at all."<sup>15</sup> Writing, of course, is not just a mark of "law" but also of "history." It is in *written* records that history is contained.

On this definition, England could not be said to have a "law" and a "history." Mill puts it as follows:

Notwithstanding the necessity of writing to produce fixed and accurate definitions in law, the nations of modern Europe have allowed a great proportion of their laws to continue in the unwritten; that is, the traditionary state; the state in which they lay before the art of writing was known. Of these nations, none kept in that barbarous condition so great a proportion of their law as the English.

But if English law was "barbarous" because unwritten, Mill acknowledges that Hindu law is "written." As he puts it: "From the opinion of the Hindus that the Divine Being dictated all their laws, they acknowledge nothing as law but what is found in some one or another of their sacred books. In one sense, therefore, their laws are written." In other words, Hindus have possessed writing—the essential marker of "law" and of "history"—all along. Might Hindus then be more "historical" and "legal" than the English? Mill is immediately forced to retreat from this position. English law, even though unwritten, is mostly written down in decisions. Hindu law, even though written, is vague, internally

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<sup>14</sup> *Ibid.*, Book II, pp. 196 – 197.

<sup>15</sup> *Ibid.*, Book II, p. p. 198.

contradictory, grievously incomplete and for all practical purposes “unwritten.”<sup>16</sup> English non-writing becomes writing; Indian writing non-writing.

In the reading I have offered, the Hindu “past” and the Hindu “law”—which both make too many and too few distinctions—fail to qualify as “history” and as “law” on the basis of their vagueness. But they are judged as vague on definitions that are no less vague (the importance of making “nice” distinctions, spurious and tautological definitions of “completeness” and “exactness”). Furthermore, what Mill considers the test and marker of an authentic, presumably “complete” and “exact” “law” and history”—*writing*—is paradoxically to be found in ancient India rather than in contemporary England. The result is that the valences of Indian “writing” and English non-“writing” must immediately be switched, such that the one comes to look like the other.

How is one to judge Mill’s own criteria of judgment as he applies them to India? One answer—presumably that of Partha Chatterjee, Homi Bhabha and others—is that what Mill calls the “niceness” of distinctions would ever be withheld from Indians. Indian distinctions would be either too few or too many, but never “nice” enough. This is the teaching of Chatterjee’s famous rule of “colonial difference,” one that mires Indians in difference, holds out a promise that will always be deferred.

I am more interested, however, in reading Mill a different way. Might one hold out the possibility of distinguishing between “history” and non-“history”—or “law” and non-“law”—even though the criteria for drawing the distinctions can be shown to be as fatally afflicted with flaws as the materials to which the criteria are applied? Put differently, can one produce a “history” and a “law” with a “point,” when the basis of the “point” can itself be shown to be internally contradictory, intellectually weak, defective? Perhaps the “point” of “history” and of “law” is merely that it stands apart from—is different from--“the past” and from non-“law.” Perhaps the “point” is—working with and through Mill—distinction itself. In this sense, both Mill and ancient Hindu law-givers might be said to work with a sense of “history” and of “law”; Mill himself suggests this. The challenge for scholars of South Asian history and law, one that I hope

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<sup>16</sup> *Ibid.*, Book II, pp. 198 – 199.

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to set myself in years to come, might be to locate the “sense” of India’s past and of  
India’s law with this weaker notion of “sense.”