UNIVERSITY OF CALIFORNIA, SAN DIEGO

The Illiberal Commonwealth: On the Problem of Difference and Imperial Control in Jamaica, the Straits Settlements and the Nineteenth Century British Empire

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by

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The Dissertation of Jack Jin Gary Lee is approved, and it is acceptable in quality and form for publication on microfilm and electronically:

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Dedication

For my parents and Chheng

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Acknowledgments

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Chapter Four, in part, is revised from the material as it appears in "Plural Society and the Colonial State: English Law and the Making of Crown Colony Government in the Straits Settlements," Asian Journal of Law and Society, vol. 2, 2015. Lee, Jack Jin Gary. The dissertation author was the primary investigator and author of this paper.

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Abstract of the Dissertation

The Illiberal Commonwealth: On the Problem of Difference and Imperial Control in Jamaica, the Straits Settlements and the Nineteenth Century British Empire

by

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This dissertation investigates two questions: One, how does a conquering state govern a foreign territory and its inhabitants from afar? Two, why was nineteenth century British colonialism marked by the authoritarian, illiberal rule of racially diverse colonies?

To answer these questions, I examine the institutionalization of Crown Colony government, which was the standardized mode of colonial rule and long-distance imperial control in the nineteenth century British Empire. Defined by the Crown's authority over colonial legislation and official appointments, the institutional framework of Crown Colony government was also a monocratic form of colonial rule that granted the Governor, as the Crown's representative, powers over the colonial legislature and judiciary. To examine the processes of institutionalization, this study focuses on the paradigmatic cases of Jamaica and the Straits Settlements (Singapore, Penang and Malacca) because their re-constitution as Crown Colonies in the 1860s marked the shift in imperial policy away from the use of the old representative system, which had been defined by the establishment of representative Assemblies. By examining the translation of colonial laws across the empire, I argue that Crown Colony government differed from English institutions of law and government because of officials' concerns over the use of English "liberties" in racially divided societies. Because both officials and elites came to understand such "plural societies" as lacking in social or cultural cohesion and also being unfit to assimilate English liberties, they then contended that such colonies required the expansive powers of the colonial state to maintain the semblance of lawfulness and order. As I demonstrate, British officials thus formulated a racial sociology of empire that was realized in their gradual imposition of a scheme of constitutional progression upon a diverse range of colonies – this was a formalized scheme of colonial rule that rendered the seemingly "backward" and "less civilized" members of plural and traditional societies as less capable of "liberty" and "self-government" and more in need of the Crown's protection. In light of its findings, this dissertation proposes that sociologists need to

analyze the changing structures of sovereignty in order to grasp the transformations of law in colonial and post-colonial states.

I.
Introduction: Imperial Control and Colonial State Formation

How does a sovereign state govern a foreign territory and its inhabitants? Since colonization consisted of more than conquest and the violent subjugation of resistance, how was colonial domination constituted and what means did the colonizing state employ to rule colonial subjects from afar? By the latter half of the nineteenth century, the British Crown and its officials had institutionalized a formal solution to the fundamental problem of imperial control:[1] Crown Colony government. Beyond the use of violence to secure the Crown's claims of sovereignty, modern British colonialism in the form of Crown Colony government was defined by the Crown's centralized regulation of the officials that staffed the colonial state and its control over colonial lawmaking, coupling the process of colonial state formation with the centralized exercise of imperial control.

What then was the significance of Crown Colony government for imperial control and colonial state formation? Given the distance and time that separated the metropole from the colonies, how did imperial control work? Together with their regulation of the appointment and conduct of officials in the colonies, the Crown's issuance of instructions to Governors and review of colonial ordinances constituted the long-distance framework

[1] Steinmetz (2014, p. 79) defines imperialism as "a strategy of political control over foreign lands that does not necessarily involve conquest, occupation, and durable rule by outside invaders." Similarly, I define imperial control as the goal-oriented exercise of power by a state over a foreign territory and its inhabitants. While imperial control does not require colonial state formation, the British established formal structures of control due to the relatively unstructured geopolitical context of imperial expansion (Go 2011, pp.142-5).

of imperial control that operated across the modern empire.[2] To ensure that the exercise of the Crown's sovereign powers could not be limited by opposition within the colonies, this administrative infrastructure entailed the *in situ* establishment of a monocratic form of colonial government, Crown Colony government, which granted the Governor, the sovereign's representative, powers over the legislature and judiciary.[3]

Within the extended apparatus of Crown Colony government, colonial lawmaking then consisted of the "projective articulation" of the various understandings of officials in the metropole and the colonies (Glaeser 2005, p. 25). In other words, when officials dispatched colonial ordinances and the documents that accompanied them between the colonies and the Colonial Office at Downing Street, these documents conveyed the views and decisions of those called to draft, review and amend them along the way. As a formalistic, long-distance mode of imperial control, this to-and-fro process of lawmaking not only made officials in the colonies accountable for their policies and rationales to the Crown and its officials in the metropole; by articulating their policies in the form of ordinances, officials in the metropole and the colonies also defined the organization and practices of the colonial state in relation to the diverse societies they ruled. Within the framework of Crown Colony government, colonial lawmaking was statemaking. In this sense, the strictures of positive law were essential for long-distance imperial control.

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[2] My use of the term, "long-distance," follows Stamatov's (2013, pp. 11-3) discussion of "long-distance advocacy" in two ways. On a descriptive level, the term indicates a scale of political action that extends across conventional territorial boundaries, which, in the context of this study, refers to the designated boundaries of the metropolitan and colonial states. Theoretically, my approach to imperial control is similar to Stamatov's discussion of the co-constitutive networks and common practices that made "long-distance advocacy" into an "institutionalized set of roles and action scripts." (Stamatov 2013, p. 12)

[3] Following Weber's (1978, pp. 222-3; Swedberg with Agevall 2016, p. 217) usage of the term, "monocratic," which he contrasted to government by collegial bodies, I describe the formal structure of Crown Colony government as "monocratic" because of the Governor's powers over the appointment and suspension of officials across the executive, legislative and judicial branches of the colonial government. Nevertheless, the Governor's monocratic powers were only exercised in his role as agent for the Crown.

In this dissertation, I contend that the examination of Crown Colony government allows us to examine the formative significance of sovereignty and law in the exercise of long-distance imperial control and the making of the modern colonial state. In contrast to Weber's (1946, 1978) attention to the significance of sovereignty and law for the development of the modern state, the leading sociological theories of the state that marked the so-called "second wave" of historical sociology overlooked the relationship between sovereignty, law and modern state formation (Adams, Clemens and Orloff 2005, p. 7; e.g., see Skocpol 1979; Evans, Rueschemeyer and Skocpol 1985; Tilly 1992; see Mann 1993, chap. 3 for an exception). I contend that such oversight has, in turn, fostered the misunderstanding of the legacies of European colonialism by assuming more institutional continuity between the metropole and the colonies than warranted. While modern colonialism did lay the organizational foundations of bureaucratic administration within many colonies, bureaucracy, as Weber (1978, p. 991; italics added) stated, "is technically the most highly developed *power instrument* in the hands of its controller." Simply put, the ends and uses of a bureaucracy are dependent upon the agents of sovereign power. Therefore, without examining the locus of sovereignty and the uses of law in shaping the exercise of organized state power, we fail to grasp the character of the modern colonial state – i.e. the "commitments" [cultural, social and material] that shaped how its officials acted (Selznick 1992, p. 321) – and its legacies.

This dissertation tackles the subject of Crown Colony government and its institutionalization as the standard model of colonial rule and imperial control in the modern British Empire over the nineteenth century. By focusing on the reconstitution of Jamaica and the Straits Settlements (Singapore, Penang and Malacca) as Crown Colonies

and the consequences of their being made such, I examine how colonial officials across Britain's empire understood the meanings of this monocratic model of colonial rule in relation to the colonized societies that they governed, and the ways that colonial officials and laws were subject to imperial control from afar. As "paradigmatic cases" that prompted British officials to reformulate their understandings of the principles and purposes of colonial rule by the late-1860s (Kuhn 1996; Flyvbjerg 2006), the racially diverse societies of Jamaica and the Straits Settlements present social grounds that allow us to understand and evaluate how and why the Crown and its officials institutionalized[4] Crown Colony government as the standard model of colonial government as the empire expanded through conquest over the long nineteenth century.

In this introductory chapter, I first present a case for why the sociological theory of the state needs to take into account the significance of sovereignty and law in understanding the construction of imperial control and the modern colonial state. I then present the empirical puzzle of the historical establishment of Crown Colony government as the most prevalent form of colonial government across the empire by defining and contrasting it to the old representative system of colonial government that had characterized colonial rule in the early modern British Empire. In this regard, I argue that the British Crown and its officials formulated and understood Crown Colony government

[4] The concept of institutionalization is a troublesome one and past definitions focused alternatively on the subjective or objective nature of institutions. To Selznick (1996, p. 271), institutionalization occurs as an organization takes on a "special character" and achieves a "distinctive competence or, perhaps, a trained or built-in incapacity." Institutionalization consists of "the [organization's] creation of social entanglements or commitments." (*ibid*) Taking a more impersonal view, Meyer and Rowan (1977, p. 341) state that institutionalization "involves the processes by which social processes, obligations, or actualities come to take on a rulelike status in social thought and action." In this dissertation, I adopt an approach that focuses more upon institutionalization as *process*: institutionalization occurs when a distinct sequence of action and reaction is "replicated, and thus stabilized in a self-similar manner." (Glaeser 2014, p. 229) Here, the essence of institutionalization lies in social practice rather than in the theorized nature of institutions.

as the solution to the inter-related problems of imperial control and difference, and that its institutionalization was predicated upon a racial sociology of empire that legitimated the Crown's imposition of an authoritarian mode of colonial rule upon racially divided societies, or "plural societies" (Furnivall 1956), with limited European settlement.

The Long, Strong Arm Of Empire? On the Specter of Sovereignty

Sovereignty matters. Adams and Steinmetz (2015, p. 277) contend that neo-Weberian, state-centered theorists, who focused on the state's organizational capacity and relative autonomy from economic elites, "drew on Weber's core notion of sovereignty – the idea that there is a final and absolute legitimate authority within a given territory – but deleted the cultural property of legitimacy." Departing from Weber's (1978, pp. 212-3) focus on the belief in legitimacy as the basis of domination, state-centered theorists like Skocpol and Tilly also bypassed the question of why subjects obey the commands of an authority. Instead, they focused on the material forces of class formation, revolution and warfare to account for the formation and organization of the modern state.[5] As Adams and Steinmetz (2015, p. 277) thus note, there was "no culture, no decisionistic openness of politics…, and no empire." In other words, from the point of view of these earlier theorists, sovereignty was dissolved in the organizational structure of the modern state, while law was reduced to the rules that facilitated or constrained state policy. In addition,

[5] As Skocpol (1979, p. 32; italics added) states, "The ebbing of a regime's legitimacy in the eyes of its own cadres and other politically powerful groups may figure as a mediating variable in an analysis of regime breakdown. But the *basic causes* will be found in the structure and capacities of state organizations, as these are conditioned by developments in the economy and class structure and also by developments in the international situation." Contrast Skocpol's organizational and realist approach to Mann's (1993, p. 65) discussion of the political significance of law in relation to European states over the nineteenth century: "Law had a dual role: expressing the monarch's will, yet also embodying customary and divine law…Its hybrid character made law a central site of ideological struggle and gave lawyers a corporate identity reducible to neither state nor civil society."

sovereignty and law were seen as the products – not constituents – of the state's autonomy and capacity since state power was ultimately dependent upon material and organizational factors. Consequently, when sociologists have applied this state-centered, or state-as-organization, paradigm to analyze empires and colonialism, they have viewed colonialism in terms of the organizational extension of state power.

To illustrate, in Tilly's (1992, pp. 91-5) work on the making of states in Europe, states' strategies of imperial expansion reflected their respective means of statebuilding. If the state, e.g. Spain, relied primarily on the coercion of subject populations to extract resources and fight wars with other states, then its imperial expansion would be based mostly upon the more resource-intensive methods of conquest or settlement. In contrast, states that drew their resources from commercial elites, like the Netherlands, were more likely to forge empire by chartering trading companies and granting them a monopoly over trade. Between these trajectories lay states that relied on both capital and coercion to procure warmaking resources – what Tilly (1992, p.151) called "capitalized coercion." Such states, e.g. France and Britain, adopted a combination of commercial and coercive strategies in building empire. Nevertheless, regardless of its strategies of statebuilding, the "national state's"[6] extension of the "long, strong arm of empire" ultimately resulted in its development of greater organizational capacity and the increased extraction of resources from its colonies (Tilly 1992, p. 91).

What then about the effects of imperial expansion upon colonized territories and their inhabitants? Tilly argues that the premises of colonial statebuilding reflected

[6] Tilly (1992, p. 2) defines the "national states" as "states governing multiple contiguous regions and their cities by means of centralized, differentiated and autonomous structures." To encapsulate the experiences of *imperial* states such as Britain, Tilly's definition might be expanded to include imperial states' control of overseas territories and their settlements (see Go 2014, p. 126).

European states' respective strategies of statebuilding and imperial expansion. As he states, "When a European power installed courts, fiscal systems, police, armies, or schools in one of its colonies it usually followed European precepts." (Tilly 1992, p. 182) Tilly's statement on colonial statemaking provokes the question of *how* officials "followed European precepts" in building colonial states. Was colonial statemaking merely a process of institutional reproduction as imperial powers extended their reach?

The central assumption that underlies Tilly's examination of European empires and colonialism can be gleaned from his characterization of imperial expansion, "the long, strong arm of empire." As a powerful metaphor that reinforced Tilly's thesis that warmaking is statemaking, the term also indicated the assumed institutional continuity between the metropole and the colonies, particularly in the organizational extension of European principles of state formation. Following Tilly, studies of British colonialism and its postcolonial legacies have maintained the assumption of institutional continuity between the British state and the colonial state by identifying metropolitan forms and principles of law and government as institutional sources of liberalism and development in the colonies and, later on, the post-colonies (Acemoglu, Johnson and Robinson 2001; Lange 2009; Mahoney 2010, pp. 234-41; Halliday and Karpik 2012; for contrasting appraisals of the British colonialism, see Go 2011; Wilson 2011; Mann 2012; Goh 2013). While the assumption of institutional continuity between European states and their colonies is not altogether wrong, scholars who have made this assumption have tended to overlook the differing adaptations and uses of European institutions within the colonies. As malleable instruments of a conquering sovereign, European laws and governmental forms could be remade into forms of imperial control when applied within the colonies.

Even though recent comparative studies of Britain's colonial legacies have demonstrated greater analytical precision in their recognition of the institutional diversity of colonial rule and the uneven nature of the institutional transfers between Britain and its colonies, their nuanced approaches have remained premised upon the assumption of institutional continuity between the metropole and the colonies to varying extents (Acemoglu, Johnson and Robinson 2001; Lange 2009; Halliday and Karpik 2012). Relatedly, their empirical analyses of the legacies of colonialism have also posited the transfer of British principles of government and law as the default mode of colonialism. For instance, Acemoglu, Johnson and Robinson (2001, p. 1370) identify the feasibility of European settlement as one of the key factors for the institutional creation of "Neo-Europes" in the course of imperial expansion. In their view, if not for the initial ecological limits to European settlement within some colonies, European colonizers tended to replicate European institutions, "with strong emphasis on private property and checks against government power," which fostered post-colonial development (*ibid*).

Within these recent studies, the transfer of institutional principles between the metropole and the colonies proceeded along two dimensions of statebuilding: governmental administration and the legal system, particularly the protection of individuals' property rights. With regards to the former, given that imperial expansion meant the extension of organized state power and metropolitan principles of government, the heart of the colonial state was a bureaucracy with varying levels of territorial and jurisdictional reach, and differing degrees of "inclusiveness," i.e. the inclusion of various non-state actors in the making and implementation of colonial governmental policy (Lange 2009, p. 36). This was the case for both "direct rule" and "indirect rule."

> Directly ruled colonies had relatively integrated and bureaucratic legal-administrative institutions that were present throughout much of their territories, while indirectly ruled colonies had dispersed states that combined a bureaucratic center with regional patrimonialism and had very limited control over most of their territories. (Lange 2009, p. 39)

In identifying the varying bureaucratic reach of the different forms of colonial rule, Lange's formulation of the varied institutional structures of British colonialism also assumes the continuity in organizational principles between the modern British state and the administrative *nucleus* of the colonial state. In this regard, the continuity in the organizational principles of government between metropole and colony was most pronounced for directly ruled colonies, and even more so in the case of settler colonies, because of the integrated and extensive nature of their bureaucratic administrations and their relative inclusiveness (Lange 2009, pp. 28-30). And, even though indirectly ruled colonies differed in their administrative structure and inclusiveness because of the collaboration of "native" institutions in colonial government, they still maintained a "bureaucratic center." Regardless of whether colonial rule was "direct" or "indirect," bureaucratic control was the cornerstone of imperial expansion and modern colonialism.

The assumption of institutional continuity becomes problematic when scholars turned to examine the institutional configuration and principles of colonial law within the British Empire. Halliday and Karpik's (2012, p. 12; italics in original) insightful comparison of the uneven ways that Britain "exported to its colonies some semblance of the rule of law," a much cherished principle of the British constitutional tradition, thus highlights two contradictions to claims of the supposed "*universality* of the rule of law" across the empire. On the one hand, the "colonial rule of difference" meant that "natives" and British persons were treated differently and unequally as legal subjects because of

their perceived differences from one another (Chatterjee 1993; Benton 2002, chaps. 4-5; Kolsky 2005; Steinmetz 2007). On the other hand, as Hussain (2003) demonstrated, the recurrent use of martial law and emergency powers by Governors within the colonies revealed the discretionary powers delegated to the colonial executive as the Crown's representative. While legal procedures and forms in the colonies might resemble those used in the metropole, the formalism of colonial law constituted a "civilized despotism" that declared "to subjects that their identity, their offenses, their grievances, all began and ended in the authority of the law…" (*ibid*, p. 65). To borrow Comaroff's (2001, p. 306) pointed term, "*lawfare*" was the mode through which British sovereignty was exercised.

In this regard, while bureaucratic control might be one institutional constant between the metropole and the colonies, the promise of a colonial "rule of law" was often betrayed or contradicted during the "longue durée" of modern colonialism over the nineteenth and twentieth centuries (Halliday and Karpik 2012). When we consider the construction of sovereign authority and the power-serving uses of law in the colonies, the administration of colonial affairs possessed an authoritarian character that lay at tension with contemporary meanings of the British ideal of the "rule of law"[7] even though most legally trained actors in the colonies, e.g. colonial judges, lawyers and administrators, recognized the significance of this ideal as part of the English common law tradition. Simply put, if British officials understood colonial ordinances as the commands of a

[7] In the words of A.V. Dicey (1960, pp. 202-3; italics added). whose writings in the late nineteenth century have shaped modern understandings of the "rule of law," the "rule of law" could be defined in three ways: one, it was "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;" two, it consisted of "equality before law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts;" and, three, it denoted "the fact that with us [the English] the law of the constitution… [was] not the source but the consequence of the rights of individuals, *as defined and enforced by the courts*." The most obvious problem that the Crown Colonies posed for the attainment of the ideal of the "rule of law" was the Crown's preservation of its Prerogative powers as a conquering sovereign over such colonies and their laws. See Rajah (2012, pp. 50-3) on "rule by law."

sovereign authority, then they were certainly not derived from the fundamental liberties of individual subjects, especially if these subjects were different from Englishmen and could not claim their inheritance of an "ancient constitution." (Pocock 1987)

Hence, until the historical emergence and successes of nationalist movements in the colonies for greater self-government and independence, the institutional ideals of "political liberalism,"[8] which have been identified with Great Britain as a "progenitor of liberal politics" (Halliday and Karpik 2012, p. 4), remained largely unattained across most British colonies except for the self-governing white settler colonies that formed Australia, Canada and, to a limited extent, racially divided South Africa. Indeed, in their wide-ranging comparison of the fates of "political liberalism" in former British colonies, Halliday and Karpik (2012, pp. 50-1) propose that organized struggles for independence and the political mobilization of legally trained actors and civil society groups during such struggles were significant factors in the variable fates of "political liberalism" within British post-colonies. Their comparative analysis suggests that the institutional continuity between Britain and its colonies was largely an outcome of anti-colonial struggles; critically, the institutionalization of "political liberalism" was possible only when the Crown's legitimacy and control had been subject to challenge or overthrown.[9]

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[8] Political liberalism consists of a bundle of ideals and repertoire of actions that lawyers can mobilize around despite their differences. Its significance thus lies in the autonomy of the legal profession and its distinct ideals. Coined by Halliday and Karpik (2012, p. 4; italics in original) through a series of empirical studies, "political liberalism" can be defined by three elements: "…a *moderate state*, whereby the power of the state is fragmented, commonly by a counter-balancing of the executive and legislature, or both of these by the judiciary; *civil society*, in which thrive autonomous voluntary associations outside the control of the state and capable of both restraining the state and contributing to constructive governance…; and *basic legal freedoms*, which include first-generation civil rights that protect individuals against state tyranny…"

[9] Similarly, in Lange's (2009, chaps. 4 and 7) analysis of successful colonial state building (and institutional transfer) in Mauritius and Botswana, the democratization of colonial rule in both colonies only occurred during "late colonialism," i.e. between the 1940s and 1960s, when waves of decolonization swept across an empire weakened by the Second World War.

Another key marker of the lack of institutional continuity between Great Britain and its colonies was the lack of representative institutions and political participation over the longue durée of modern colonialism. By the beginning of the twentieth century, elected legislative bodies, in the form of either Assemblies or Parliaments, were limited to the self-governing white settler colonies as well as the West Indian colonies, Bahamas, Barbados, Bermuda, that retained the older system of representative government that was commonly found across the Britain's Atlantic colonies over the eighteenth century (also see Table 1.1). In this regard, colonies under the Crown's "direct rule" were not only contrasted to colonies subject to "indirect rule." "Direct rule" also meant that the Crown and its officials did not have to contend with an elected Assembly, which possessed powers to make ordinary laws for a colony because the Crown had formally ceded its legislative powers. As Mann (2012, p. 48) observes of the lack of political participation across most British colonies: "The big picture in political power relations was again a contrast…between the emergence of civil and political citizenship in the imperial core and the white settler colonies versus subjection in the colonial periphery – between nation-state and empire." Significantly, the lack of representative institutions marked the preservation of the Crown's powers over colonial legislation and government.

Beyond the Crown's establishment of bureaucratic centers of administration, or "legal-administrative institutions" (Lange 2009), in the colonies, the authoritarian uses of colonial laws and the preservation of the sovereign's power to rule without the need for consent across the colonial periphery indicate that British officials departed from their own traditions of the "rule of law" and parliamentary supremacy when they approached the task of colonial statebuilding. Simply put, the Crown and its officials did not follow

"European precepts," as Tilly (1992, p. 182) supposed. Instead, they constructed a distinctive model of colonial government, Crown Colony government, and vested extensive powers over colonial administration, legislation and even the supervision of judicial conduct in the office of the Governor, which acted as the Crown's representative.

In the following sections, I tackle the inter-related problems of imperial control and difference that shaped the making of Crown Colony government as a mechanism for the Crown's exercise of its sovereign powers over long distances. For one, the problem of imperial control was defined by how the Crown granted legal authority and discretionary powers to agents who could be entrusted and also empowered to enact the sovereign's will in foreign territories; in turn, the stability of imperial control depended upon how Governors and their subordinates understood and responded to the differences between the colonizer and the colonized. The latter problem of difference was, at its core, then a problem of legitimacy. How could a conquering sovereign establish a stable relationship of *legitimate* domination with conquered subjects if the colonizer and colonized were divided by a chasm of difference? Without common customs or beliefs, colonial domination rested on precarious grounds. In light of this conundrum, I turn now to define Crown Colony government and its significance as a solution to these problems.

The Problem of Imperial Control and Colonial State Formation

The problem of colonial state formation was also the problem of imperial control. Because the foundations of colonialism lay in conquest, this study begins with the proposition that the institutional origins and consequences of colonial state formation can only be understood in relation to the ways that sovereign power was exercised, and also

constructed, from afar. In starting with this premise, I traverse an approach between the sociological Scylla and Charybdis of mechanical reproduction and unfettered agency in understanding the relations between the imperial center, i.e. the metropole, and the colonies. While I reject the notion that colonial governments and laws were outgrowths, or reproductions, of metropolitan institutions, I also contend that the alternate position – that colonial institutions were particularistic and differentiated according to the unique conditions of the colonies – obscures the control that powerful metropolitan actors exercised across empire. For, at its heart, colonialism was about the exercise of power by a sovereign actor upon the "native" inhabitants of conquered territories, who were also marked by their difference from, and supposed inferiority to, the "natural born" subjects of the conquering state (Steinmetz 2014, p. 79). For better or worse, *imperium* left its imprint on the societies subject to it. Even within the British Empire, with its bewildering diversity of colonies, protectorates, protected states, etc., we can still discern uniformities in the institutional forms of imperial control and colonial rule.

This study focuses on the institutional origins and consequences of one particular form of imperial control, Crown Colony government, which was widely established across the modern British Empire. Excluding British India and the self-governing Dominions,[10] 47 out of the 51 dependencies[11] under the control of the Colonial Office

[10] The Dominions Office supervised the governments of Australia, Canada, Newfoundland, New Zealand, Southern Rhodesia and South Africa. In a nutshell, self-government, or "responsible government," meant that the executive officers, except the Governor, of the government were held accountable to, and could be replaced by, the elected legislature. Also, the Crown ceded its legislative powers to the elected legislature.

[11] Among these 4 colonies were the West Indian colonies of Bahamas, Barbados and Bermuda, which retained the old representative system of colonial government that had also been the form of government in the American colonies prior to the Revolution. The other colony that also departed significantly from the Crown Colony model was Ceylon, which was re-constituted in 1931 such that leading members of the elected state council held administrative offices as ministers; notably, Malta also achieved this form of semi-responsible government in 1921 but this was revoked in 1936 by the Crown (Wight 1946, pp. 90-7).

were subject to imperial control through the institutional framework of Crown Colony government (see Table 1.1) by the beginning of the Second World War[12] – an event that triggered constitutional change in the colonies and accelerated the pace of decolonization. My basic argument is that Crown Colony government was the institutional mechanism that allowed the Crown and its officials to exercise control across long distances and upon diverse societies by the dual means of the colonial civil service and positive law. Relatedly, Crown Colony government was also a monocratic model of colonial state formation founded upon the Governor's powers over the executive, legislative and judicial branches of government. While colonial state-building under the Crown Colony system varied in its extent as it was compatible with the practice of "direct rule" and/or "indirect rule" within and even beyond the territorial boundaries of a colony, the principle of imperial control was always maintained through the regulation of colonial officials and legislation given the Crown's "unlimited jurisdiction" over the affairs of a dependency.[13]

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[12] The overall number of 51 dependencies was based on the classification of colonies presented in Section 101, Colonial Regulations, J. Harding and G.E.C. Gent, *The Dominions Office and Colonial Office List 1940* (London: Waterlow and Sons Ltd., 1940), p. 888. Following Wight (1946, p.137), I have also added the dependencies of Aden (Colony and Protectorate) and the Presidencies that make up the Leeward Islands to the original list of 44, a figure that was only current up to 1935.

[13] Following the practice of British officials in compiling the Colonial Regulations, I include "Protectorates" in the list of dependencies listed in Table 1.1. Under international law, a "Protectorate" existed whenever "one country is under the protection of another," which essentially meant that the defence and external affairs of the territory came under the Crown's control (Roberts-Wray 1966, p. 47) However, British officials also distinguished between "Protected States" and "Protectorates" according to whether "the internal administration of the country" was "under the control of the United Kingdom and Parliament…, *the Crown possessing unlimited jurisdiction*." (Roberts-Wray 1966, pp. 47-8; italics added). Because the internal affairs of a "Protectorate" came under the control of the Crown, as was the case for all colonies except for the self-governing Dominions, British officials included them in the official list of British dependencies. While "Protectorates" were typically subject to "indirect rule," they were subject to imperial control through the framework of Crown Colony government as the Governors and Legislative Councils of colonies were typically empowered to legislate for neighboring "Protectorates" (see Table 1.1). Analogous arrangements were used to exert British influence in "Protected States," e.g. the Malay States that came under British protection around the turn of the nineteenth century, where the local sovereign exercised power with the "advice" of British Residents or Advisers, both of whom were linked to the metropolitan government as members of the colonial civil service. In the case of the Malay States, their British Residents or Advisers were sent out from the Crown Colony of the Straits Settlements.

Table 1.1: Legislative Institutions of the British Dependencies of the Colonial Office *circa* 1940

Legislative Arrangements	Colonies or Protectorates	Notes
Limited form of self-Government; Secretary of State has power to give directions (1)	Ceylon	
Elected House of Assembly and nominated Legislative Council (3)	Bahamas, Barbados, Bermuda	This form of government was the old representative system.
Legislative Council consisting partly of elected, nominated and official members; official members are *not* in the majority but Governor possessed powers to control legislative process, e.g. through the nomination of members or by enacting legislation against the vote of the majority (14 when each of the Presidencies of the Leeward Islands with Legislative Councils are counted as well)	British Guiana, British Honduras, Dominica (Windward Islands), Grenada (Windward Islands), Jamaica, Leeward Islands (see note), Malta, Mauritius, St. Lucia (Windward Islands), St. Vincent (Windward Islands), Trinidad and Tobago.	The Leeward Islands' Legislative Council has concurrent legislative powers with the subordinate legislatures of its four Presidencies: Antigua (with Barbuda); St. Christopher and Nevis (with Anguilla), Monsterrat and Virgin Islands. The Virgin Islands has no Legislative Council. The Windward Islands had no general legislature. Instead, each of the colonies (Dominica, Grenada, St. Lucia and St. Vincent) within this federated grouping possessed its own Legislative Council.
Legislative Council consisting partly of elected and/or nominated members, and official members; official members are in the majority (9)	Fiji, Gold Coast, Kenya, Nigeria (Colony and Protectorate), Northern Rhodesia, Sierra Leone (Colony and Protectorate), Straits Settlements.	
Legislative Council consisting partly of nominated members, who are not officials, and partly of official members (8)	Falkland Islands, Gambia, Hong Kong, Nyasaland Protectorate, Seychelles, Uganda Protectorate, Tanganyika Protectorate (League of Nations Mandates), Zanzibar	The constitutions of these dependencies provided for official majorities.
No Legislative Council; legislation is either made by a Governor or by the Governor and an Advisory/Executive Council (14)	Aden (Colony and Protectorate), Ashanti, British Solomon Islands Protectorate, Cyprus, Gambia Protectorate, Gibraltar, Gilbert and Ellice Islands Colony, Kenya Protectorate, Northern Territories of the Gold Coast, Palestine (excluding Trans-Jordan; League of Nations Mandate); St. Helena, Somaliland Protectorate, Virgin Islands (Leeward Islands)	The Legislative Council of Kenya is empowered to legislate for the Kenya Protectorate. The Legislative Council of Gambia is empowered to legislate for the Gambia Protectorate
Mandates on behalf of the League of Nations without Legislative Council (2)	Cameroons under British Mandate, Togoland under British Mandate	The Governor of Nigeria is empowered to legislate for the Cameroons (Northern and Southern parts). The Legislative Council of Nigeria is also empowered to legislate for the Southern part of the Cameroons. The Governor of the Gold Coast is empowered to legislate for Togoland.

Note: This table was compiled with reference to Harding and Gent, *The Dominions Office and Colonial Office List 1940*, p. 888, Wight (1940, pp. 170-1). When inconsistencies in classification were identified, they were verified with Colonial Office, *The Colonial Office List 1946* (London: HMSO, 1946).

As a legalistic mode of imperial control, Crown Colony government was based upon five tenets. Firstly, the Crown's legislative powers over a colony or protectorate, i.e. the use of Orders in Council or Proclamations to enact ordinary legislation without the need for the consent of the colony's inhabitants, was preserved.[14] Secondly, beyond the maintenance of the Crown's legislative authority, the Crown's officials also instituted a subordinate legislature, e.g. the Governor alone or with a Council, with limited powers to enact colonial laws. Typically named the Legislative Council and expressly constituted in the form of Royal Instruments issued to the Governor (see Wight 1946, p. 174), this body operated according to rules that allowed the Governor and the Colonial Office to initiate, amend and disallow colonial legislation. Unlike the elected Assembly, the legislature that was found within the thirteen American colonies and the older West Indian colonies governed by the old representative system, the Legislative Council was a means of imperial control.[15] Statutes enacted by the Legislative Council were designated as "ordinances"[16] – at its root, the word means orders given by an authority.

Thirdly, to maintain the Governor's control over the Legislative Council, metropolitan officials limited the representation of local interests on the Council when they drafted the constitutions of a Crown Colony. Even when the number and proportion of elected members of the Legislative Council eventually increased to a significant extent

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[14] The exceptions to this rule were the older West Indian colonies, i.e. British Honduras, Jamaica and the Leeward Islands, where the Crown's legislative powers had been lost through the previous grant of an Assembly prior to the establishment of Crown Colony government. Harding and Gent, *The Dominions Office and Colonial Office List 1940*, p. 888.

[15] Notably, unlike the old system of representative government, the Governors of Crown Colonies were no longer dependent upon an elected assembly to appropriate public revenue for the maintenance of the colonial administration and the remuneration of the colony's officials.

[16] In contrast, statutes passed by Legislative Assemblies were designated as "Acts." Section 54 of Chapter I in Her Majesty's Stationery Office (H.M.S.O.), *Rules and Regulations for Her Majesty's Colonial Service* (London: Eyre and Spottiswoode, 1867), p. 14.

in some colonies, their Governors could – in theory – still form a legislative majority by combining the official vote with the votes of those "unofficial"[17] members whose nomination depended on the Governor.[18] In some colonies, e.g. British Guiana and Mauritius, their Governors also possessed powers that allowed him to enact legislation against the majority vote of the Council. Fourthly, the Governor also possessed delegated and discretionary powers, e.g., over the declaration of martial law, as the Crown's representative in the colony. In addition, the Colonial Office typically deferred to the Governor in the making of colonial policy as a matter of practice on the grounds of *his* experience and professed expertise in local affairs. However, the Governor could also be overruled if his advice ran contrary to metropolitan policy (see Chapter Five). And, lastly, even though the Governor was entrusted with a tremendous range of powers, the appointment, promotion and removal of the Governor and his subordinates were still subject to the approval of their superiors, meaning that the Colonial Office could always sanction acts of official misconduct or reward officials' achievements.[19]

By establishing the institutional framework of Crown Colony government across the empire over the nineteenth century, metropolitan officials institutionalized a set of formal rules and practices regarding the maintenance and exercise of the constitutive and

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[17] The term "unofficial member" simply means a member of the Legislative Council who was not part of the colonial civil service. Colonial officials who served on the Legislative Council either served in an *ex officio* capacity or they served because the Governor nominated them as members. Typically, unofficial members were nominated, or elected, because they exerted a significant influence within colonial society.

[18] As I detail in Chapter Five, metropolitan officials did not over-rule the opinions and votes of local elites and even officials unthinkingly. These subordinate actors could make use of their separation from the metropole in distance and time to delay or even challenge the application of metropolitan instructions; however, they did so at the risk of losing their positions. Thus, in practice, imperial control depended on how metropolitan officials adjudicated long-distance debates through both command and compromise.

[19] Promulgated by the Colonial Office, the rules and regulations of the colonial civil service were published and circulated throughout the empire, and they included instructions on the Governor's duties, the appointment of subordinate colonial officials, as well as directions regarding how official correspondence was to be conducted.

legislative powers of the Crown[20] over the colonies. The historical emergence of this form of imperial control also signaled the transformation of British colonial rule in ways more consonant with modern understandings of colonialism – one defined in terms of the conquest and rule of a conquered territory and its inhabitants rather than the settlement and cultivation of a new land by an emigrant population (Steinmetz 2014, p. 79). Indeed, in grasping for the common thread of the colonial governments of the mid-eighteenth century British Empire, we find the "liberty" that the American and West Indian colonists enjoyed in their institutions of representative government while the empire remained a "museum of medieval and near contemporary institutions," ranging from Royal grants of territory to feudal proprietors to "chartered governments" (Fieldhouse 1982, pp. 60-2).

In the early modern British Empire, "liberty" was embodied in the institution of the Assembly, whose members were elected as representatives (of white male property-holders in the colony) with the power to make laws and, more importantly, control taxation and the use of public finances – powers that often set the Assembly at odds with the Governor, who could still disallow the Assembly's acts and dissolve the Assembly to call for new elections (Go 2011, p. 43). As Fieldhouse (1982, p. 61) thus notes, "In no colonial empire then or since had the metropolitan state less direct power." Similarly, Greene (1994, p. 48), in his account of the extended controversy over the privileges of the Jamaican Assembly from 1764 to 1766, observes that the early modern British Empire "was not a highly centralized entity in which the metropolis enjoyed a monopoly of uncontested constitutional authority." In contrast to the parcellization (and appropriation)

[20] These powers, together with the powers to acquire colonies and also make treaties of war and peace, are part of the Crown's Prerogative powers (Roberts-Wray 1966, p. 150).

of sovereign power in a system of patrimonial domination (Adams 2005, p. 17), the Crown's exercise of imperial control over colonies that possessed Assemblies was hindered by settlers' attempts to imitate English institutions of the common law and parliamentary government in their new settlements (Greene 2010, pp. 5-7). By mimicking and going beyond the range of parliamentary powers established in Britain, these settlers' attempts to develop the powers of their local Assemblies set legal limits to the exercise of the Crown's sovereign powers under the guise of the fundamental rights of Englishmen.

Because local elites in the colonies could use the legislative powers of their Assemblies to express their political opposition to metropolitan directives or even refuse to fund the Governor and his administration, the Crown's exercise of imperial control was problematic and always contingent upon local consent. Within the early modern British Empire, there were, in effect, two loci of sovereign decision-making within the colonies, the Governor and the Assembly. Even though the Governor acted as the Crown's representative and could veto colonial legislation, neither he nor the Crown could impose ordinary laws, i.e. laws that did not change the colony's constitution, upon the colony without the Assembly's consent. In contrast, as I have outlined in this section, the Crown's unimpaired authority over colonial government and law was the underlying premise of Crown Colony government (Wight 1946, p. 57).[21] Under this modern system of colonial rule and imperial control, Governors, as agents of the Crown, controlled the legislative process and did not require the consent of an Assembly to enact colonial laws.

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[21] Scholars of the British Empire, e.g. Fieldhouse (1982, pp. 55-7) and Go (2011, p. 32n10), have cautioned against over-emphasizing the break between the "first" [i.e. eighteenth century and before] and "second" [nineteenth century] British empire because of the continuities of territories and traditions between the two. However, as Fieldhouse (ibid) acknowledged, the "basic British colonizing tradition" identified with the American colonies could be contrasted with the "traditions which were evolved later to meet the different problems of the colonies acquired for the first time in and after 1763," the end of the Seven Years' War.

This contrast in governing institutions then points to an historical puzzle: how and why was Crown Colony government instituted as the standardized form of colonial rule and imperial control in the modern British Empire? How did the grounds of empire change such that it was no longer possible to imagine an empire bound by English liberties?

The Meanings and Uses of Crown Colony Government: The Problem of Difference

In this dissertation, I tackle this empirical puzzle by examining two colonies that were reconstituted as Crown Colonies in the latter half of the 1860s, Jamaica and the Straits Settlements (Singapore, Penang and Malacca). I argue that the Crown's contemporaneous establishment of Crown Colony government in these two colonies provides apposite lenses for us to observe how the processes and understandings that drove the institutionalization of Crown Colony government worked. The significance of these two colonies stems from the timing of their reconstitution, which coincided with a period when the Colonial Office revised its classification of "Crown Colonies." As long-standing British colonies at the time of their reconstitution,[22] the cases of Jamaica and the Straits Settlements also reveal how colonial officials adapted the use of Crown Colony government beyond its initial origins in the government of conquered or ceded colonies.[23]

Even at the beginning of the 1860s, "Crown Colonies" continued to be another official term of reference for conquered or ceded colonies, as contrasted to colonies with "the old Colonial system of Government," which officials held to be "legally entitled to

[22] Jamaica was conquered from the Spanish in 1655, while the East India Company acquired each of the Straits Settlements (Singapore, Penang and Malacca) through treaties before their merger as a single colony in 1826. Despite their acquisition through conquest or cession, they had been treated as "settled colonies" in law. See *Campbell v. Hall* (1774) 1 Cowp. 204. and *Regina v. Willans* (1858) 3 Ky. 16.

[23] The official term of art, "Crown Colonies," was first applied to Britain's territorial gains from the Anglo-French War of 1793-1815 (Wight 1946, p. 57).

Representative Institutions," and colonies governed under the special enactments of the British Parliament.[24] Given such, Britain's empire still seemed to be a jumble of governing institutions, reflecting the distinct circumstances and authorities with which each colony had been acquired and constituted. Furthermore, even though the basic institutional elements of Crown Colony government already existed in colonies like Trinidad and Ceylon, metropolitan officials had yet to recognize Crown Colony government as the standard form of colonial rule across the British Empire.

Table 1.2: Official Classification of British Colonies in 1862

Colonies with Representative Institutions on the old West Indian Model	Crown or Conquered Colonies	Colonies with a single nominated Legislative Council established under Parliamentary Authority	Colonies in which Representative Institutions exist under Parliamentary Enactment
Colonies with a Council and Assembly: Antigua, Dominica, St. Kitt's, Montserrat, Nevis, Barbados, Grenada, St. Vincent, Tobago, Bermudas Colonies with an Executive Council, Legislative Council and Assembly: Nova Scotia, New Brunswick, Prince Edward's Island, Jamaica, Bahamas, Honduras, Vancouver's Island Colonies with a Single Chamber or Council that consists of both nominees and representatives: Turks Islands, Virgin Islands (Tortola), Bay Islands (Elective)	No Legislative Council: Gibraltar, Heligoland, British Kafaria Single Legislative Council: St. Lucia, Trinidad, Mauritius, Ceylon, Labuan, British Guiana (governed by "Court of Policy) Mixed Councils that are partly Representative, by Charters from the Crown: Natal, Malta Conquered Colony in which the Crown has ceded its Legislative rights: The Cape of Good Hope (governed by elective Council and Assembly, as established by the Crown)	Sierra Leone, The Gambia, The Gold Coast, Falkland Islands, Hong Kong, Western Australia, St. Helena	Nominated Council, and Elective Assembly: Canada, Newfoundland, New South Wales, New Zealand, Elective Council and elective Assembly: Tasmania, Victoria
Total = 20	Total = 12	Total = 7	Total = 6

Section 53, Chapter 2 of "Rules and Regulations for Her Majesty's Colonial Service," enclosed in Sargeaunt and Birch, *The Colonial Office List for 1862*, pp. 77-8.

[24] The third class of colonies included the self-governing colonies in Australia and Canada together with colonies, e.g. Hong Kong and Sierra Leone, whose nominated Legislative Councils were established under the authority of the British Parliament – this latter group possessed similar forms of government as the "Crown Colonies" but they were not recognized as such. "Rules and Regulations for Her Majesty's Colonial Service," enclosed in William C. Sargeaunt and Arthur N. Birch, *The Colonial Office List for 1862* (London: Edward Stanford, 1862), pp. 76-8. This is the first volume of *The Colonial Office List*.

This provisional understanding and usage of the term, "Crown Colonies," changed when the Colonial Office reclassified this scheme and its institutional principles – an occurrence that coincided with the reconstitution of Jamaica and the Straits Settlements as Crown Colonies in 1866 and 1867, respectively. By 1867, the Colonial Office divided the colonies into three exclusive classes, with each being defined by the presence or absence of imperial control over colonial legislation and the staffing of the colonial administration. Unlike before, metropolitan officials defined Crown Colonies in terms of their institutional principles, contrasting them to colonies that maintained the old representative system and those that achieved "self-government."

> 1. Crown Colonies, in which the Crown has the power of legislation and the administration is carried on by public officers under the control of the Home Government.
> 2. Colonies possessing Representative Institutions but not Responsible Government, in which the Crown has not the power of legislation but the Home Government retains the control of public officers.
> 3. Colonies possessing Representative Institutions and Responsible Government in which the Crown has not the power of legislation, and public officers, except the Governor, are not under the control of the Home Government.[25]

As encoded in its *Rules and Regulations,* the Colonial Office's application of this scheme to its list of colonies revealed two social features of imperial policy towards colonial government (see Table 1.3). Firstly, almost all the white settler colonies in Australia and Canada had achieved responsible government – also known as "self-government." Responsible government meant that the Crown had ceded its legislative powers and its control over the appointment of public officers, except the Governor, to the elected legislature; the Governor and his Ministers in particular were thus made

[25] Section 1 of Chapter I in H.M.S.O., *Rules and Regulations for Her Majesty's Colonial Service*, pp. 1.

responsible to the colony's elected legislature. Secondly, about half of Britain's colonies at this point were then classed as "Crown Colonies." The old representative system was no longer the norm since the number of Crown Colonies had grown to outnumber the colonies that maintained the representative institution of the Assembly. Furthermore, after Jamaica's Assembly set a precedent by abolishing itself at the 1865, several other Assemblies in the Britain's West Indian colonies followed suit over the late 1860s and the 1870s. By 1881, the Assemblies of Bahamas, Barbados and Bermuda were the only remainders of the old representative system within the modern British Empire.[26]

Table 1.3: Official Classification of British Colonies in 1867

Crown Colonies	Colonies with Representative Institutions but without Responsible Government	Colonies with Representative Institutions and Responsible Government
Legislation by Governor (2): Gibraltar, St. Helena Legislative Council constituted by Crown (11): Malta, Ceylon, Mauritius, Hong Kong, Labuan, British Guiana, Trinidad, St. Lucia, Monsterrat, Virgin Islands, Heligoland Legislative Council constituted by Crown under authority of a Parliamentary statute (9): Jamaica, Straits Settlements, British Columbia, Western Australia, Sierra Leone, Gambia, Gold Coast, Lagos, Falkland Islands	Government by Governor with elective Council and elective Assembly (1): Cape of Good Hope Government by Governor with nominated Council and elective Assembly (5): Barbadoes (*sic*), Grenada, Tobago, Bahamas, Bermuda Government by Governor with single Legislative Chamber, partly elective and partly nominated (8): Natal, Antigua, St. Christopher's, Dominica, Honduras, Turks Islands, Nevis, St. Vincent	Legislature consists of an elective lower legislative chamber and elective upper chamber (4): Prince Edward Island, Victoria, Tasmania, South Australia Legislature consists of an elective lower legislative chamber and nominated upper chamber (5): Canada, Newfoundland, New South Wales, Queensland, New Zealand
Total = 22	Total = 14	Total = 9

Sections 2-4 of Chapter I in H.M.S.O., *Rules and Regulations for Her Majesty's Colonial Service*, pp. 1-3.

As the Colonial Office's revised classification of colonies also demonstrated, Crown Colony government had been established mainly across colonies with limited European settlement and large "native" populations, suggesting that the Crown and its officials associated the existence of racial difference within a colony with the need to

[26] Section 3 of Chapter I in "Rules and Regulations for Her Majesty's Colonial Service," enclosed in Edward Fairfield, *The Colonial Office List for 1881* (London: Harrison, 1881), p. 270.

exercise imperial control.[27] In this light, both Jamaica and the Straits Settlements present useful cases for our purposes not only because of the timing of their reconstitution as Crown Colonies, but also because scholars have understood them as "plural societies" defined by the existence of separate racial sections (Furnivall 1956; Smith 1974). Hence, they allow us to examine how metropolitan officials viewed the character of societies that were defined by the co-existence of various racial groups, including European settlers, and to evaluate whether and how officials' understandings of this perceived social fact were related to the institutionalization of Crown Colony government across the empire.

Jamaica and the Straits Settlements were the "paradigmatic cases" that demonstrated to British officials that the institutional elements of Crown Colony government, as they existed in the colonies conquered during and after the Anglo-French War of 1793-1815, were more than *ad hoc* and temporary means of administering conquered colonies; for this authoritarian mode of colonial government could also be extended to a broader grouping of colonies defined primarily by their large racially different populations and limited European settlement, i.e. "plural societies" (Kuhn 1996; Flyvbjerg 2006, pp. 232-3). In this sense, the cases of Jamaica and the Straits Settlements were paradigmatic because their reconstitution as Crown Colonies prompted officials to "activate the family resemblances" between these cases and the existing Crown Colonies, e.g. Trinidad and Ceylon, when they sought to extend the establishment of Crown Colony government beyond its initial scope of application (Biernacki 2012, pp. 150-1).

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[27] One exception to this norm was the Cape of Good Hope, which possessed representative government and would later be granted self-government. The population of the colony was diverse and Europeans were reported to be about 37% of its total population of 496,381 persons in 1865. Even so, this is an exception that proves the rule. The number and proportion of Europeans in the colony was large compared to other colonies; e.g. Jamaica's white population in 1865 was only about 3% of its total population of 441,264. Arthur N. and William Robinson, *The Colonial Office List for 1867* (London: Harrison, 1867), pp. 30 & 52.

Understood as racially divided societies that were marked by the risk of disorder due to the purported lack of common customs and social bonds between its diverse inhabitants, these "plural societies" were then viewed more as artificial products of conquest and/or colonial rule rather than as "traditional societies" similar to British India, which were seen as "functional, cultural wholes" (Mantena 2010, p. 15). Whether wrought by the forces of slavery or the influx of capital and "free" migrant labor, the populations of plural societies were largely composed by persons who were neither indigenous, in the true sense of the word, nor assimilable to the limited community of British settlers.

The pivotal changes in the application of Crown Colony government towards Jamaica and the Straits Settlements as plural societies thus led to officials' reformulation of the institutional definition, principles and uses of this form of colonial rule. Hence, with the reconstitution of Jamaica and the Straits Settlements, Crown Colony government became the Crown's standardized solution to the inter-related problems of difference and imperial control in an expanding empire. The emergence of this formalistic mode of imperial control and colonial rule over the mid- to late-1860s was historically significant in the institutional development of modern British colonialism. On the one hand, as a monocratic mode of colonial rule, Crown Colony government became the apparatus for "direct rule" by the Crown, whose local agent was the Governor, as colonial officials and local elites rejected the fractious political arrangements of the old representative system – a dynamic exemplified in the case of post-emancipation Jamaica. On the other hand, Crown Colony government provided the constitutional terms for the Colonial Office's expansion of its long-distance control over the government of new foreign territories and populations – a process demonstrated in the case of the racially mixed Straits Settlements.

Furthermore, the problem of difference that racially divided societies like Jamaica and the Straits Settlements posed was a long-standing one that concerned the political stability and legitimacy of colonial rule. To the British, the potential social sources of instability within "plural societies" seemed to require the exercise of long-distance imperial control over colonial legislation and the appointment of colonial officials. Indeed, the Crown and its officials had confronted the recurrent problem of difference as the empire expanded through conquest, despite the loss of the American colonies, over the late eighteenth and early nineteenth centuries. As the British Crown added more colonies to its empire, Crown Colony government emerged as the cumulative product of metropolitan officials' reiterative responses to the varying ways that the problem of difference manifested itself in the newly conquered or ceded colonies within the East and West Indies.[28] Even so, the model of Crown Colony government was initially limited to its application to this particular group of colonies in light of the ostensibly similar historical circumstances of their acquisition through war.

In contrast to the overarching context of war that shaped the acquisition of the initial Crown Colonies, British officials' recognition of the problem of difference took center stage when they reconstituted Jamaica and the Straits Settlements during the liminal period of the mid-nineteenth century. As a different conception of empire and colonialism took hold of the "official mind" (Robinson and Gallagher 1981), there were two aspects to the problem of difference that surfaced in official discourse about the appropriate forms of colonial government: one, the maintenance of British domination

[28] The initial "Crown Colonies" included the following: the Cape of Good Hope (or Cape Colony), Ceylon, Trinidad, Malta, British Guiana, St. Lucia, Heligoland, Mauritius and the protectorate of the Ionian Islands (Wight 1946, pp. 48-53). Their acquisition marked the growth of Britain's empire beyond the Atlantic.

and imperial control in societies mainly populated by "native," i.e. non-European, populations; and, two, the apparent absence of cohesion, or social integration, within "plural societies" given their perceived divisions along the lines of race and religion.

Firstly, to the British, difference was a problem partly because of the way they defined themselves; within the self-understanding of the British, the right to be governed according to laws one consented to and the right to have one's liberties protected by law were essential to their national identity and, more notably, status (Greene 2010, pp. 3-4). When confronted by colonized peoples who were of different origins, British officials and settlers then faced the question of whether the colonized were entitled to the same privileges. In this regard, the problem of difference also heightened British officials' awareness of the limits and risks to imperial control within the institutional framework of the old representative system of colonial government. Simply put, the existence of large non-European populations in a colony presented a political problem for British settlers and the Crown and its officials. Should the members of racially different populations be granted "liberty" in the form of representative government and the legal protection of their individual rights, they could then claim that they were the equals of the British in legal and political terms, effectively undermining the social basis of colonial domination.

Secondly, the problem of difference posed a more fundamental challenge to British claims of sovereignty because officials' recognition of pluralism within a colonized society raised questions about the colonial state's legal authority and its exercise of power. If the varied social groups within a colony possessed differing beliefs and laws, how could the colonial state claim to be the definitive source of legal authority and thus construct a legitimate "state-centered legal pluralism" (Benton 2002, p. 6)? And,

if sovereignty required the establishment of a legitimate, and stable, "*unity* of power" through the law (Foucault 2003, p. 44; italics added), was it even possible for officials to articulate a cohesive framework of common beliefs that could justify, or at least "naturalize," colonial rule in the face of religious and racial divisions in a colony? In the following section, I address how the perceived conditions of the "plural society," as first conceptualized by Furnivall (1956), posed a challenge to British officials, who had to reconsider and re-formulate their taken-for-granted principles of law and government within new social contexts, since it was no longer possible to assume the prior existence of common customs, traditions and usages amongst the governed. Modern colonialism thus consisted of a different approach to the establishment of social and political order.

The Racial Sociology of Empire and the Concept of Plural Society

When confronted by the problem of difference during the long nineteenth century, British officials formulated a racial sociology of empire that was realized in their eventual imposition of a scheme of constitutional progression upon a diverse range of colonies – a formalized scheme of colonial rule that rendered the seemingly "backward" and "less civilized" members of plural and traditional societies as less capable of "liberty" and "self-government" and more in need of the Crown's protection. At its most basic level, this racial sociology of empire was formed by the body of understandings, including claims derived from ethnographic knowledge of culturally different "native," i.e. non-European, populations (Steinmetz 2007; Goh 2007; Wilson 2011), which colonial officials as well as local elites had expressed and accumulated regarding the racial composition and character of colonized societies. Driven by the process of long-

distance imperial control and colonial policy-making, colonial officials and elites articulated these comparative understandings of cultural difference together with ontological assumptions of the sources of social order in such societies and their apposite forms of government. This was because nineteenth century social theory pushed back against the priority granted to politics and sovereign power in the making of order within Enlightenment and eighteenth century thought (Mantena 2010). By reversing the line of social causation, Victorian-era intellectuals (and colonial officials) like John Stuart Mill and Henry Sumner Maine argued that the propriety of forms of government derived from the character and organization of a people or "society" as a whole rather than abstract assumptions of universal human nature. An important corollary of this view was that English institutions of government and law were not necessarily appropriate for the different populations and societies subject to the British Crown – a view that was manifest in the divergence between Crown Colonies and the self-governing colonies.

Nevertheless, since officials across the empire used their evaluations of difference to justify and maintain British colonial rule as well as their ideals and policy preferences with respect to the colonies, their practical claims of the racial sociology of empire could be inconsistent and even conflict so long as they did not threaten the bottom-line of British domination. Drawing from Mantena's (2010, p. 12) insightful examination of the political and intellectual origins of "late imperial ideology," I add that the significance of the racial sociology of empire rested on its use as an *alibi* that displaced the "moral and political responsibility for imperial domination" from the colonizer onto the colonized.[29]

[29] Mantena's (2010, p.12) poignant use of the Latin word, *alibi*, harkens back to its origins as a term used to claim the displacement of the speaker's position elsewhere. In its contemporary usage, the term also carries a moral and legal significance that speakers use to claim the innocence of their actions and intentions.

In other words, colonial officials and elites could claim that the extension of the reach and sovereign powers of the Crown across the changing empire was necessary because the character and social organization of the colonized demanded British protection. Hence, beyond the irruptive use of violence, British colonial domination was legitimated and sustained through an evolving body of knowledge that allowed colonial officials and elites to recursively imagine and act upon the social basis and purposes of colonial rule. As a politically contingent set of understandings that shaped the constitutions and laws of colonial governments, or their "native policies,"[30] the racial sociology of empire was thus articulated in the making of colonial constitutions and laws as the ideas and interests of British officials engaged in the long-distance imperial control were translated into the official forms, laws and policies of the colonial state. The processes of colonial state-building, in short, were "refracted" through the racial sociology of empire (Wilson 2011).

Entangled with their exercise of sovereign power over foreign populations through the comparative prism of the racial sociology of empire, British officials' approach to colonial governance was predicated upon the perceived cultural difference *and subordination* of the so-called "natives" in contrast to the British – a principle of political practice that Chatterjee (1993) calls the "colonial rule of difference." As an integral element of the emergent racial sociology of empire and colonial state formation, the "colonial rule of difference" demarcated the political limits to epistemological and policy conflicts amongst colonial officials and elites: for even when colonial officials or elites insisted upon the application of liberal ideals like the "rule of law" in the colonies,

[30] According to Steinmetz (2007, p. 43; italics in original), the "native policy" of European colonizers was "concerned specifically with the *stabilization* of the culture, subjectivity, and activities of the colonized on the basis of clear definitions." Steinmetz's conceptualization also opens up the question of how the racialized definitions of the "culture, subjectivities and activities" of the colonized were actually stabilized.

the cultural inferiority and British domination of foreign populations, or their need for the Crown's protection, were not subject to doubt. This echoes Said's (1979, p.7) reflections on the flexible ideological nature of Orientalism, which "[in] a quite constant way…puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand." Given the structure of domination of the "colonial rule of difference," the pursuit of English liberal ideals in making of colonial laws and policy was fraught even when colonial officials sought to adapt the application of these seemingly universal ideals to the differing contexts of the colonies (see Chapter Five).

The "colonial rule of difference" and the racial sociology of empire emerged partly as a political response to the rise and institutionalization of humanitarian long-distance advocacy networks that were woven into the expansion of European empires as part of missionary campaigns to save and protect those subject to the mercy of the ascendant European powers, i.e. specifically, "natives" and slaves (Stamatov 2013). Steinmetz (2007, p. 37) thus observes that the "colonial rule of difference" surfaced as a political principle of colonialism in the latter half of the eighteenth century as "it became necessary…to actively defend conquest, subjugation, and the establishment of conditions of permanent domination and inequality." While Steinmetz (*ibid*) attributes the salience of the "colonial rule of difference" during this period as imperial states' response to the "discourses of democracy, political secularism, cultural relativism, abolitionism and even explicit anticolonialism,"[31] my research identifies a more historically proximate cause that has been largely overlooked, the changing social contexts of imperial expansion and

[31] For example, both Adam Smith and Jeremy Bentham expressed critical or skeptical views of Britain's imperial policy and colonialism in works published in the latter half of the eighteenth century (Pitts 2006).

colonial rule, that account for the institutionalization of the "colonial rule of difference" and the growing salience of an evolving body of comparative knowledge about colonized peoples and societies across the British Empire. Indeed, the principle of the "colonial rule of difference," as well as the imperative of imperial control, only overshadowed the English traditional ideals of "liberty" as the foundational principles of British colonialism when the expansion of empire beyond the Atlantic and the emancipation of slaves led to the Crown's incorporation of new classes of persons in different social configurations.

Specifically, the extension of the Crown's sovereignty and legal authority over new subjects and territories in India, as well as other smaller possessions in the East and West Indies over the war-filled latter decades of the eighteenth century and the front half of the nineteenth century – notwithstanding the loss of the thirteen American colonies – did not only pose the renewed problem of imperial control (Wight 1946; see Benton 2002 on the expansion of the Crown's legal authority in eighteenth century British India). Confronted by populations that the British could no longer legally exclude and remove as enemy aliens, as they did with the "Indians" in North America, or dehumanize and enslave as chattel, the Crown and its officials began to formulate new principles of colonial rule and imperial control to secure and maintain British dominance in changed social contexts. This was partly because conquest and emancipation in this period raised the prospect of the incorporation of "natives" and freedmen as British subjects with equal rights and status as British settlers and their European peers. Beyond colonial officials and elites' anxieties over the incorporation of difference, the perceived social configuration of these colonies also diverged from the paradigm of British settlement, where English customs and law had prevailed as part of the "birthright" of Englishmen.

Therefore, whether they were defined by the co-existence of culturally different "races" or the presence of a long-standing civilization, the social organization and character of these colonies were then subject to speculation, investigation and debates as British officials sought to relate the differing social conditions of these colonies to English traditions and ideals of law and government. This emergent racial sociology of empire was further given shape by the series of rebellions within the empire in the mid-nineteenth century, ranging from the 1857 "Sepoy Mutiny" in British India to the 1865 Morant Bay Rebellion in Jamaica. Notably, to Mantena (2010, p. 8), these events occasioned a crisis in Britain's liberal imperialism as "moral and political justifications of empire [premised upon the education and improvement of the colonized] soon gave way to the ascendancy of elaborate social, cultural, and racial explanations and alibis of European imperial domination." While I agree with Mantena's assessment of the emergence of a distinct imperial ideology – what I call the racial sociology of empire – by the time of these rebellions, my research reveals that this ideological formation was already nascent in official discourse since British officials first formulated the elements of Crown Colony government as a mode of colonial rule for conquered colonies over the early half of the nineteenth century (see Chapter Two). Thus, when the re-constitution of Jamaica and the Straits Settlements occurred in the 1860s, officials at Whitehall and the colonies drew from and re-imagined the racial sociology of empire, as articulated in prior colonial discourse, in crafting differing forms of colonial rule. The institutionalization of Crown Colony government as a form of "direct rule" by the Crown thus resulted from their re-making of colonialism, and, as Mantena (2010) reveals, "indirect rule," which depended on the institutional framework of the former, also developed soon after.

Table 1.4: The Racial Sociology of Empire and the Systems of Colonial Rule

	Source of Social Order: External (political/economic)	Source of Social Order: Internal (social ties/culture)
Principle of Governance: the Assimilation of English Liberties	British "Settler Societies," or "Plantations," and the Old Representative System – e.g. the thirteen American colonies and the pre-emancipation West Indian colonies	White "Settler Societies" and "Self-government" – e.g. Australia, Canada and, subsequently, South Africa
Principle of Governance: the "Colonial Rule of Difference"	"Plural Society" and "Direct Rule" – e.g. Jamaica, the Straits Settlements and Presidencies of British India (Madras, Bombay, and Bengal)	"Traditional Society" and "Indirect Rule" – e.g. the Federated Malay States, the Residency System in British India and, to a limited extent, the Crown Colony of Fiji

See Fisher (1991); Holt (1991); Greene (2010); Mantena (2010, pp. 171-177); (Go (2011, pp. 94-102)

Within the racial sociology of empire, the concept of "plural society" accounted for the need for "direct rule" by the Crown. First coined by J.S. Furnivall (1956, p. 306), who served for more than twenty years as a colonial official in Burma, in his landmark comparative study of Netherlands India, i.e. modern Indonesia, and Burma, which was governed as part of British India, the concept of "plural society" denotes a society with "three characteristic features: the society as a whole comprises separate racial sections; each section is an aggregate of individuals rather than a corporate or organic whole; and as individuals their social life is incomplete." Juxtaposed against the purportedly homogenous (and civilized) "modern societies" of the Western imperial powers as well as the seemingly backward "traditional societies" within British India, Furnivall's (*ibid,* pp. 303-12) bleak assessment of the withered state of social relations within colonies with racially differentiated populations constructed an image of vulnerable societies that were held together by economic relations, as enforced by the positive laws of the colonial state.

A "plural society," in this view, amounted to a commercial enterprise lacking in social or cultural restraints: "The only deterrent to unsocial conduct in production is the legal penalty to which those are liable who can be brought to trial and convicted

according to the rules of evidence of infringing some positive law." (*ibid*, p. 312) In place of the binding force of shared ideas of the good or customs, which were lost due to the social transformations wrought by modern colonialism, an imposed system of law seemed to be the sole means of securing order between persons within a plural society that had been transformed by the economic and political forces of colonialism. How then was law able to prevent the racial sections of a plural society from splintering apart?

While being the predominant source of order, law in a plural society under colonial rule was devoid of any social basis in shared custom or morality between the colonized and the colonizer – as befitting Furnivall's Hobbesian image of the *Leviathan*-like colonial state within plural society. In his description of the workings of colonial law, Furnivall's theory of the colonial state and law concords with Hussain's (2003, p. 65) analysis of colonial law in nineteenth century British India, where the influence of English law was most clearly found in the establishment of formal legal procedures. Similarly, as Ng (2009, p. 36) notes in his discussion of law in the Crown Colony of Hong Kong, the formal and procedural nature of English law presented a "consolatory form of legitimacy to the ruled" as colonial subjects could merely expect that laws "once declared, would be followed." While the legitimacy of colonial rule might be paper-thin, this exchange of obedience for legal consistency also constituted the relationship of sovereignty between the British Crown and its subjects. Like Thomas Hobbes' *Leviathan*, the Crown exchanged the promise of protection for subjects' obedience of its orders, while "justice" was founded upon this barefaced relationship of domination and trust.[32]

[32] Hobbes' (1985, p.201) conception of justice focuses on the maintenance of the promises that men make with one another: "*That men performe their Covenants made."* The covenant lay at the heart of the constitution of "Soveraigne Power," as it could be based alternatively on "Naturall Force; as when a man

Notwithstanding its unitary image of British sovereignty, the Hobbesian character of government and law in plural societies, as formulated by Furnivall (1956), is better understood as a historical product of contingent processes of political and legal ordering, as the re-constitution of Jamaica and the Straits Settlements as Crown Colonies indicate. The colonial *Leviathan* had to be made and its institutions were not simply imposed by the Crown upon conquered territories without political debate and conflict. The making of this artificial entity is an area for historical and sociological investigation, and thus not to be assumed in theory even though the monopolization of governmental authority in plural societies has been understood, regrettably, as part of the *theory* of "plural society."

To illustrate, in Smith's (1974, p. 86; italics added) development of Furnivall's concept, he posits, "Given the fundamental differences of belief, value and organization that connote pluralism, *the monopoly of power by one cultural section is the essential precondition* for the maintenance of the total society in its current form." In his view, "plural societies" are "institutionally split societies…[that] tend to rely…on regulation" because of their lack of "institutional motivations toward conformity with social norms" (*ibid*). Or, as Furnivall (1956, p. 308) stated, "there is no common social will." The issue with these propositions do not only lie with the reification of culture and race as rigid institutional boundaries, but also with the deduced need for authoritarian form of rule to maintain the organization and stability of a "plural society." In practice, British officials across the empire expressed similar assumptions when they sought to craft appropriate institutions of colonial government. Given such, the theory of "plural society" has been,

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[as the sovereign]…by Warre subdueth his enemies to his will, giving them their lives on that condition," or upon the mutual agreement of men to submit themselves to a holder of sovereign power (*ibid*, p. 228).

in fact, a re-articulation of British officials' understandings of the social organization and character of colonized societies, i.e. their racial sociology of empire.

In this dissertation, I argue that the institutionalization of an authoritarian form of colonial rule and imperial control, Crown Colony government, across the British Empire was a historically contingent solution to the problems of imperial control and difference that confronted British officials in the metropole and the colonies. Typically applied to plural societies over the nineteenth century and later, the constitutional framework and laws of Crown Colony government gave form to a nascent racial sociology of empire that justified the authoritarian control of plural societies and the simultaneous grant of "self-government" to the white settler colonies within the empire. When the divergent constitutional forms of these colonies were considered as a whole, they presented an altogether new conception of the British Empire, as Martin Wight (1952, p. 15) observed:

> The change from the old Empire to the new Empire was the change from a simple system to a double system of colonial government. The old representative system was replaced by crown colony government plus responsible government. These two were complementary, and developed side by side. But underlying the governmental change was the more profound development from a static to an evolutionary conception of empire. The old Empire was constitutionally a solar system, in which the dependencies, revolving at an inalterable distance, reflected the liberties of the mother-country. The new Empire is constitutionally a procession, in the dependencies are graded according to their degree of self-government.

Even though Wight's optimistic sketch viewed the modern British Empire as one defined by social progress and political evolution, the distinction between the multi-racial Crown Colonies and self-governing white settler colonies revealed a dual logic of empire – one cleaved into two by the enduring problem of difference. While English ideals of "liberty" continued to shape the political development of colonies where there had been

significant European settlement, the imperative of imperial control and the "colonial rule of difference" acted as a brake upon the constitutional "progress" of "plural societies" and "traditional societies" until the events of the Second World War fatally undermined British claims to superiority. This was because the making of colonial constitutions and laws by the Crown and its officials gave form to the racial sociology of empire and the "colonial rule of difference," as these legal forms were shaped by officials' understandings of the character of racialized "natives" and concerns over the perceived instability of colonial rule over racially divided societies. In this light, anxieties over the control of colonial difference – rather than English ideals of "liberty" – were the more profound force that shaped the legacies of colonialism for the post-colonial states that inherited the mantle and institutions of sovereignty. To paraphrase Marx (1978, p, 595), colonialism's legacies continue to weigh "like a nightmare on the brains of the living."

Looking Forward

This dissertation examines the empirical puzzle of the institutionalization of Crown Colony government in the modern British Empire to understand how a state governs a foreign territory and its inhabitants from afar. Focusing on the two paradigmatic cases of Jamaica and the Straits Settlements, this study examines the proximate historical events that led to British officials' application of this form of colonial government upon these plural societies, and the institutional consequences of these events for imperial control and colonial state formation across the rest of the multi-racial colonial periphery. Building on a recent turn in the historical sociology of empire and colonialism toward the significance of ethnographic knowledge production in

modern colonial rule (Steinmetz 2007, 2013; Goh 2007; Wilson 2011), I examine the social understandings that shaped the course of these transformative events and their far-reaching outcomes in the following chapters on the re-constitution of Jamaica and the Straits Settlements as Crown Colonies. Since the Crown's unimpaired authority over colonial lawmaking and the appointment of colonial officials defined Crown Colony government, these chapters also focus upon how these sovereign powers were justified by British officials as they formulated the constitutions and laws of these colonies from afar.

Before I turn to the transformative period of the mid-nineteenth century to examine the establishment of Crown Colony government in my cases, Chapter Two provides a legal history of Crown Colony government as an institutional form. Tracing the origins of Crown Colony government to the early modern English legal doctrine regarding the treatment of conquered territories and their inhabitants, this chapter highlights the foundations of colonial rule in the sovereign's act of conquest. By examining how the term, "Crown Colonies," came to be applied upon colonies that were conquered or ceded around the period of the Anglo-French War of 1793-1815, I show how the Crown and its officials confronted the inter-related problems of difference and imperial control in colonies like Quebec, Grenada, Trinidad and British Guiana. This chapter thus accounts for the origins of the basic elements of Crown Colony government.

Chapter Three turns to the establishment of Crown Colony government in Jamaica after the event of the 1865 Morant Bay Rebellion, and it focuses on the question of why British officials abolished the cherished institution of the Assembly and re-constituted the island. As I discuss, Jamaica's abrogation of representative government proved to be a pivotal moment in the replacement of the old representative system of

colonial government by Crown Colony government within the West Indies. Furthermore, this historical event sheds light on how the emancipation of slaves in 1838 changed the political and social contexts faced by British officials, who had to deal with the intransigent political opposition of the planter-dominated Assembly when they sought to incorporate freed persons as subjects (and wage labor). In this regard, this chapter examines British officials' articulation of a racial sociology of empire not only in relation to the racialized laws and politics of Jamaica and Britain, but also to the legal architecture of imperial control.

Chapter Four then moves the focal point of our attention to the colony of the Straits Settlements in the East Indies. While the re-constitution of the Straits Settlements as a Crown Colony in 1867 was the result of administrative deliberations that were not occasioned by a violent act of rebellion against British authority, I examine how local elites, particularly European merchants, and the Straits Settlements' first Chief Justice, Sir Peter Benson Maxwell, clashed with the new Governor, Sir Harry St. George Ord, over the constitution and administration of the colony's courts and the underlying principles of Crown Colony government. In this regard, I demonstrate how local elites and British officials understood the racially diverse context of the Settlements, and highlight how these understandings shaped the prolonged conflict between local elites and the Chief Justice with the Governor. Notably, I evaluate how and why events in the Settlements then led to the 1870 Privy Council Memorandum on the differing terms of appointment and independence of colonial judges across the empire. As the Memorandum stated, judges in Crown Colonies served on terms that differed from their counterparts in self-governing colonies, and were more easily suspended for misconduct.

In my final empirical chapter, Chapter Five, I adopt a different tack by going beyond the formative events of the re-constitution of Jamaica and the Straits Settlements as Crown Colonies to examine the institutional consequences of the establishment of this mode of imperial control and colonial government. This chapter focuses on the *carnal* practices and politics of long-distance imperial control in relation to the "protection," i.e. regulation, of "native" populations in the Crown Colonies of Jamaica, Hong Kong and the Straits Settlements. By analyzing the varying enactments and repeal of the Contagious Diseases ordinances, which regulated the spread of venereal diseases and prostitution, I examine how male British officials in the metropole and the colonies continued to authorize the regulation of "native" women and girls despite the efforts of metropolitan activists and their allies in the imperial government to abolish the regulation of prostitution and its restrictions on the "liberties" of women. Since the official debates over the repeal (and transformation) of the Contagious Diseases ordinances were premised upon the tension between English ideals of individual "liberty" and claims of cultural and racial difference, this chapter also reveals that liberal ideals were recurrently invoked in the politics of imperial control even though they were unrealized in practice.

Finally, I turn to the institutional legacies of Crown Colony government in the conclusion of this dissertation. As a speculative chapter, I build upon the findings of the previous chapters to understand how sociologists might better understand the legacies of colonialism. Hence, I outline an approach to colonial legacies that takes into account how the presence of the laws and social knowledge of the colonial past hinge on sovereignty. Drawing from the empirical chapters, I propose that the legacies of the colonial past lie in the recursive transformations of law, social knowledge and the relations of sovereignty.

II.
Unraveling the Myth of Liberty: Conquest and the Origins of Crown Colony Government

Introduction

To render Tilly's (1992) understanding of empire differently, the "long, strong arm of empire" might be better likened to the extended but thin appendages of shadow puppets used in the Javanese and Malay art of *wayang kulit*. This is because the constitutional relations between the imperial center and periphery could be refashioned according to changes in context, projecting variable forms of law and statecraft based on officials' notions of local culture and society. In this regard, the efficacy of the Crown's long-distance exercise of imperial power lay in its projection of legal forms as well as physical force. To develop a sociological account of sovereignty, or more precisely, imperial control, we need to consider the construction of the formal mask of power, i.e. the legal *persona* that it adopts in relation to its subjects.[1] Articulated in terms of both law and violence, the dual projections of sovereign power were intertwined even when British subjects claimed that the bonds of empire were defined by the "transplantation" of the English common law and its liberties. Indeed, acts of conquest lay in the shadows of colonists' claims for English law and liberty within the settler colonies, and conquest was the foundation for the Crown's rule by law in the form of Crown Colony government.

[1] See Chapter 16 of Hobbes (1985, p. 217) on the Latin etymology of the word "person."

As its nomenclature signifies, Crown Colony government established rule by the Crown. How did this form of colonial rule first come about? What made it possible for the Crown to declare its unfettered sovereignty over a territory and its inhabitants? And, conversely, what prevented the Crown from ruling colonies purportedly "settled" by English and later British colonists in a similar manner? Since English common law and its liberties were integral to the early modern self-understanding of the British due to their claims to an inherited "ancient constitution" (Pocock 1987), British colonists initially sought to establish colonial government in ways that reflected this self-understanding. Hence, by the latter half of the eighteenth century, the commission of Assemblies that embodied male, propertied colonists' rights to consensual government was the norm across an empire that was still mostly centered in the Atlantic. However, this model of colonial governance, in which sovereign powers over ordinary law-making were ceded to elected Assemblies in the colonies, began to fray at the end of the eighteenth century due to the recurrent political difficulties the Crown and its officials experienced in ruling newly acquired colonies and their diverse populations. These difficulties, as marked by the loss of the thirteen American colonies, were the early ripples of the sea change that led to the institutionalization of Crown Colony government in the modern British Empire.

In this chapter, I demonstrate how Crown Colony government emerged in a piecemeal fashion at the end of the eighteenth century as the Crown and its officials wrestled with the challenges of ruling newly subjugated populations that were marked by their religious or racial differences from the British. In the eyes of officials across the empire, these difficulties were compounded by the flaws of the old representative system of colonial government that had been established in North America and the West Indies.

Beginning from a brief discussion of the early modern imperial jurisprudence regarding the powers of a conquering sovereign, this chapter will then discuss how the basic elements of Crown Colony government, namely, the preservation of the Crown's legislative powers, the Legislative Council and the Colonial Office's centralized role in imperial control, emerged at the turn of the eighteenth century in relation to the colonies of Quebec, Grenada, British Guiana and Trinidad. As this process of institutional change and transformation revealed, political tensions over religious and racial difference in the colonies and metropolitan officials' concerns with the intransigence of Assemblies encouraged the piecemeal emergence of a new, direct mode of colonial rule.

The Janus-Faced Foundations of Empire: Between Conquest and Liberty

To the British, empire was founded upon the Janus-faced combination of conquest and liberty. No matter where one looked within the reaches of the empire over the eighteenth and early nineteenth centuries, the British Crown's claims of sovereignty over foreign territories and their inhabitants were either expressed in terms of the powers of the King upon conquest or established by the settlement of Englishmen, who brought along their laws and liberties, on seemingly "unoccupied" lands.[2] The officials of the Crown thus divided Britain's list of possessions into colonies that had been "conquered" or "settled" at the end of the eighteenth century. Using this legal classificatory scheme, the Crown and its officials could approach the government of the colonies in distinct ways depending on the colonies' respective modes of acquisition.

[2] Colonies that were ceded from other imperial powers, e.g. the previously French colony of Grenada, under the terms of a peace treaty were also considered by British officials to be colonies of conquest.

However, the premises that shaped the way that the Crown exercised its powers over the colonies rested, ultimately, on the ineluctable act of conquest, whether on the part of the Crown or British colonists themselves. Conquest lay behind the Crown's prerogative in defining the laws of a colony especially if its inhabitants were non-Christians. Conquest also made it possible for "settlement" to occur: for British colonists were only able to claim that they settled "uncultivated" lands because they marginalized, excluded or even forcibly removed the physical presence of indigenous communities that they did encounter. The doctrine regarding the settlement of "unoccupied" lands was thus a fiction that served the interests of British colonists. Nevertheless, the Crown and its' officials' validation of this fiction entailed real consequences for it meant that colonists could defend their possession of greater territories and also claim their entitlement to English laws and liberties, including the right to consensual government. As I discuss in this section, conquest, whether undertaken by the Crown or elided by colonists' claims of settlement, was the basis for the imposition of the Crown's authority and English laws.

Firstly, the Crown could direct and control the government of a colony by changing its laws upon command when sovereignty was established through conquest. These powers were clearly established in Sir Edward Coke's report of *Calvin's Case* (1608), which concerned the right of Robert Calvin, a Scottish subject born after the accession of the King of Scotland, James VI, to the English throne in 1603, to bring suit in the English common law courts to protect his inherited title to land within England.[3]

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[3] *Calvin's Case* 7 Coke Report 1a, 77 English Reports 377 (1608). The case was important because it dealt more broadly with the problem of whether the Scottish subjects of James VI of Scotland could claim the same legal rights and protections as his English subjects in England after his accession as James I of England to the English throne (Tomlins 2010, p. 85). Fine-grained analyses of the case and its implications for imperial jurisprudence can be found in Hulsebosch (2003, pp. 454-458) and Tomlins (2010, pp. 82-89).

As Tomlins (2010, p. 85) recognized, the substance of the case and its extenuating circumstances led Coke to examine in detail the "legal-jurisdictional consequences" that followed the royal acquisition of new territories. The case had proceeded against the political background of the English Parliament's discouragement of the migration of Scots to England and their acquisition of property and its privileges. Since the case was, in effect, a "collusive effort" to overcome Parliament's opposition to the recognition of Scots as the subjects of James I, the name of James VI upon his accession as the King of England, Coke's determination of the consequences of a King's acquisition of territory mattered (Hulsebosch 2003, p. 454). Key to Coke's opinion on this issue was a feudalistic notion of sovereignty based on the allegiance of subjects to their sovereign; allegiance was the basis of subjects' rights and privileges, as granted by the King.

Adopting a doctrine derived from Roman law that a King could acquire territory (and subjects) through either conquest or inheritance (Hulsebosch 2003, p. 461), Coke thus examined a King's tremendous powers of law-making upon conquest:

> …there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem* [power over life and death], he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue; and in that case, until certain laws be established amongst them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given...[4]

[4] 77 E.R. 398. Notably, over a century later, Lord Mansfield stated that Coke's mention of the exceptional treatment of "pagans" was "absurd" and had likely "arose from the mad enthusiasm of the Criosades." *Campbell v. Hall* (1774), 1 Cowp. 204 at 209.

Strikingly to modern eyes, religion – not race – was the key marker of difference in a King's treatment of conquered subjects. Religious belief defined the limits of toleration, and it shaped the relationship between a conquering sovereign and their subjects accordingly. Unlike conquered Christian kingdoms that could retain their "ancient laws" until the conquering sovereign altered them, non-Christian kingdoms and their subjects would have their laws nullified upon conquest and they were to be judged according to "natural equity" until the conquering King gave them laws. In practice, "natural equity" would have meant that, upon conquest, an English King would likely judge the subjects of non-Christian kingdoms according to the familiar principles and usages of English common law. In relation, Coke's justification of the distinction between Christian and non-Christian kingdoms was tied to the assumption that English law was concordant with the "law of God and of nature" and thus superior to the laws of non-Christians.[5]

When confronted by difference in a foreign land, the sovereign's act of conquest led to divergent legal consequences in early modern English law. Nevertheless, whether a conquered kingdom were Christian or not, I note that the act of conquest laid the cornerstone for the conquering sovereign's establishment of absolute rule within a conquered territory if the Crown so desired. A conquering sovereign possessed "*vitae et necis potestatem,*" i.e. power over life and death – a prerogative that translated into the sovereign's absolute constitutive and legislative powers over a conquered land.

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[5] In the English colonization of North America, Englishmen understood the significance of religion in imperial expansion in terms of the religiously inflected distinction between savagism and civility. As Sheehan (1980, p. 2) argued, "savagism elucidated human origins and explained contemporary peoples who, by remaining attached to the simple existence of the primal age, failed to replicate the European mode of life, but it left open the nature of that presocial condition. Savages might be either noble or ignoble, either the guardians of pristine virtue of the agents of violent disorder."

Secondly, if British sovereignty was based upon settlement, the official design of colonial government could be derived from the traditional "birthright," or liberties, of English settlers. The proprietors of settler colonies, as natural-born subjects of the Crown, thus sought to be, and indeed were, governed by their own representative Assemblies, which symbolized "that most cherished right of Englishmen, not to be taxed or governed without their consent" (Greene 2010, pp. 4-5). The government of a "settled" colony by representative Assemblies rested upon the assumption of the supposedly inalienable, and thus portable, liberties of British colonists. As Tomlins (2010, p. 69) notes, this trope of "legal transplantation" figured in the legal fiction of "settlement" as "one strand of a self-absorbed history of settlers setting up shop in an empty landscape." This simple narrative was marred by the fact that English "settlement" in North America was marked by the conquest or purchase of lands already inhabited by indigenous peoples. In this regard, English arguments that justified their acquisition of new lands also turned on a combination of two claims: one, the indigenous peoples of North America "exhibited in the English *imaginaire* none of the appurtenances or capacities of sovereignty;" and, two, "what determined whether land was vacant [and available for settlement] was less ownership or even habitation than *use*." (Tomlins 2010, pp. 143-4; italics in original)

In contrast to the colonists' fervent claims of settlement, leading English jurists such as Sir John Holt, Sir William Blackstone and Lord Mansfield continued to view the American and West Indian colonies as conquered or ceded lands even though they did acknowledge the significance of English laws and liberties in shaping the governments of

these colonies (Hulsebosch 2003, pp. 474-5).[6] While the doctrine of settlement as another method of territorial acquisition originated with *Craw v. Ramsey*, which was heard in King's Bench, in 1670,[7] these English jurists did not apply the doctrine to the colonies in the Atlantic despite the efforts of colonists and their lawyers to claim that their colonies were "settled" and English settlers brought their liberties with them (Hulsebosch 2003, pp. 472-5). However, there were isolated legal opinions in England as early as the 1720s that recognized colonists' claims of their "settlement" of "unoccupied" lands and their bearing of English laws and liberties as their "birthright;" not surprisingly, these opinions then "circulated widely in the Atlantic world." (Hulsebosch 2003, p. 474)

To the colonists, the doctrine, or legal fiction, of "settlement" and the "transplantation" of English laws and liberties to their new lands was a compelling idea – one that obscured the legacies of British conquest in America and the West Indies and the marginalized presence of indigenous and enslaved persons. Politically, it also legitimated the colonists' resistance to royal authority and justified their "right" to be governed by their own representatives. Hence, despite the earlier juridical recognition of the American and West Indian colonies as conquered lands in England, British colonists in the Atlantic fought for the protection of their liberties as "settlers," and for the establishment of Assemblies as the common basis of colonial government (Mancke 2010, pp. 44-5).

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[6] In Mansfield's view, the act of conquest did not mean that the doctrine of "settlement" could not apply to the development of colonial government in such colonies. Examining the case of Jamaica, which had been conquered from the Spaniards in the seventeenth century, Mansfield noted in *Campbell v. Hall*: "The constitution of every province, immediately under the King, has arisen in the same manner; not from grants, but from commissions to call assemblies; and, therefore, all the Spaniards having left the island or been driven out, Jamaica from the first settling was an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his Crown." 1 Cowp. at 212.

[7] 124 *English Reports* 1072. See Hulsebosch (2003, p. 472) for an account of this case and its significance. While Hulsebosch (*ibid*) dates the case to 1681, the report of the case identifies it as occurring in the 21st and 22nd year of Charles II's reign, which was 1670.

In light of the bifurcated possibilities of colonial state-building – one that was founded on the Crown's powers upon conquest and the other based on English liberties, the officials of the Crown tasked to administer the empire could translate British claims of sovereignty into contrasting approaches to colonial government. However, at the cusp of the American Revolution, the institutional norm was for the Crown to commission the Governors of newly acquired colonies to call elected Assemblies with legislative powers, regardless of whether a colony was "conquered" or "settled." This was because liberty – not conquest – was the legitimating principle, or myth, of British colonialism over much of the eighteenth century (Go 2011, pp. 50-52). As a myth, liberty was not merely a rallying cry for colonists against the King's taxation of the colonies. Liberty was also a cultural and political ideal that marked English and, after the union of England and Scotland, British national identity. Similarly, the early modern British Empire was defined by liberty even though non-British persons, such as indigenous communities, enslaved persons and Catholic Europeans, did not enjoy the same freedoms as those possessed by British colonists (Mancke 2010, pp. 46-7).

Drawing from Stinchcombe's (1995, p. 319) conceptualization of freedom as a social relation,[8] I view the myth of English liberties as a legal and political discourse that allowed for both settlers and the Crown's officials to formulate and negotiate the terms of the constitutional and political relations of the metropole with the colonies, as well as the relations between the inhabitants of the colonies. This discourse was mythical because

[8] Drawing from Adam Smith's observation that the grant of "free governments" in the eighteenth century British empire facilitated planter oppression of slaves in the American and West Indian colonies, Stinchcombe (1995, p. 319) highlighted the way that the grant of political liberties, i.e. the power to elect representatives to make laws, to settlers was inversely related to the freedom of their slaves and also to the scope of imperial authority and control over colonial affairs.

the language of "liberty" and "rights" could be adapted – like how the mythical narratives of the Trojan War were used to formulate the supposed origins of the Greeks and Romans – to account for the practice of representative government in the colonies or to justify the need for imperial control. Just as British colonists insisted upon their natural, inalienable possession of individual liberties by virtue of their birth, the Crown and its officials could also insist on the need for metropolitan control to ensure the liberty of commerce and the amelioration and emancipation of enslaved persons; the latter policy resulted from the "long-distance advocacy" of the powerful abolitionist movement (Stamatov 2013). In the eyes of humanitarian advocates and their like-minded allies in the imperial government, the "liberty" that was founded upon the establishment of representative government in the American and West Indian colonies was not only an obstacle to metropolitan control; within slave-holding colonies, the Assemblies were effectively bastions of privilege that were invested in the exploitation of slave labor. The meaning of "freedom," in this sense, was a political one. One man's "freedom" could constitute another's fetters.

Despite the problems they posed for metropolitan control and policy, Assemblies formed an integral part of the model of colonial government before and immediately after the American Revolution. At this juncture, British officials still understood their empire as one premised upon the ideal of "liberty." Hence, after acquiring several colonies in a peace treaty with France and Spain in 1763, the Crown proclaimed the establishment of four governments, Grenada, Quebec, East Florida and West Florida, within the ceded territories, and also empowered their incoming Governors to "summon and call General Assemblies in such Manner and Form as is used and directed in those Colonies and

Provinces in America which are under our immediate Government…"[9] Within this same Proclamation, the Crown then empowered these representative Assemblies, along with the Governors of the colonies, to "make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under Regulations and Restrictions as are used in other Colonies…"[10] Critically, by granting legislative powers to Assemblies within these colonies, the Crown revoked its own power to make laws for these colonies without the consent of these respective bodies. Institutionalized in this manner, Assemblies were a central element of the old representative system of colonial government, manifesting the successes of British colonists in their efforts to maintain their political privileges, or "rights," and limit the powers of the Crown over colonial affairs.

Powers of Conquest and the Problem of Difference: On Grenada and Quebec

The Crown's 1763 Proclamation was notable for another reason. Unlike the American and the older West Indian colonies, the majority of the inhabitants of the new colonies were of different origins. Specifically, in Grenada and Quebec, there were large populations of French settlers whose laws and Catholic religion differed from the British (Wrong 1969, p. 45; Ward 1976, p. 5-6).[11] Given such, the Crown and its officials limited

[9] George R., *The Royal Proclamation of October 7, 1763*, cited from Keith (1933, pp. 4-6).
[10] *Ibid*.
[11] Since East and West Florida were ceded back to Spain by 1783, they have been less important in the subsequent development of Crown Colony government and for my analysis. Notably, Ward (1976, p. 5) observes that, unlike Grenada and Quebec, these two previously Spanish colonies "had only meagre European settlement." If the British had maintained these two colonies, it is likely that their constitutional development would have been significant for the institutional development of Crown Colony government.

their participation in colonial government. Within the instructions and commissions issued to the Governors of Grenada and Quebec,[12] the Crown stated that members of the Council and Assembly were to take oaths against the doctrine of transubstantiation, effectively excluding the Catholic French from participation in colonial governance. Also, while an Assembly was soon called in Grenada by 1765, no Assembly was called in Quebec partly because of the lack of British settlement (Ward 1976, p. 6).

As the initial exclusion of French Catholics from the institution of the Assembly in Grenada and Quebec revealed, religious difference posed a problem to the Crown and its officials on the ground. In particular, the early reluctance of Quebec's governors to call for the election of an Assembly stemmed from the potentially fraught relations between the French majority and the minority of English settlers. For these local agents of the Crown, there was "nothing to gain by calling a representative legislature, which the English would have dominated to the irritation and possible detriment of the French." (*ibid*) In this light, it was seen that the election of an Assembly would lead to instability for it was unlikely that a English-dominated Assembly would be willing to recognize the French law and practices that had been practiced in the territory by the majority of its inhabitants. What resulted instead was an *ad hoc* governing arrangement that tested the terms of the 1763 Royal Proclamation and raised questions about the Crown's authority over colonial legislation after it had commissioned an incoming governor to call for an Assembly. To understand the legal significance of Quebec's anomalous situation, I turn to occurrences in Grenada that revealed the nature of a Crown's powers after conquest.

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[12] Instructions to General Robert Melvill, 14 November 1763, cited from Madden (1987, pp. 465-467); Commission of Captain-General & Governor in Chief of the Province in Quebec. Nov 21, 1763, cited from Shortt and Doughty (1918, pp. 173-181).

Specifically, even though the Crown had proclaimed and commissioned the incoming Governor to call an Assembly in Grenada, it did not immediately refrain from exercising its legislative powers over the ceded colony. Seeing that an export duty on the export of sugars and other goods had been imposed in the other West Indian colonies of Barbadoes and the British Leeward Islands, the British Crown then exercised its powers to impose the same levy upon Grenada *before* the arrival of the Governor and the election of the Assembly. This duty provoked the legal challenge of James Campbell, a planter in the island, against William Hall, a collector of the Crown's export duty. *Campbell v. Hall* was then tried at Guildhall, and Lord Mansfield's judgment was "of lasting importance in British imperial history" (Ward 1976, p. 11).

Claiming the long-standing precedent set by *Calvin's Case*, Lord Mansfield reiterated the Crown's expansive constitutional powers over the life, death, property and laws of the inhabitants of a colony that was gained by conquest or cession.

> It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part of the whole of the law or political form of government of a conquered dominion.[13]

Nevertheless, because of the 1763 Royal Proclamation, Lord Mansfield ruled that it was not possible for the Crown to continue to exercise legislative authority over Grenada and levy a duty on its exports. Only the colony's Assembly and the imperial Parliament could

[13] *Campbell v. Hall* (1774), 1 Cowp. 204 at 210-1.

change the island's laws henceforth. As held by Mansfield, the commission of an Assembly, even if such a body was not yet elected, curtailed the King's absolute powers.

In effect, the King was bound by his own words to "preclude himself from the exercise of a legislative authority over the island of Grenada."[14] Beyond upholding Campbell's claims against the Crown, *Campbell v. Hall* affirmed that the Crown could no longer change the ordinary laws of a colony after commissioning the Governor to call an Assembly to make laws for "the public peace, welfare and good government."[15] Even so, despite stating such limits, Mansfield's judgment did not question the Royal Prerogative to amend the constitution of such conquered or ceded colonies in other respects, such as the formation of the courts and the judiciary; indeed, the same could be said of colonies that had been settled by British subjects even though settlers purported to carry the laws and liberties of English law with them (Roberts-Wray 1966, pp. 152-3 & 158-9). The Crown's powers to constitute and shape the government of colonies – whether settled, conquered or ceded – through proclamations and other instruments remained significant even after the commission of an Assembly. What this case settled was the limits to the King's exercise of ordinary legislative powers over a conquered land and its subjects.

Given the expansive scope of the Royal Prerogative over the inhabitants of conquered or ceded colonies, why would the Crown ever cede its legislative powers to Assemblies, which were sources of opposition to imperial policy, in the first place? Here, the economics of colonization played a part. In the latter half of the eighteenth century, the establishment of the old representative system of colonial government within the

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[14] *Ibid* at 212.
[15] *Ibid* at 206.

colonies was justified by the view that the commission of Assemblies encouraged the investment and settlement of British subjects. Lord Mansfield's judgment said as much. As he asked of why the King had commissioned the Governor to call an Assembly in Grenada in the 1763 Proclamation, "With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, &c. more secure if the legislation was vested in an assembly, than under a governor and council only."[16]

Understood in this manner, the British Crown and its officials viewed Grenada and Quebec as territories that were to be further settled and cultivated by British subjects, who would then control the Assemblies (Wrong 1969, p 46). Simply put, colonization meant Anglicization. However, as the initial exclusion of the French Catholic populations in Grenada and Quebec demonstrated, British officials adapted their formulation of colonial rule to fit the socially different and divided milieu of these newly acquired lands, which were mainly populated by subjects whose religion and origins differed from the British. The mere fact of social difference of these ceded colonies was not the only issue that confronted the Crown and its officials. The growing assertiveness of British colonists in North America and the West Indies, particularly the Thirteen colonies and Jamaica, against the King and the dictates of imperial policy further highlighted the political risks of calling an Assembly that would only represent a restive minority of British settlers (Greene 1994). The myth of "liberty" thus began to unravel in the face of difference and disagreement. Given the changed social and political situation of the Atlantic colonies, what was needed was an alternative to the Assembly, i.e. a body that would facilitate – rather than obstruct – effective governance by the Governor, the Crown's representative.

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[16] *Ibid* at 213.

Such means of imperial control was thus formulated in Parliament's enactment of the 1774 Quebec Act, which was the "first time Parliament directly constituted a colony" and a clear assertion of its imperial authority in light of the ongoing American Revolution (Wight 1946, p. 38). Significantly, Wight (*ibid*) suggests that the official term, "Legislative Council," first became current during the debates over the Quebec Bill, and the phrase was then officially employed for the first time in the Royal Instructions issued to Governor Carleton in 1775. Within the act, the establishment of a Council in lieu of an Assembly was premised upon the existence of a large Catholic population, which it stated to be "above Sixty-five thousand Persons" at the point of conquest.

> …And whereas it is at present inexpedient to call an Assembly; be it therefore enacted by the Authority aforesaid: That it shall and may be lawful for his Majesty…to constitute and appoint a Council for the Affairs of the Province of *Quebec*, to consist of such Persons resident there, not exceeding twenty-three, nor less than seventeen, as his Majesty…shall be pleased to appoint…which Council, so appointed and nominated, or the major Part thereof; shall have Power and Authority to make Ordinances for the Peace, Welfare, and good Government, of the said Province, with the Consent of his Majesty's Governor…[17]

The act broke with the old representative system of colonial government by instituting a nominated Council to make ordinances, and it also contained a provision that allowed for the colony's Catholic majority to participate in this more limited form of government by no longer requiring them to take an oath against their beliefs.[18] Even so, this merely redefined the exclusion of the Catholic French by reconstituting their government *in toto*.

While the constitutional solution of the 1774 Quebec Act proved to be temporary, British officials' creation of a Legislative Council in Quebec provided a template that

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[17] 14 Geo. III. c. 83.

[18] The faith-based restriction on the holding of public offices was removed earlier in Grenada in 1768 after a series of deliberations over the matter by the legal officers of the Crown and the Privy Council. Madden (1987, pp. 468-473) *Cf.* Manning (1933, pp.64-65).

colonial officials could apply elsewhere whenever the commission of an Assembly seemed inexpedient. In fact, the belligerent inhabitants of Quebec's neighboring American colonies, who viewed the act as an illegitimate extension of the British Crown and Parliament's powers over colonial affairs, quickly recognized the wide-reaching significance and possible consequences of this act. Among the charges levied against the British Crown in their Declaration of Independence in 1776, the representatives of the united States of America then stated that the King had abolished "the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies." (cited from Ward 1976, p. 9) Notably, beyond the 1774 Quebec Act's deviation from the old representative system of colonial government, the Americans' objections included its "condoning popery" and its recognition of French Canadian law in the administration and adjudication of civil issues, among others; reflecting the law's dissonance with the dominant myth of "liberty," similar criticisms had also been sounded in Parliament before its enactment (*ibid*).

Simply put, the 1774 Quebec Act, in favoring the laws and religion of the Catholic French, was illiberal towards the British, who viewed the principle of consensual government and the use of English laws as integral elements of their identity. Nevertheless, the rejection of English principles of government and law with regards to Quebec was the intention of the law's drafters. The act was the brainchild of Quebec's Governor, Sir Guy Carleton, who distrusted English settlers and their claims for an Assembly because of the growing republican tendencies within North America (*ibid*, pp.7-8). Facing a colony divided between two nationalities with different laws and

religions, Carleton was worried about the political instability that the establishment of representative government could bring and thus favored a governing arrangement that strengthened the Crown and Governor's powers.

Set together, *Campbell v. Hall* and the 1774 Quebec Act then set the stage for the making of Crown Colony government by prefiguring some of its tenets: the preservation of the Crown's legislative powers and the establishment of a Legislative Council instead of an Assembly. Nevertheless, as I have related, the Crown's powers to dictate the ordinary legislation in Grenada and Quebec were curtailed by the 1763 Proclamation that commissioned the establishment of Assemblies as per the old representative system. And, while Parliament then reconstituted Quebec in 1774 due to the Governor's reluctance to call for the election of an Assembly, the newly created Legislative Council of Quebec was later abandoned in the constitutional reforms of 1791 – reforms modeled upon the British constitution (Ward 1976, pp. 12-9). Within a colony that would eventually gain self-government, the innovation of the Legislative Council was a temporary measure. There was still no separate system of government for conquered or ceded colonies, as English principles of government and law remained the norm despite their obvious limits on imperial control. The myth of "liberty" retained its strength even as its threads frayed.

Imperial Control and Crown Colonies, British Guiana and Trinidad

Hence, when the Crown again acquired new colonies after the outbreak of the Anglo-French War of 1793-1815, metropolitan officials fashioned governmental forms, which they intended to be provisional, through the Governor's Instructions. But, there was a shift in their approach by this point. In light of their prior difficulties in governing

conquered colonies like Grenada and Quebec as well as uncertainties over "which, if any, of these conquests, were to be retained permanently," British officials did not proceed to establish the old representative system immediately in the territories acquired through the treaties of Amiens (1802) and of Paris and Vienna (1815) (Madden 1987, p. 670).

Acquired at the turn of the eighteenth century, these new colonies were thus ruled according to a policy of "*laissez-aller*…leaving things as they were," which meant that no major changes in the colonies' pre-existing French, Dutch or Spanish laws and institutions were made (*ibid*). As Madden (*ibid*) relates, this "standstill formula" was first adopted for the colonies of San Domingo and Martinique, then borrowed for Ceylon and Cape Colony, "and thereafter used widely as a temporary solution." Starting with the short-lived colony of San Domingo in 1794, the Royal Instructions issued to the Governors of these colonies did not call for Assemblies, effectively preserving the Crown's legislative powers upon conquest, and they also established the Governor as the sole source of executive authority (Murray 1965, pp. 49-56). While British officials still assumed that these colonies would be granted Assemblies in due time, they maintained the reins of imperial control tentatively for the sake of stability.

What were the anticipated sources of difficulty in the government of these recently conquered colonies? Why was it crucial to reserve the legislative powers of the Crown? The problem, as the recent precedents of Grenada and Quebec indicated, lay in their different social composition and the possibility of political instability in such a social context. In the West Indies, these racial differences were made even more marked by the institution of slavery, which was increasingly under attack by advocates in Britain and across the empire by the end of the eighteenth century. As I discuss in this section,

Crown Colony government emerged as colonial officials grappled with the simultaneous challenges of governing in the face of social differences and that of the abolition of the slave trade and slavery. In particular, Trinidad and British Guiana provided the key testing grounds for the consolidation of the form of Crown Colony government by the early 1830s. While the former was where British officials first set in place a different and enduring system of colonial rule that maintained imperial control over the affairs of "plural societies" that were divided along the lines of race, the latter was the subject of discussions in the newly created Colonial and War Department – the precursor of the Colonial Office – about the principles of the nascent Crown Colony system that was increasingly applied to the newly conquered and ceded colonies.

It was the social and political situation in Trinidad that led to officials' change of mind regarding the temporary nature of the Governor's Instructions that had been issued to such colonies in the course of the war (Murray 1965, p. 78). First conquered from Spain in 1797 and then formally ceded to the British Crown in the 1802 treaty of Amiens, Trinidad was initially ruled by the British under the terms of a military occupation before being re-constituted as a civil government by the instructions issued to its Governor, Lieutenant Colonel Thomas Picton, in 1801. These instructions, like others issued to the Governors of the colonies acquired during this period, were meant to be temporary. However, instead of being changed after the hostilities of war ceased and when the colony appealed for an Assembly, the Governor's Instructions in 1801 then became the basis for the island's constitutional development when it was adapted in 1812 for the incoming Governor (*ibid*, pp. 82-84). This shift was consequential, for it revealed officials' realization that not all colonies were suited for the old representative system.

Notably, British officials' reasons for the retention of Trinidad's initial form of government, under which the Governor ruled with a nominated Council of *Advice* of three to five persons, portended their subsequent views on colonial government in the West Indies after emancipation (Millette 1970, p. 68). This was because Trinidad had a free "colored" population that outnumbered "white" persons – a situation that would be further magnified after emancipation across the West Indies.[19] In this regard, when the imperial government received an appeal from British planters in Trinidad in 1810, calling for English laws and a representative form of government, the appeal was thus rejected:[20]

> …But in the Island of Trinidad the People of Colour, at this time form a very great Majority of the Free Inhabitants of the Island, and the Question would rise, according to the proposed System [i.e. the old colonial system of representative government], whether in establishing, for the first Time, a popular Government in that Colony we shall exclude that Class of People from all Political Rights and Privileges. Such an Exclusion we know would be regarded as a grievance…
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> […] [Moreover]…the Abolition of the Slave Trade by Parliament, imposes upon the Government the necessity of keeping within itself every Power which may be material for rendering this Measure effectual. It is essential for this purpose that, in a new Colony the Crown should not divest Itself of its Power of Legislation, and that neither the Crown nor Parliament should be subject to the Embarrassments which, on such occasion, might perhaps arise from the conflicting views of the Imperial Parliament, and of a Subordinate Legislature. Under these Considerations you may consider it a point determined, that it is not adviseable to establish within the Island of Trinidad, any Independent Internal Legislature.[21]

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[19] Millette (1970, Table VI) reports that in 1810, the free "colored" population (6,264) was more than twice the size of the "white" population (2,495). At the same time, "slaves" were the majority population, numbering about 20,821 persons. There were also 1,683 Indians, i.e. indentured labor from British India.

[20] The free colored inhabitants of the colony also sent a petition, asking for the King "to take into his Royal consideration the present state of Existence of his faithful Subjects of Colour in the Island of Trinidad, and to extend unto them (under whatever System of Jurisprudence his Royal Wisdom may deem expedient for the future Government of this Colony) such a participation in its operation as may secure to them (on a permanent and inviolable footing) their Personal Security and Social Happiness." (cited from Murray 1965, pp. 79-80; also see Millette 1970, pp. 260-6)

[21] The Earl of Liverpool to Lieutenant-Governor Thomas Hislop, 27 November 1810. Cited from Madden (1987, pp. 733-735).

Strikingly, the social differences found amongst Trinidad's inhabitants were apprehended in terms of racial categories derived from slavery rather than religion.[22] Indeed, the central objection raised by the Secretary of State for War and the Colonies, the Earl of Liverpool, in his response to British planters in Trinidad was premised on the exclusion of the majority of free persons along racial lines, which would likely result if the old representative system were established. Liverpool's use of "race," in this sense, was not yet affixed to a biologically determined and rigid hierarchy of populations, as his response also noted the lack of familiarity or education of the other "white" inhabitants of the colony in the knowledge of "the British Constitution and Laws."[23] Against the background of the recent Parliamentary abolition of the slave trade in 1807, Liverpool's concerns seemed to be driven more by the need to preserve the Crown's legal powers to ensure the protection and welfare of enslaved persons. The establishment of an Assembly would, from his perspective, be a self-defeating act that limited imperial control over slave-holding colonies and their exploitative planter elites. His view that "the Crown should not divest Itself of its Power of Legislation" was justified by the moral ends of abolition, which could only be realized by preserving the Crown's Prerogative powers.

Critically, the Crown's immense powers over the colonies stemmed from the Royal Prerogative in external affairs, which had also provided the basis for the expansion of empire. As Sir Kenneth Roberts-Wray (1966, p. 150), who became the Legal Adviser to the Colonial Office in 1945, recognized, "It is under the Prerogative to make treaties of

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[22] Jordan (1977, p. 95; also see Sheehan 1980) remarks upon the apparent shift from religion to race in British colonists' categorization of themselves and others in their North American milieu: "colonists referred to *Negroes* and by the eighteenth century to *blacks* and to *Africans*, but almost never to Negro *heathens* or *pagans* or *savages* [, which were the terms used in the early years of colonization]."

[23] Liverpool to Hislop, 27 November 1810. Cited from Madden (1987, p. 734).

war and peace that Colonies have been acquired by cession or conquest." As two sides of the same coin, the Crown's power to constitute the government of its colonies originated with its authority in warmaking and territorial expansion. Notably, the former and latter were characterized, respectively, by the use of distinct means of projecting state power: positive law and organized violence. While this link between colonial statemaking and war is seemingly expressed in the utilitarian notion of law as a sovereign's commands backed by force, this overlooks the fact that the Royal Prerogative itself has been defined in terms of rules – as Hart (1997, p. 76) notes, "rules are constitutive of the sovereign."

Therefore, despite its suggestions of patrimonial power, the Royal Prerogative was not founded upon the personal will of the King or Queen. Rather, the Crown stood for the executive machinery of the imperial government; salaried officials had been appointed to administer the colonies since the second half of the seventeenth century.[24] After the independence of the American colonies resulted in what Wight (1946, p. 53) called an "administrative interregnum" between 1782 and 1801, the beginning of the Anglo-French War in 1793 then led to the creation of the office of the Secretary of State for the War and Colonial Department in 1801; with this appointment, the Departments of War and the Colonies were united between 1801 and 1854 until their separation into distinct departments.[25] Henceforth, throughout the nineteenth century and afterwards, imperial policy toward the government of colonies was crafted by the Secretary of State for (War and) the Colonies and his staff, as Liverpool's abovementioned dispatch proved.

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[24] For instance, the members of the Council of Trade and Plantations, which handled colonial affairs between 1696 and 1782, received a yearly salary of £1000 by the time that the Council was abolished upon the independence of the American colonies. J. Harding and G.E.C. Gent, *The Dominions Office and Colonial Office List 1940* (London: Waterlow and Sons Ltd., 1940), p. vii.

[25] *Ibid*.

As my brief discussion of imperial expansion and the government of Trinidad in this section has highlighted, two issues, in particular, occupied the Colonial Office and its predecessor in the early decades of the nineteenth century: first was the government of the newly acquired colonies, many of which consisted of populations that were not British in origin; second was the abolition of the slave trade and slavery. These problems intersected and their solutions shaped each other: the result was the gradual establishment of a framework of colonial government and imperial control, Crown Colony government, which was imposed exclusively on colonies conquered and ceded at the turn of the eighteenth century. As Penson (1926, pp. 110-1) argued, the "determining factor" in the making of Crown Colony government was "the question of slavery," as this form of colonial government and imperial control "transformed the suppression of the slave trade and the amelioration of slave conditions into comparatively manageable tasks."

What about Crown Colony government allowed for the Colonial Office to tackle such tasks, which required the colonies to conform to imperial policy? In Penson's (1926) study of the constitutional formation of British Guiana at this juncture highlighted, the basic tenets of Crown Colony government were formulated by leading colonial officials like Sir James Stephen.[26] In his discussions with Horace Twiss, the Parliamentary Under-Secretary for War and the Colonies, over how the three ex-Dutch settlements of Berbice, Demerara and Essequibo were to be joined and constituted as British Guiana, Stephen argued for the development of a system of colonial government that could be adapted to the diverse conditions of the newly acquired colonies of his time (Penson 1926, pp. 129-

[26] Stephen first served as counsel to the War and Colonial Office in 1813 and then as its Permanent Under-Secretary of State from 1836 to 1847 (Swinfen 1970, pp. 21-22).

130; Ward 1976, pp. 107-109). Rather than seek uniformity in colonial government, as Twiss' proposal aimed to do, Stephen outlined a system of centralized imperial control.

> The unity of system which I have desired to see established consists chiefly in the following particulars. I would have in each a Legislative Body, in which a certain number of Officers dependent on the Crown should meet an equal number of Proprietors who are exempt from any such dependence. I would define in each Colony the limits of this Legislative Authority in the same terms, and in each I would prescribe certain forms of proceeding for the enactment of Laws. The rules should be the same…respecting the transmission of their Laws to England, and respecting the exercise of the Royal prerogative and respecting the time and manner in which Colonial Enactments should take effect. Further I would prescribe one common system for regulating the expenditure of the Public Revenue. Further than this I doubt the possibility of proceeding with advantage…[27]

Two other principles were also expressed by Stephen in these deliberations: one, the necessity of considering the social character of the colonies in granting the franchise; and, two, the importance of leaving other matters of government to their Governors' control.

Writing in 1830, Stephen's recommendations thus outlined the contours of the system of Crown Colony government that had already been established in varying ways across the diverse set of colonies acquired during the Anglo-French War of 1793-1815. These early "Crown Colonies" – a label that was applied years after their incorporation into the empire – included the following: the Cape of Good Hope (or Cape Colony), Ceylon, Trinidad, Malta, British Guiana, St. Lucia, Heligoland, Mauritius and the protectorate of the Ionian Islands (Wight 1946, pp. 48-53).[28] As Penson (1926, p. 109) also recognized, the earlier official debates and experiences regarding the constitution of

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[27] Stephen to Twiss, 25 August 1830. CO 111/98. Cited from Madden (1987, pp. 772-773).

[28] This list excludes Martinique and Santo Domingo, which were acquired in this period but did not remain under British control. For a list of all colonies with their date and means of acquisition in 1862, see: "Her Majesty's Colonial Possessions." Enclosed in William C. Sargeaunt and Arthur N., *The Colonial Office List for 1862* (London: Edward Stanford, 1862), p. 74.

these newly conquered and ceded colonies had informed Stephen's development of the principles that set "the foundations of the new colonial system of the nineteenth century."

By the first quarter of the nineteenth century, colonial officials had laid the building blocks of Crown Colony government across the conquered colonies of the Anglo-French War of 1793-1815. In contrast to Tilly's (1992) theory of how the strategies and principles of colonial statebuilding mirrored those of European states, British officials' definitions of the foundational elements of Crown Colony government revealed the use of differing principles of government and law in the empire. Precisely because British officials and subjects viewed the old representative system as one that was suited only to persons of British origins, the increasing acquisition of colonies with limited British settlement and racially different populations led officials to abandon the commission of Assemblies within these colonies. Instead, metropolitan officials established a centralized system of imperial control in relation to these new colonies, creating a distinct, flexible form of colonial government that continued to develop according to the circumstances of the Crown's wartime acquisitions. In fact, one of the key institutions of the Crown Colony system, the Legislative Council, was not established in the Crown Colonies until the 1830s despite its brief period of establishment in Quebec. The turning point was again Trinidad, where the new Commission and Instructions to the Governor in 1831 created a Legislative Council of twelve nominated members, half of whom consisted of officials (Ward 1976, p. 110-1). Trinidad's example was followed with the issuance of the same Royal Instruments to the conquered colonies of St. Lucia and Mauritius in 1832, Ceylon in 1833, and Malta in 1835 (*ibid*). And, by then, the term, "Crown Colonies," had become part of official discourse (See Murray 1965, p. 158n75).

Conclusion

By the end of the first quarter of the nineteenth century, the myth of "liberty" as an ideology of colonization had more or less unraveled. The fact of conquest was laid bare as the Crown's acquisition of new territories and subjects was no longer followed by the immediate issuance of Proclamations or instructions to call for an elected Assembly. Even so, Crown Colony government remained identified with the Crown's acquisitions around the period of the Anglo-French War of 1793-1815, and it was not yet the dominant form of colonial government and imperial control in the empire as the colonies governed under the old representative system still outnumbered the so-called "Crown or conquered colonies." Even so, as I relate in the following Chapters Three and Four, this fact changed soon after the colonies of Jamaica and the Straits Settlements were re-constituted as Crown Colonies in the 1860s. Whereas the final blow to the maintenance of the old representative system in Jamaica, as well as the rest of the West Indies, was powerfully marked by the tumult and uncertainties of the 1865 Morant Bay rebellion, the extended administrative politics linked to the re-constitution of the Straits Settlements as a Crown Colony in 1867 demonstrated how the bureaucratic rules, procedures and institutions of Crown Colony government had become taken for granted over time by the staff of the Colonial Office and their agents, the colonial Governors. Proving, perhaps, that the owl of Minerva only flies at dusk, the dramatic politics and official justifications of the Crown and Parliament's establishment of Crown Colony government in Jamaica and the Straits Settlements then revealed how colonial officials only belatedly grasped the racial ideologies that had informed their gradual formulation of this form of colonialism.

In charting the interspersed origins of Crown Colony government, this chapter's discussion of early modern imperial jurisprudence and the constitutional changes of Grenada, Quebec, Trinidad and British Guiana also pointed to the growing salience of "race" in making of colonial government and law. Displacing religion as a main vector of difference between the Crown's diverse subjects, the emergence of "race" as the ostensible marker of social difference over the seventeenth and eighteenth centuries was bound up with the practice of slavery across the Atlantic colonies. With this gradual shift, religious differences between persons were then subsumed under conceptions of "race" as entire communities or peoples were gradually associated with certain characteristics, dispositions and essences, which were not yet bound to human biology at this juncture. As I discuss in the ensuring chapters of this dissertation, colonial officials and elites' various, and sometimes contradictory, understandings of the personhood and character of their diverse subjects played a figurative role in their formulation of colonial government and laws. Like Crown Colony government, this racial sociology of empire also had its roots in the myth of *English* "liberties" that justified the old representative system. For once the rights and privileges of one's status as subject was unbound from the profession of allegiance and faith to a sovereign, as per Coke's judgment in *Calvin's Case*, and understood instead as a inalienable "birthright" that one possessed, it would only take a small leap of imagination for Englishmen to apprehend and understand social difference in terms of human nature or biology. Entwined with the project of imperial expansion, British officials and elites' racial sociology of empire then reinforced the principle of the "colonial rule of difference" in various ways even though English ideals of "liberty" continued to spark political struggles across the colonies, as we will observe.

III.
Imperial Architectures, Old and New: On the Crafting of Crown Colony Government in Jamaica

Introduction

As a product of conquest and the preservation of the Royal Prerogative over law-making, Crown Colony government constituted a significant departure from the older representative form of colonial government that had been found in Britain's American and West Indian colonies. As related in Chapter Two, the basic constitutional elements of Crown Colony government, which granted the Colonial Office and Governor control over the laws and administration of colonial government, were initially established in colonies that were conquered by, or ceded to, the British during the Anglo-French War of 1793-1815. Despite the limited extension of this form of imperial control at the beginning of the nineteenth century, Crown Colony government became the standardized form of colonial government and imperial control for racially divided colonies with limited European settlement by the century's end, displacing the old representative system in its reach and significance in the empire. How and why did this paradigmatic shift occur? Or, what drove the dramatic re-construction of the legal structures of British colonialism?

The answers to this transformation of imperial policy towards colonial rule are to be found in the 1865 Morant Bay rebellion and the consequent re-constitution of Jamaica as a Crown Colony. As the catalyst that sparked the sea change in the government of

racially divided colonies across the West Indies, the violent rebellion and the instability that it occasioned created a long awaited opportunity for colonial officials in Jamaica and at Whitehall to overcome the long-standing colonial opposition to imperial control posed by the elected Assembly under the old representative system. In turn, because Jamaica was understood as a "settled" colony by English legal authorities like Lord Mansfield,[1] the Crown's imposition of Crown Colony government in Jamaica, along with the growing scope of self-government granted to the white settler colonies of Australia and Canada, then precipitated a shift in the imperial classification of colonial governments from the "distinction between conquered colonies and settled" to "the distinction between non-self-governing and self-governing" colonies (Wight 1946, p. 57). Significantly, under the new approach to classification laid an emergent set of racialized understandings – what I call the racial sociology of empire – that rendered "plural societies" like Jamaica as less fitted to the liberal ideals and institutions of law and representative government.

Given its wide-ranging consequences for the development of colonial rule in the nineteenth century British Empire, the 1865 Morant Bay rebellion has been subject to historical, legal and political analysis by various scholars (Heuman 1981; Holt 1992; Kostal 2005; Darian-Smith 2010; Mantena 2010). These works tell a complex tragic story of how the political promise of freedom set out by emancipation was denied by the repeated attempts of Jamaica's white planter elite to entrench their dominance in the economy and the island's legal and governing institutions. Thus betrayed by the ostensible failure of the political experiment of emancipation, the Morant Bay rebellion was a major uprising of freed blacks against colony's predominantly white planter elites.

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[1] *Campbell v. Hall* (1774) 1 Cowp. 204, pp. 211-212.

This was a rebellion that not only occasioned dramatic changes in the island's form of government, but also led to attempts in Britain to hold Governor Eyre accountable for the summary arrest and execution of his political foes during the declaration of martial law – an act that violated the English principle of the "rule of law." In this chapter, I highlight a strand of this history that has been overlooked even by scholars who have highlighted the implications of the rebellion for the Crown's reformulation of colonial government in Jamaica and the empire (Holt 1992; Mantena 2010). Focusing more on the growing significance of race in colonial governance and British officials' disenchantment with "liberal imperialism" after the rebellion and other similar uprisings across the empire, prior scholarship did not analyze how the changing legal architecture of empire, i.e. the constitution of sovereign power in the colonies by metropolitan and colonial laws, mattered in relation to the post-emancipation social context of colonial rule in Jamaica.

By addressing the legal origins and consequences of the Morant Bay rebellion, this chapter analyzes how the institutionalization of Crown Colony government in Jamaica and the British Empire rearticulated the legal architecture of empire, as well as the significance of British officials' understandings of law and society in this transformation. To do so, I focus on British officials' "translations" of law and their understandings of Jamaica's social conditions in relation to the occurrences linked to the re-constitution of the colony.[2] Building on the landmark scholarship of Holt (1992) on the rebellion, I begin from the "problem of freedom" that had been posed by emancipation, and then turn to analyze the varying ways that British officials confronted the problem of

[2] Following Mawani and Hussin's (2014, pp.745-747) critique of "transplantation" and "transmission" as metaphors for the politics and processes that attended the movement of laws and legal practitioners across jurisdictions, I use the term, "translation," here to better encapsulate the role played by politics and the interpretation of meaning in the circulation of institutional forms and practices within empire.

imperial control before and after the rebellion. As Mill (1867, pp. 346-347) argued in reflecting upon his experiences in the administration of India, the organization of the rule of "backward populations" was one of the more important problems of his time.

Situated at the intersection of the inter-related historical problems of freedom and imperial control were the inhabitants of Jamaica, whose racially inflected struggles over economic and political power after emancipation played a figurative role in the constitutional changes in colonial rule and imperial control across the West Indies and the empire. To borrow Mantena (2010, p. 186) terms, their struggles were "triggers" for "liberal disappointment" and they brought about the re-thinking of the project of empire and colonial rule. While Mantena (*ibid*) argues that such re-thinking led to the rejection of moral *ends* in imperial governance, this chapter focuses instead on the changes to the legal *means* of imperial control. Specifically, I argue that Jamaica's re-constitution as a Crown Colony was tied to a reformulation of the institutional basis of colonial legality, reflecting the growing resonance of the racial sociology of empire.[3] Rather than relying on the institutions of a representative government to protect the political liberties of British subjects, the legality of colonial rule was founded upon the Colonial Office's bureaucratic exercise of imperial control over a colonial government that was made subject to the delegated and discretionary powers of the Governor. In realizing their long-standing plans to reform the old representative system in the West Indies, British officials thus gained from the irruption of racially inflected violence in the Morant Bay rebellion.

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[3] Enmeshed in politics, my understanding of legality encapsulates more than "the meanings, sources of authority, and cultural practices that are commonly recognized as legal" within various facets of social life (Ewick and Silbey 1998, p. 22). Shaped by the politics of the past and laden with consequences for the future, legality may be also understood as "encoded" understandings of law and rightfulness that inform the ongoing formation and re-formation of institutions (Abbott 2016, p. 15).

The "Problem of Freedom" and the Racial Sociology of Empire

In Jamaica, Crown Colony government became the institutional solution to the instability fostered by colonial officials and elites' failed attempts to assimilate emancipated persons as wage labor, and thus as self-disciplined liberal subjects. In Holt's (1992, p.309) poignant rendering of British policy and political thought, he argues that when freed persons rejected the unremitting regime of work in the plantations for the greater autonomy they could enjoy as peasant freeholders, "they became *themselves* vulnerable to redefinition… [as] a different kind of human being, at least insofar as their suitability for normal political participation and economic self-determination were concerned." Consequently, in the eyes of British officials on the ground and in the Colonial Office, "These wayward children of the human family were fit subjects for a 'beneficent despotism.'" (*ibid*) Building on Holt's interpretation of the politics of post-emancipation Jamaica and the empire, I propose that the purported institutional fit of Crown Colony government to Jamaica resulted from the "articulation," i.e. attachment, of liberal political economy – then ascendant among Britain's "radical" intellectuals and politicians – with officials' emergent understandings of the racial sociology of empire.[4]

This *zeitgeist* of the post-emancipation British Empire was well expressed in the contemporary works of John Stuart Mill, the active statesman and philosopher whose

[4] As Sewell (2005, p. 339) notes, "articulation implies the attachment or 'jointing' of distinct discourses to one another." As the "bread and butter of cultural history," the articulation of discourses also opens up interesting questions for sociological inquiry, particularly regarding the ways that the institutional means of "articulation," e.g. laws, organizations, rituals, etc., are used in practice and to what ends. In this sense, even though Crown Colony government clearly underlines the racialized social limits to the liberal ideal of representative government, it remains an open question how the Colonial Office and Governor, as the sovereign's representative, developed their expansive powers over colonial policy in the course of events.

influence over British public discourse and politics exceeded (and was different from) that of his father and Jeremy Bentham's. In particular, while he remained a "Radical and Democrat for Europe and especially for England," Mill (1969, pp. 144-145) revised his commitment to "representative democracy as an absolute principle" after a mental crisis he suffered in the 1820s. By 1830, he "looked upon the choice of political institutions as a moral and educational question more than one of material interests, thinking that it ought to be decided mainly by the consideration, what great improvement in life and culture stands next in order for the people concerned, as the condition of their further progress, and what institutions are most likely to promote that…" (*ibid*) Despite this shift in his opinions, Mill (1969, p. 137) did not abandon his commitment to the liberal ideal of democratic self-government with regard to civilized societies; rather, influenced by the poet Samuel Taylor Coleridge and romanticism, he adopted a theory of "human progress" that saw some peoples as being advanced and better suited for representative government.

This was an essentialist understanding of human culture and development that not only viewed persons according to their nationality or race, i.e. as a "people." It also assumed a shared character within a group identified as such.[5] Nevertheless, even though scholars argue that "Mill was no racist" given his views on the innate malleability of human character, his essentialist understanding of character and human progress was analogous to racist, exclusionary views towards colonized populations (Holt 1992, p.328;

[5] While essentialist in these aspects, Mill's view of human progress, or "human flourishing," was also a multi-faceted one that consisted of the fostering of individuality together with the moral and intellectual virtues within society (Ikuta 2015, pp. 701-3). Even so, Mill's understanding of the basis of "social union" emphasized the existence of "a strong and active principle of cohesion among the members of a same community or state." While such cohesion was not necessarily based on race, Mill's social ontology could slide into a racialized worldview. Hence, in discussing the necessity of obedience to the government for "social union," Mill (1988, pp.110-3) also noted: "Among a timid and spiritless race like the inhabitants of the vast plains of tropical countries, passive obedience may be of natural growth."

Mantena 2010, pp. 34-36; Ryan 2012, p.332). As Holt (*ibid*) notes of this unintended congruence between Mill and his racist contemporaries – e.g. Thomas Carlyle, who Mill famously criticized – on the way that "race" or racial character was used to exclude certain peoples from liberal institutions of law and government: "For racist ideologues, the blacks' cultural differences were cause to cast them into outer darkness, as exceptions to humankind." In contrast, Mill understood and naturalized such differences between persons by highlighting the lesser state of progress of non-European populations. To him, with "progress" and the foundation of appropriate institutions, these differences in character could be bridged and institutions of representative government then established.

In practice, Jamaica, with its preponderant population of freed blacks,[6] was considered by British officials as being unfit for representative government because of the perceived lack of the moral cultivation and education among ex-slaves. The source of this entrenched judgment in Jamaica and Britain was colonial officials' judgments of the character of Jamaica's freed population in terms of criteria based upon the renewed subjection of ex-slaves to their ex-masters as "free" wage labor. Specifically, officials were unwilling to acknowledge that freed persons were not indolent when they rejected paid work for their former masters; for instead of renewing their subordination in another form, freed persons increasingly sought to combine estate labor with market gardening, continuing a practice that preceded emancipation (Holt 1992, pp. 163-168). But, in the jaundiced eyes of officials in the colony and Whitehall, as well as the white planter elites,

[6] To colonial officials and their subjects in Jamaica, Jamaica could be divided according to various racial groupings: namely, black, brown or colored and white. Following historians of Jamaica (Holt 1992; Heuman 1981, 1994), my usage in this chapter refers back to this contemporary mode of racial classification, and should not be understood as essential racial or ethnic types or cultures. Simply put, these terms indicate boundaries – not groups.

freed persons were expected to become wage labor on the plantations whenever needed. Their perceived failure to do so was then interpreted as a sign of their deficient character, an indicator that the majority of the inhabitants of Jamaica were not ready to be subjects equal to the white and colored male elites who dominated the old representative system.

Also mitigating against the maintenance of representative government in Jamaica was the fact that colonial officials distrusted the creole white minority of Jamaica,[7] whose efforts at preserving their positions of power frustrated the Colonial Office's attempts to ensure that ex-slaves would receive the necessary education and governmental support to exercise their newly granted freedoms in due time. As Sir Henry Taylor, who was the Senior Clerk in the Colonial Office's West Indian Department, noted in a Minute submitted to the Cabinet in 1839 regarding the Colonial Office's initial plans to reform colonial government after emancipation, the creole White minority, which controlled the Assembly, was "possessed by all the passions and the inveterate prejudices growing out of the slave system."[8] Therefore, Jamaica's Assembly, as "the very result and representative of slavery—proud and stubborn," was "eminently disqualified for the great task of educating and improving a people newly born into freedom as it were."[9]

Colonial officials' animosity toward the white settlers had been accumulated from the recurrent difficulties posed by intrasigient political opposition to the Governor and imperial policy on the part of the creole white elites. In particular, their prejudiced

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[7] Drawing from Heuman (1981, p. xx), my use of creole designates either persons born in Jamaica or those who adopted a "local point of view, as opposed to a primarily metropolitan attitude." The creole white minority thus refers to white settlers whose positions and view points are distinct from those who remained in Britain or Europe.

[8] Taylor's observations in 1839 included a rough census of Jamaica's racially divided population. There were 320,000 recently freed blacks, 28,000 "partly coloured, partly black" persons who were already free before emancipation and onnly 9000 whites. Henry Taylor, *Autobiography of Henry Taylor, 1800-187*, 2 vols. (London: Longman, Green and Co, 1885), 1: p. 250-1. See Holt (1992, pp. 108-111).

[9] *Ibid*, 1: pp. 254-255.

dispositions towards subordinated populations were a recurrent obstacle to efforts to "civilize," protect and improve the welfare of freed persons. Consequently, beyond their understandings of the deficient character of each race within the colony, colonial officials were also cognizant of the ongoing tensions that marked the economic, political and social relations between the various "races" of a plural society like Jamaica. Notably, Taylor's criticism of Jamaica's creole whites echoed the way that Mill reflected upon his experiences as a clerk overseeing correspondence for the British East India Company between 1823 and 1858. As Mill (1867, p. 352) argued:

> Now if there be a fact to which all experience testifies, it is that, when a country holds another in subjection, the individuals of the ruling people who resort to the foreign country to make their fortunes are of all others those who most need to be held under powerful restraint…Armed with the *prestige* and filled with the scornful overbearingness of the conquered nation, they have the feelings inspired by absolute power without its sense of responsibility.

In this light, the failure of the diverse inhabitants of post-emancipation Jamaica to overcome the economic, political and social divisions formed by slavery raised questions about the establishment of representative government in racially divided colonies. Indeed, in the plural society of Jamaica, the Assembly had maintained the subordination of the majority of freed persons by a creole white minority, thereby failing to incorporate ex-slaves as "free" wage labor and subjects. Seeing the limits of political liberty in colonies like Jamaica, British officials' understandings of "freedom" were increasingly differentiated: on the one hand, economic freedom was defined in the abstract doctrine of liberal political economy, which emphasized the formation of a market economy based on "free" labor; on the other hand, political freedom increasingly made sense in relation to a racial sociology of empire that emphasized the social basis of government.

By the racial sociology of empire, I refer to the ways that British officials viewed, evaluated and classified colonies based on their seeming racial composition and the perceived character of their inhabitants; consequent to this racial sociology was the establishment of political institutions that were suited to the perceived level of "civilization" of colonized populations. And, even though British officials' contingent understandings of the racial sociology of empire could be premised upon conflicting notions of "race," they, like other European colonizers, governed their dependencies in ways based upon their understandings of "native" races and their supposed character (Mantena 2010; Wilson 2011; see Steinmetz 2007 for the case of German imperialism). Also, since officials situated Britain and its liberal institutions at the apex of the empire and "civilization," the racial sociology of empire possessed a temporal orientation as officials governed colonies according to an imagined teleology of "progress."

With such an articulation of liberal thought with the racial sociology of empire, colonial officials were confronted with a different problem – one that did not resonate as much when "native," i.e. non-European, populations were not incorporated as subjects; slaves, for instance, were property. We might turn to Mill (1867, pp. 346-347) to grasp this sense of purpose, as stated in his *Considerations on Representative Government*:

> As it is already a common, and is rapidly tending to become the universal condition of the more backward populations to be either held in direct subjection by the more advanced, or to be under their complete political ascendancy, there are in this age of the world few more important problems than how to organize this rule, so as to make it a good instead of an evil to the subject people, providing them with the best attainable present government, and with the conditions most favorable to future permanent improvement.

Hence, to the "problem of freedom" that had emerged with emancipation, we can add the problem of the imperial control of racially different colonies, with the resolution of the former closely tied to the latter. Thus expressed, the purpose of imperial control was to cultivate the aptitudes of the colonized for the eventual realization of self-government. Even so, the hubris and hypocrisy of such official designs was often revealed in practice.

At the heart of this weave of understandings of freedom and imperial control in empire, as Holt's (1992, p. 9) work has powerfully highlighted, lay the "the struggle of master and slave, of freed people and their erstwhile emancipators." The political conflict between freed persons and their ex-masters mattered not only for their individual and collective fates, for it also helped to establish the institutionalization of Crown Colony government across the empire. Nevertheless, while emancipation held out the possibility that all persons, no matter their status or perceived racial origin, could achieve individual and political freedom, the imposition of Crown Colony government in Jamaica cemented the "colonial rule of difference" in the constitutional frameworks of a changing empire.

In this light, the Morant Bay rebellion was indeed a historical event that led to a enduring transformation of the legal architecture of empire: in contrast to the self-governing European settler colonies, multi-racial colonies like Jamaica would henceforth be ruled as Crown Colonies.[10] Within this schema of "progress," the promised route to political liberty lay, paradoxically, through "direct rule" by the Crown. What then of the "rule of law" in Crown Colonies? Also, how did British officials' understandings of the racial sociology of empire affect their uses of law and the practice of imperial control?

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[10] Sewell (2005, p.228) defines the historical event as "(1) a ramified sequence of occurences that (2) is recognized as notable by contemporaries, and that (3) results in a durable transformation of structures."

Whither the "Rule of Law?" The Case of Jamaica and its Consequences

> There was much more at stake than only justice to the Negroes, imperative as was that consideration. The question was, whether the British dependencies, and eventually, perhaps, Great Britain itself were to be under the government of law, or of military licence; whether the lives or persons of British subjects are at the mercy of any two or three officers however raw and experienced or reckless and brutal, whom a panic-stricken Governor, or other functionary, may assume the right to constitute into a so-called court-martial. This question could only be decided by an appeal to the tribunals… (Mill 1969, p. 252)

Reflecting on his efforts to hold Governor Eyre responsible for his actions in the suppression of the 1865 Morant Bay rebellion, Mill demonstrated the legalistic manner that marked the political struggles and public debates in Britain regarding the atrocities that Eyre and his government had wrought in Jamaica under the sanction of martial law (Kostal 2005, p. 462). Mill, as leader of the voluntary Jamaica Committee, sought to have Eyre and his subordinate officials charged in the English courts for their actions. However, as Kostal (2005, p. 466) notes, Mill's cause was not primarily motivated by the need to see that justice would be done to punish the acts of retributory violence suffered by black and colored persons during martial law; rather, Mill and other like-minded elites were more concerned for the implications of Eyre's actions for the rule of law in the colonies and, more importantly, Britain. To Mill and his allies, the sacred principle of the "rule of law" within the British Empire was the true stake in their struggles to hold Eyre accountable in the English courts.

The liberal cause of the Jamaica Committee was to be defeated in the English courts, revealing the racial limits to justice within the empire. As Mill (1969, p.253) later remarked in his *Autobiography*, "It was clear that to bring English functionaries to the bar

of a criminal court for abuses of power committed against negroes and mulattoes was not a popular proceeding with the English middle classes."[11] Despite their continued lack of success, the Jamaica Committee ended up bringing legal charges against Eyre in the English criminal courts thrice, including two for murder (Kostal 2005, p. 16). When these criminal charges proved to be unsuccessful, the Committee then supported a civil lawsuit against Eyre, which also met with the same fate (*ibid*). Ultimately, Mill (1969, p.253) could only claim a moral victory for the Committee, which showed that "there was at any rate a body of persons determined to use all the means which the law afforded to obtain justice for the injured." While Mill's words might have reflected a self-interested defence of his cause, his actions reveal the ways that law and politics worked across the empire. Despite the localized nature of the racial and class conflicts that precipitated the rebellion of Jamaica's black underclasses on 11 October 1865, Eyre's declaration of martial law and his government's use of violence against suspected rebels provoked official and public debates that had consequences for both government and law across the empire.

This proceeded in two directions. For one, the legal and political struggles led, in part, by the Jamaica Committee resulted in the articulation of various judicial opinions, legal arguments and official memoranda on the meaning and use of martial law, particularly in colonial contexts. While these debates considered the legality of the Eyre's actions in declaring martial law, they revealed how British officials maintained the need to preserve the colonial executive's discretionary authority in dealing with violent threats against the Crown's authority. Notably, as agents of the Crown in the colonies,

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[11] See Darian-Smith 2010, pp. 144-6 for an account of why the English middle classes were tended to support Eyre's actions. Simply put, they viewed the rebellion of the black working classes in Jamaica as being akin to the seemingly riotous working classes they faced at home in a period of working class agitation for the franchise.

Governors' ability to declare martial law originated from the Crown's prerogative to rule its possessions and to protect its sovereignty. Furthermore, the preservation of Governors' discretionary authority was not only justified by the urgency of the situations that necessitated the suspension of civil law. The difficulty of framing general rules regarding the implementation of martial law across differing colonial contexts also meant that Governors' use of discretion during martial law would be considered crucial to avoid the use of unnecessarily punitive measures. In the eyes of the Colonial Office, the legality of the Governor's actions during martial law could only be judged after the fact by those who controlled his appointment.

Secondly, the rebellion and its suppression did not merely highlight the fundamental instability of British rule within racially divided colonies like Jamaica; this event also provided an opening for the Colonial Office, Eyre and the imperial Parliament to remove a troublesome legislature that had constantly sought to entrench the power of the white planter elites. Their actions, in turn, established a precedent for the abolishment of representative government within racially divided colonies in the West Indies. Hence, even though the Jamaica Committee's activism did demonstrate how the English ideal of the "rule of law" shaped public debates over the state's use of violence within the metropole, the ripples of change across the empire that followed the Morant Bay rebellion meant that one of the institutional safeguards of individual liberties, representative government, was to be mostly denied to racially plural colonies. In place of the older representative system, Jamaica then adopted the authoritarian model of Crown Colony government that had been put in place in colonies, like Trinidad, that were conquered or ceded during the Anglo-French War of 1793-1815. To colonial officials,

greater imperial control would be necessary to prevent abuses of power by dominant groups and to maintain the legality of colonial rule within racially divided colonies.

Hence, Jamaica's adoption of Crown Colony government after the rebellion set off a series of similar constitutional changes in other West Indian colonies that were alike in their racial demographics. As Henry Taylor later wrote in 1871 to E.D. Fairfield, who served with him in the Colonial Office's West Indian Department:

> The other West Indian Colonies were naturally startled by the occurrence in Jamaica, and the whites, moreover, found themselves to be gradually losing ground in the Assemblies and felt more disposed to be governed by the Crown than by the black and coloured people […] Barbados, Grenada, and Tobago are now the only West Indian islands which adhere to their old constitution.[12]

Lamenting that these constitutional changes had not occurred earlier when he had first proposed them in 1839,[13] Taylor observed: "a whole generation of negroes was thus deprived of the laws and government by which they might have been fitted for the freedom conferred upon them in 1838. When a whole generation had grown up under this deprivation, the rebellion of 1865 followed naturally enough."[14] In his *Autobiography*, Taylor laid the blame for the initial failure to establish Crown Colony government in Jamaica at the feet of the Conservative politician Sir Robert Peel, who had opposed the proposals of the Colonial Office and Lord Melbourne's Cabinet in Parliament. Tellingly, Taylor recounted that Peel's opposition had been based on "the principle of preserving

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[12] Taylor to Fairfield, March 26,1871, CO 7/143. Cited from Higham (1926, p. 94).
[13] In 1839, the Colonial Office had already sought similar changes to Jamaica's constitution through the means of imperial legislation, failing in their efforts partly because of the political weaknesses of the Whig government. (See Holt 1992, pp. 109-12). To substantiate the Colonial Office's policy, Taylor had penned a confidential memorandum to the Cabinet in favour of the abolishment of elected legislatures in the West Indies. This memorandum is enclosed as an appendix in CO 884/2/6.
[14] Taylor to Fairfield, March 26,1871, CO 7/143. Cited from Higham (1926, p. 94).

West Indian Representative Legislatures as embodying principles of *liberty*…"[15] However, to this seasoned Senior Clerk, the preservation of the Assemblies merely meant the maintenance of the political domination of the creole planter elites.

Written in a tone that expressed the certitude of his beliefs, Taylor's remarks expressed the understanding that the freedom gained by the emancipated population of Jamaica would have been more appropriately combined with an unfettered form of imperial control. Crown Colony government would have better served to educate the ex-slaves so that they could learn to exercise their newly granted freedoms. His argument – that the "deprivation" of freed persons of the absolute control and guidance of the Crown had "naturally" led to the Morant Bay rebellion – was based on the assumption that the imposition of imperial control would have been beneficial. Extending his observations to the other West Indian colonies, Taylor affirmed his opinion that "popular constituencies are out of the question and the Crown is the only possible representative of the people."[16]

Analogous to Mill's views on colonial government, Taylor's understanding of the purpose of Crown Colony government was a part of the emergent racial sociology of empire. As Taylor imagined them, the West Indian Legislative Assemblies were utterly "*un*representative of the populations, or of the public interests" because of the particular combination of races, each of which lacked the character to take on the task of improving the colony, that were found in these plural societies.[17] What was needed was a different architecture of imperial control and one that maintained the sovereign powers of the Colonial Office and the Governor, as its agent, to direct the making and use of law.

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[15] Henry Taylor, *Autobiography*, p. 264n1.
[16] Taylor to Fairfield, March 26,1871, CO 7/143. Cited from Higham (1926, p. 95).
[17] *Ibid*. Cited from Higham (1926, p. 94).

Colonial Law and the Staging of the Morant Bay Rebellion

To put it very lightly, Taylor's assessment of the cause of the rebellion could not be further off the mark. If anything, his obliviousness to the actual deprivations experienced by Jamaica's non-white population may be considered emblematic of the willful misapprehension by colonial officials and the local elites of the economic, social and political conditions in Jamaica before the fateful Morant Bay rebellion. In this regard, both colonial officials (in the Jamaica and the Colonial Office) and the elected representatives of the island agreed that an increasingly punitive policy towards the theft of property was necessary even though the majority of the island's inhabitants were struggling with poverty and starvation during an economic depression brought on, in part, by the decline of the sugar industry, a long-standing drought and the government's heavy taxation of imported staple goods like cotton and flour (see Holt 1992, pp. 264-278).

Within a racially divided colony then populated by 13,816 "Whites," 81,065 "Brown" persons and 346,374 "Black" persons, such a punitive response to hardship reeked of officials and creole white elites' misjudgment of the deprivations faced by the *other* inhabitants of the island, whose livelihoods lay at the mercy, or lack thereof, of a moralistic Governor and an Assembly dominated by white planter elites.[18] For instance, when Edward Bean Underhill, Secretary of the Baptist Missionary Society in London, relayed local accounts of widespread poverty on the island to the Colonial Office, the first response of Jamaica's officials and elites was to dispute the contents of his report.[19]

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[18] Summary of Census Returns taken on the 6th of May, 1861; *Blue Book for the Island of Jamaica for the Year 1865*, CO 142/79.

[19] See Underhill to Cardwell, January 5 1865, CO 137/398; Eyre to Cardwell, March 7 1865, CO 137/388.

Hence, at the beginning of the last legislative session before the rebellion, Governor Eyre thus addressed the elected representatives of the Legislative Assembly and the appointed members of the Legislative Council,[20]

> The great increase and almost universal prevalence throughout the country of larceny of provisions, or of domestic animals, calls for the most prompt and stringent measures to repress an evil which frustrates the toil of the industrious, and paralyses all efforts at improvement or comfort.
>
> The gaols of the colony are filled with the young and the strong of both sexes, chiefly committed for theft; and though the value of labor performed by prisoners during the past year has increased in proportion to their augmented numbers…it is clear that the punishments at present in force have not that deterring effect which should be the chief object of penal law. I believe, therefore, that a resort to whipping, and the re-establishment of a treadmill in the penitentiary, are absolutely essential to put a stop to a class of crime which is attaining a magnitude so serious and so detrimental to the best interests of the colony.[21]

The Legislative Assembly and Council then harkened to Eyre's moralistic call to curb the "evil" of larceny, passing a series of acts that were aimed at the punishment of offenders of the crime, as well as those who were deemed to be indolent. Among these measures, they included a law that allowed for the whipping of all males who had been repeat offenders of larceny and a law that authorized justices of the peace to apprentice, i.e. indenture, persons under sixteen who had been convicted of petty larceny.[22]

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[20] Before its abrogation, the Legislative Assembly, as the lower chamber, consisted of 47 elected members who represented the various parishes. This representative body was coupled with the Legislative Council, which operated as an upper chamber and was an appointed body with both official and nonofficial members. The latter held veto powers and could also initiate certain legislation. See Holt (1992, p. 248), as well as William C. Sargeaunt and Arthur N. Birch, *The Colonial Office List for 1862* (London: Edward Stanford, 1862), p. 13.

[21] Reported in *Journals of the Legislative Council of Jamaica*, 1st day of November, 1864. CO 140/163.

[22] Jamaica Acts 28 Vic. c. 18 and 19. In total, 5 of the 45 acts passed in this legislative session were either directly or indirectly concerned with the increase of larceny on the island. The other 3 acts, respectively, defined the offence of larceny as a felony, punished men who failed to maintain their families and made provisions to deal with the increased number of prisoners. Jamaica Acts 28 Vic. c. 4, 5 and 22. These were the only criminal laws passed in the year preceding the rebellion.

By reverting to the punishments of flogging and apprenticeship, both of which had been characteristic of the pre-emancipation regime, the colonial government articulated the severe understanding that physical coercion was necessary for the "improvement" of the colony and its numerous able-bodied but indolent population. Here, law was a means of inducing labor and moral discipline even though those subject to it would likely understand otherwise. As the Committee of the British and Foreign Anti-Slavery Society, which had continued the long-distance activism of the British abolitionist movement (Stamatov 2013, p. 178), thus argued in a petition against both of these laws: "the people of Jamaica would be likely to resist, in a most determined and dangerous manner, the application of enactments calculated, so painfully to remind them of their former degraded condition, with all its brutalizing accompaniments."[23] Seen in light of the subsequent rebellion, the Committee's words proved to be a prescient warning but the Colonial Office, and particularly Henry Taylor, disregarded their objections.

In this regard, undermining Taylor's argument that imperial control under the system of Crown Colony government could have averted the rebellion was the fact that the Colonial Office disallowed the latter law against petty larceny by young persons, which was "open under any circumstances to great abuse," only *after* the rebellion in view of the "present very critical state of the island."[24] Since the lawmaking powers granted to Jamaica's Legislative Assembly did not remove the Crown's power to disallow colonial laws, the Colonial Office's failure to act earlier was revealing of its

[23] Anti-Slavery Society to Secretary of State, 3 April 1865, CO 137/397.
[24] Cardwell to Storks, 29th January 1866, enclosure in Eyre to Cardwell, 22 March 1865, no. 60, CO 137/388.

alignment with local elites regarding this matter.[25] Indeed, the Secretary of State for the Colonies, Edward Cardwell, merely directed that the act be amended in the way it was carried out – this went unheeded – in his initial reply when the act was sent to the Colonial Office, having "no objection to the principles."[26] Given extant reports of the rise in petty larceny on the island, the act's use of apprenticeship to punish young thieves likely resonated with the Colonial Office's own emphasis upon the need to foster the moral discipline of ex-slaves and their families.

In practice, this law also highlighted the social tensions that attended the administration of justice in Jamaica. Planters were not only dominant in the economy and politics; they also acted as magistrates and could use the law to advance their interests. Reflecting upon the Colonial Office and Governor's initial responses – or lack thereof – to the enactment of the law, the Under-Secretary of State for the Colonies, W.E. Forster, made the following pointed observations after the rebellion:

> As the act stands at present any two planters or agents who happen to be magistrates may take a boy of 16 who has plucked a sugar cane from his parents and apprentice him to one of themselves for 5 years.
>
> Surely the unpaid magistrates of Jamaica are not men to whom such a power as this of making a profit out of punishment can safely be trusted…[27]

In hindsight, it was exceedingly obvious that laws such as this one were heavily weighted towards the interests of the creole planter elite, with or without amendment to its method

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[25] Compare this initial failure to act with the then-Colonial and War Office's earlier decision in 1834 to deny its assent pending amendment to a Jamaican Act that allowed two ordinary magistrates to "exercise summary and irreversible jurisdiction over all misdemeanors" – something pointed out by James Stephen, the Assistant Under-Secretary of State and legal counsel to the office (Swinfen 1970, p. 40). Given the extant emancipation of slaves under the sytem of apprenticeship, this act, as originally formulated, could likely be subject to abuse by white planter magistrates to punish ex-slaves.

[26] Minute by Edward Cardwell in Eyre to Cardwell, 22 March 1865, no. 60, CO 137/388.

[27] Memorandum, Forster to Cardwell, enclosure in Eyre to Cardwell, 22 March 1865, no. 60, CO 137/388.

of application. Likely due to its use of apprenticeship to punish the stealing of food, the act was seen by the black population as "a plot to restore slavery; it figured prominently in the agitation and violence of 1865." (Holt 1992, p. 287; Heuman 1994, p. 52)

Seeing how colonial laws further entrenched the domination of the planter elite and their associates, it should have been of no surprise that the occurrences that led to the outbreak of the rebellion occurred at the Morant Bay courthouse on 7 October 1865. Troubles began when the actions of a disruptive crowd during public court proceedings, which were chaired by two planter magistrates, resulted in the beating of two black policemen.[28] This incident was blamed on Paul Bogle, a peasant farmer who was an influential Native Baptist preacher, and it was the authorities' attempt to arrest him in the following days that led to the violent confrontation at the courthouse on 11 October 1865. The men and women who had gathered in support of Bogle took over the town by the day's end, but their violence was not indiscriminate. As Holt (1992, p. 299) notes of the clash between Bogle's supporters and the local authorities, "Ordinary white townspeople were not attacked; magistrates, parish priests, and plantation personnel were sought out." The accumulation of economic, political and legal power in the hands of the minority of the mostly-white planter elites and their associates made them clear targets for the rebels, who consisted of black peasants and estate workers. In an unintended way, Taylor was right. The rebellion was a "natural" consequence of the inequities wrought by Jamaica's Assembly, which had protected the long-standing domination of white planter elites.

The façade of representative government could not mask the actions that the Colonial Office and Jamaica's colonial officials had undertaken to curtail the potential

[28] For a detailed account of the court proceedings and the rebellion, see Holt (1992, pp. 295-307).

political power of the emancipated populations. Because of local restrictive property- and tax-based qualifications for the franchise that were implemented since the Franchise Act of 1859, a declining proportion of freed persons could be found in those eligible to be voters or legislators (Holt 1992, pp. 254-9). Consequently, even with the decline of the sugar estates, the minority of white planters and their associated controlled the Assembly. As the larceny laws revealed, the laws passed by this legislature reflected the interests of this group of creole elites, a tendency that also fit with the long-standing pattern of racial and class-based domination that persisted despite emancipation. Colonial laws were perceived as instruments of maintaining the structure of a highly unequal society even if lawmakers had claimed that these laws were aimed at moral ends and the public interest.

Critically, among the colonial laws passed since emancipation, one of them authorized the Governor to declare martial law for thirty days with the approval of a Council of War; the perceived necessity of such powers was based on the repeated occurrence of violent slave rebellions in Jamaica's past. Similar to how the unjust laws of the island had been the source of grievances for both black and colored Jamaicans, colonial law also made it possible for the Governor to suppress violence with violence by proclaiming martial law on 13 October 1865. In the aftermath of the rebellion, the constitutionality of the relevant provisions of this law, sections 96 and 97 of the *Act to Consolidate and Amend the Militia Laws*,[29] was the subject of correspondence between the Secretary of State for the Colonies and the Attorney- and Solicitor-Generals of England. In the views of the latter, this colonial act gave the Governor the right to declare martial law, i.e. to authorize the "exercise of summary military authority." They noted:

[29] Jamaica 9 Vic. c. 35.

> The Petition of Right and Magna Charta have, in our opinion, no bearing at all upon this question. Neither of those English statutes is made applicable by the express words or necessary intendment of any Act of Parliament to Jamaica, or to any other colony. Even, therefore, if the substance of their provisions, or such of them as might be applicable to the circumstances of the Colony, had been introduced into Jamaica, otherwise than by Imperial legislation (and of Imperial legislation introducing them we find, as we have said, no trace), there would have been nothing to prevent the Colonial Legislature from repealing, or altering, or passing laws repugnant to that part of their local law (see 28 and 29 Vict., cap. 63, sections 1, 2, 3).[30]

In other words, the reception of English law in Jamaica did not necessarily introduce the basic liberties within the English law that guaranteed protection against the tyranny of the state. And, even if such provisions had somehow been introduced into Jamaica, both legal officers stated that the Jamaican act in question, or any other similar colonial law, would not be void even though it would be repugnant to these tenets of English law. Protected by the *1865 Colonial Laws Validity Act*,[31] which the imperial Parliament recently passed, Eyre's authority to declare martial law was doubly supported by a colonial act made by Jamaica's Legislative Assembly and the larger legal architecture of empire; within this framework, the colonial translation of English law did not necessarily mean the adoption of its principles. In this case, Eyre's constitutional powers to declare martial law, as recognized by these British officials at Whitehall, buttressed the authoritarian laws of a colonial legislature that served only to entrench the dominance of the white planter elites.

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[30] Palmer and Collier to Cardwell, January 24, 1866, enclosed in "Papers Connected with Martial Law," CO 885/3/17. The imperial act referred to is the *Colonial Laws Validity Act 1865*.

[31] 28 and 29 Vict., c. 63. Demonstrating how events at separate ends of the empire could shape each other, the imperial statute in question had, in fact, originated out of attempts to affirm the validity of laws passed in the elected legislature of South Australia (see Swinfen 1970, Chap. 11; McLaren 2011, Chap. 8).

Indeed, the legal basis for the declaration of martial law in the colony extended beyond the provisions of colonial law.[32] As stated by the Attorney- and Solicitor-Generals, Roundell Palmer and R.P. Collier, "the Crown has throughout its dominions an unquestionable right to meet war by war in case of any armed insurrection against its authority."[33] Nasser Hussain (2003, p. 107) also argues that martial law originated in the English common law even though it was only applied in Britain's colonial territories. Nevertheless, Eyre's proclamation of martial law, even though it was deemed to be lawful, eventually provoked a controversy that was to bring an end to his career in the colonial service. In particular, his involvement in the summary trial and execution of George William Gordon, a colored member of the Legislative Assembly and a frequent opponent of Eyre's, was soon seen as an egregious abuse of the Governor's powers, and it was the basis for the unsuccessful prosecution of his actions in the English courts.

However, even though the origins of martial law laid in the English common law, Eyre's actions and the British officials' willingness to justify them reveal the authoritarian translation, or non-application, of English legal principles in Jamaica and the rest of the empire. Also, they demonstrate how colonial governance was premised upon the protection of the Crown's authority, and that the abuse of power by officials on the ground was, in practice, more effectively limited by the Colonial Office's exercise of control over their appointment. In this light, the colonial "rule of law" was better defined by the limitation of power through the Colonial Office's exercise of oversight over the legislative and administrative activities of the colonial government.

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[32] Indeed, following the instructions contained in the Colonial Office circular dated 30 January 1867, Jamaica's Legislative Council repealed the provisions that granted the Governor the statutory right to declare martial law, i.e. sections 96 and 97 of Jamaica 9 Vic. c. 35. See Jamaica Ordinance No. 19 of 1867.
[33] Palmer and Collier to Cardwell, "Papers Connected with Martial Law."

Rearticulating the Legal Infrastructure of Empire

I have stressed how the inequities in the government and laws of Jamaica set the stage for the 1865 Morant Bay rebellion and the subsequent violence wrecked upon those suspected to be rebels by British soldiers. The local state of affairs could be described as a crucible in which long-standing racial and class tensions were brought to a boiling point by the local authorities' attempt to arrest Paul Bogle for the disruption of proceedings at the Morant Bay courthouse. Notwithstanding their parochial nature, the legal powers that colonial officials and creole elites wielded in the course of the event were buttressed by the legal infrastructure of empire, which had protected the validity of colonial legislation and also limited the translation of long-standing English liberties in the colonies. In turn, the rebellion turned out to possess wide-ranging ramifications for the reformation of colonial law and government in the empire. Hence, I turn to examine two aspects of British officials' re-articulation of the rules regarding the use of power in the colonies: first was the Colonial Office's efforts to define the application of martial law; second was the course of actions that abrogated Jamaica's old representative system of government.

Firstly, Eyre's conduct during martial law had provoked great controversy in London – an affair that invited scrutiny of the Colonial Office and its officials and their use of martial law in the colonies. Consequently, the Colonial Office developed a set of rules by the end of 1866 to offer guidance to Governors in the event of the proclamation of martial law. In particular, the drafters of these rules paid particular attention to the potential for misconduct by a colony's authorities and particularly its civil magistrates, who were typically drawn from members of the white elite within a colony.

> 6. Great abuses have arisen from Civil Magistrates imagining, with no foundation, that they are clothed with extraordinary powers by the proclamation of Martial Law. The Governor would do well to warn them against falling into this error, in the manner best suited to the circumstances of the particular colony.[34]

In creating and circulating such regulations, the Colonial Office took a practical view towards the regulation of governmental conduct during martial law. Hence, the proposed rules did not limit the discretionary powers granted to Governors during the proclamation of martial law. For even when the drafters did introduce an "express Rule" within this set of guidelines to regulate the conduct of Civil Magistrates, they left it to the Governor to figure out how best to avoid abuses of power.[35]

This insistence on maintaining the scope of the Governor's discretionary authority during the proclamation of martial law was, in part, attributed to the diverse conditions and circumstances of the colonies. As the drafters of these guidelines noted, the Governor retained authority over the treatment of the civilian population despite the necessary use of military force to suppress rebellion during martial law.

> In some the operations will resemble those of an army in an enemy's country, and will therefore be purely military. In other instances there may be a large body of loyal and well-conducted inhabitants, and yet it may be considered necessary to maintain Martial Law in order to afford them protection against predatory bands of insurgents and marauders…we think that in other than military operations the Governor should have power to give, if he so think fit, authoritative instructions on some points to the officer commanding the troops, as well during the continuance of Martial Law as upon its first proclamation. Among such matters we may mention the punishment of offenders, proclamations of pardon and amnesty, levies on the inhabitants, arming Magistrates with special powers, the continuance, resumption, or suspension of the ordinary tribunals.[36]

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[34] "Proposed Rules to be introduced, on the subject of Martial Law, into the Volume of Colonial Regulations," enclosed in Lugard et al. to Carnarvon, Dec 15 1866, confidential, CO 885/3/16.
[35] Lugard et al. to Carnarvon, *ibid*.
[36] *Ibid*.

Regarding the question of how martial law should be implemented, the Governor's understanding of the social and political circumstances of the colony would be important in guiding the way that the military operations treated both rebels and the vulnerable civilian population. Hence, the drafters of the guidelines recommended that the Governor be empowered to maintain his authority over the administration of justice and even the imposition of levies. Martial law did not mean the complete suspension of the civil government because the manner of its implementation depended on the Governor's discretionary powers and judgment. The result of the Colonial Office's deliberations over the use of martial law in the colonies thus recognized the overarching importance of the Governor, as the agent of the Crown, in restoring order and the semblance of lawfulness.

Secondly, besides providing the immediate impetus for the creation of these guidelines on martial law in the colonies, the Morant Bay rebellion presented a long-awaited opportunity for British policy-makers in Whitehall to do away with the Legislative Assembly, the cornerstone of the older representative system of government in Jamaica. Recognizing this possibility, Governor Eyre said as much when he wrote privately to Secretary Cardwell: "there is nothing like striking whilst the iron is hot or if we are to get a change of constitution thro' the medium of the Assembly itself, now is the time to do it when everybody is in a state of the greatest alarm and apprehension…" (cited from Heuman 1994, p. 159). Critically, the rebellion made it feasible for Eyre and the Colonial Office to adopt a strategy that targeted the unsettledness of Jamaica's Assembly – a strategy unlike the Colonial Office's earlier attempt to impose a version of Crown Colony government in Jamaica in 1839 directly through an act of Parliament.

Eyre's initiative in proposing this fundamental change in the colony's constitution to the Colonial Office and, later, the Legislative Assembly was instrumental in establishing a monocratic form of government that would further empower the Governor and facilitate the Colonial Office's exercise of imperial control by removing opposition to imperial policy by an elected legislature. Specifically, in a confidential – and, this time, official – despatch to Secretary Cardwell, Eyre proposed the abrogation of Jamaica's Assembly due to its purportedly seditious elements: "The real truth is that the people are not fit to elect legislators, and there are few persons in the Island fit to become legislators. […] My own impression is that it would be desirable to revert to the now exploded form of Government–by a Governor and Council as at Trinidad."[37]

However, cognizant of the difficulty of persuading elected Assembly members to vote for a single nominated Council to replace Jamaica's existing bicameral legislature, Eyre noted that it was likely that they would compromise and vote for the establishment of a Council that would be half nominated and half elected. His concerns proved to be right, as the Legislative Assembly and Council then passed an act that amended the constitution by establishing a unicameral legislature that was half-nominated and half-elected.[38] As expected, the enactment of this compromise was a challenge. When Eyre reported on the act's passage, he noted that while the first proposed bill was based on the formation of a nominated Council, this measure was opposed by groups in the Assembly, and he had to meet "in conference" with their leaders to obtain "mutual concessions."[39]

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[37] Eyre to Cardwell, Oct 24 1865, confidential, enclosed in "Jamaica (Despatches)," CO 884/2/5.
[38] Jamaica 29 Vic. c. 11.
[39] Eyre to Cardwell, Dec 7 1865, CO 137/396. Heuman (1994, p. 159) also notes that the majority was in favor of constitutional reform though a "a small group of coloured and Jewish representatives in the House

Notwithstanding its significant restructuring of the colony's constitution, this act was amended weeks later by another that would be more radical in its consequences.[40] This was because Eyre's official despatch to Cardwell had prompted a confidential response from the Colonial Office. Not surprisingly, it was drafted by Henry Taylor, who opposed the maintenance of representative government in the West Indies.[41] In his reply to Eyre's proposed plan to reform Jamaica's constitution, Taylor stated: "in a case in which local self-government is incompatible with the welfare and even the safety of the Colony, there would be no hesitation on the part of Her Majesty's Government, if called upon by the Colonists, to accept such an amount of additional responsibility as the circumstances might seem to require."[42] By presenting Taylor's words in his message to the Assembly as a "private and confidential intimation" and making it seem that no other solution would be acceptable to Whitehall, Eyre urged its members to amend the act and leave the Crown "unfettered in determining the character of the future constitution."[43] Following Eyre's framing of the Assembly's course of action, the final act of the Assembly and Council in 1865 confirmed the abolition of the colony's legislature and made it "lawful for her majesty the queen to create and constitute a government for this island, in such form, and with such powers as to her majesty may best seem fitting…"[44]

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argued against any change in the system" because the various proposals would have limited, or entirely removed, the franchise.

[40] The earlier act was passed on 7 December 1865, but it was later amended by the passage of Jamaica 29 Vic. c. 24 in the Legislative Assembly and Council on 20 and 21 Dec 1865, respectively.

[41] Draft of Cardwell to Eyre, Novermber 1865, confidential, enclosed in "Jamaica (Despatches)," CO 884/2/5. Taylor relates the fact that he had drafted the Colonial Office's response to Eyre in his *Autobiography*, 2: pp.268-9.

[42] *Ibid*.

[43] Enclosure in Eyre to Cardwell, 24 December 1865, CO 137/396. Interestingly, within this reported exchange of messages between Eyre and the Assembly, he declined their request for more information regarding the confidential despatch.

[44] Section Two of Jamaica 29 Vic. c. 24.

This was a significant act on the part of Jamaica's Assembly, which had typically opposed attempts by the Crown and the Colonial Office to dictate colonial policy. Furthermore, the act meant the demise of the elected Assembly, which had existed since the late seventeenth century. Eyre's speech at the close of the last meeting of Jamaica's bicameral legislature at the end of 1865 said as much. Having commanded the attendance of the Assembly and Legislative Council's members to announce his assent to the act, Eyre thanked them for sacrificing the cherished institution of representative government. In light of the recent rebellion and the extent of racial tensions within the colony, Eyre reasoned that this was "the only course which holds out any hope of success" and that members of both legislative chambers had done well in allowing the Crown to reconstitute the colony.[45] He added,

> It is impossible to help regretting the necessity which has enforced the abandonment of institutions so deservedly dear to every British heart, and which, even in this colony, have remained unchanged for a period of two hundred years; but it is wiser and better, circumstanced as we are, to give up institutions which are valued rather for the associations which are connected with them, than for any advantages which have resulted to the colony from their existence in Jamaica, and to substitute in their place a perhaps less showy and less time-honored form of government, but one which is certainly more practicable and better suited to the altered circumstances of our position.[46]

Given the long-standing association of the Assembly with the enshrined liberties of British subjects, this voluntary act of political suicide by the elected members of Assembly provokes larger sociological questions about how and why they did not oppose Eyre's blunt attempt to wrest the legislative powers, or political liberties, of the Assembly from the colony and its elites. In the terms of Ermakoff's (2013, p. 53; italics in original)

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[45] Reported in *Journals of the Legislative Council of Jamaica*, 22nd December, 1865. CO 140/163.
[46] *Ibid*.

theorization of political suicide, their actions constituted "*collective abdication*, broadly defined as a formal decision by means of which a group or representative assembly transfers to an external agent the right to define the rules allocating decisional and representational rights." In this light, given the Assembly's past successes in resisting the Crown's attempts to direct colonial policy and the lack of ambiguity in Eyre's intentions to abolish the old representative system of government, the voluntary abrogation of the island's Assembly is puzzling because it ran contrary to the political interests of its members. While a systematic investigation of the understandings and interests of individual members of the Assembly would throw more light on this puzzling outcome (e.g., see Heuman 1981; 1994), my reading of the official correspondence and the legislative proceedings suggests that the Morant Bay rebellion had likely provoked concerns among most of Jamaica's creole white elites about the threat posed by the restive black majority and the need for the Crown to maintain the precarious racial order.

Beyond the localized racial politics of "collective abdication," the abrogation of Jamaica's legislature in the form of a colonial act soon brought up questions about the changing legal architecture of empire. Could an Assembly divest itself of powers that the Crown had granted to it? If not, how could British officials legitimately transform the terms of colonial rule? Raised by Sir Frederic Rogers, who was the Permanent Under-Secretary of State for the Colonies, to the Crown's legal officers, the crux of the matter turned upon whether Jamaica's Legislative Assembly and Council could legitimately surrender its legislative powers to the Crown. On this question, the Attorney and Solicitor-Generals, Roundell Palmer and R.P. Collier, judged that the acts of Jamaica's legislature, on their own, were "*ultra vires* and void."

> When a Constitution was originally granted to Jamaica, the Crown parted with the right of legislating for that island, otherwise than in accordance with such Constitution (Campbell v. Hall 1 Cowper 204). Nor could the Legislative Council and Assembly…deprive the inhabitants…of their Constitutional rights and liberties, so as to revest an arbitrary legislative power in the Crown, by any Act of surrender or self-renunciation...
>
> The ordinary power of such Assemblies, according to all Charters of which we have any knowledge, is to make laws, with the Royal Assent, for the order and good government of the particular Colony. But, such a power cannot, we think, extend to the annihilation, by local enactment, of the Legislature itself, with its whole power of legislation.[47]

In their opinion, without any further action by the imperial Parliament, the Crown did not have the power to impose a new constitution upon Jamaica despite the express intentions of the colony's acts of "self-renunciation." In other words, the old architecture of empire, which has been based on the Crown's commission of elected Assemblies, could not be reformed by colonial laws alone. Nevertheless, while the Crown could not simply renege on its grant of political liberties, Parliament possessed the power to effect this change.

Given such, this constitutional obstacle was soon surmounted. In March 1866, Parliament passed an act to make the powers granted by the colonial laws in question "exercisable by Her Majesty in Council," paving the way for the Crown to establish a wholly nominated Legislative Council in Jamaica "to make laws for the Peace, Order, and good Government" of the Crown Colony.[48] In effect, the voluntary abrogation of Jamaica's Assembly and Parliament's subsequent confirmation of the colony's acts re-articulated the legal architecture of imperial control. Under Crown Colony government, the Crown and Governor would control the appointment and activities of the new Legislative Council. Jamaica's elected Assembly and its political liberties were no more.

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[47] Palmer and Collier to Cardwell, January 19 1866, confidential, CO 884/2/8.
[48] Section 2 of 29 Vic. c. 12; *ORDER OF THE QUEEN IN COUNCIL for providing for the Government of the Island of Jamaica, and for establishing a Legislative Council in the said Island*, dated 11 June 1866.

Conclusion

In my analysis of the Morant Bay rebellion, I have highlighted how colonial laws and the old legal architecture of empire precipitated the violent rebellion at the end of 1865 in the eastern part of Jamaica. Despite the Colonial Office's powers of disallowance over colonial legislation, Jamaica's Assembly wielded its legislative powers to discipline and punish freed persons who refused to conform anew to relations of dependence with the creole planter elite. The validity of such laws, in turn, were secured by Parliamentary legislation like the *1865 Colonial Laws Validity Act*, as well as the limited translation of the rights and liberties of English law in the colonies. In this sense, colonial law sustained the fragile domination of creole white elites over a subordinated black and colored majority, undermining the colony's façade of representative government and eventually setting the stage for rebellion. In relation, the Morant Bay rebellion reinforced an understanding shared by colonial officials and elites: within a racially divided colony like Jamaica, there existed a precarious racial order – one liable to cycles of rebellion and suppression. To British officials like Eyre and Taylor, the instability of this social configuration necessitated the reconstitution of colonial government according to the model that was developed for the rule of conquered Crown Colonies like Trinidad.

Hence, in the wake of the Morant Bay rebellion, both Eyre and Taylor grasped at opportunity to reconstitute Jamaica as a Crown Colony, so as to allow the Crown to reclaim control over colonial affairs by establishing a nominated Legislative Council helmed by the Governor. The institution of Crown Colony government then allowed the Colonial Office and the Governor, as the Sovereign's local representative, to exercise

unfettered control over both colonial legislation and officials. In the eyes of key officials at the Colonial Office like Taylor, this framework of imperial control was necessary for the Crown to be able to better educate and discipline freed persons and to protect them from the encroachment of planter elites, whose misrule of the colony was responsible for the rebellion. Imperial control through law, or imperial "rule *by* law," was necessary for the attainment of a modicum of "justice," as understood in terms of the sovereign's duty to protect its subjects, even though this meant the loss of representative government.

The prioritization of the executive powers of the Crown was also manifest in the Colonial Office's creation of guidelines concerning the use of martial law in the colonies. Notwithstanding the unsuccessful legal prosecution of Eyre and his abuses of power during marital law by Mill's Jamaica Committee, the Governor, who was the Crown's local representative, would still be entrusted with discretionary authority over the manner of its proclamation and administration. The essential thing was that he was accountable for his actions to the Crown and Colonial Office. Therefore, whether in relation to the government of racially divided colonies or the use of martial law, these changes in the rules of imperial control then rearticulated the political relations between the Crown, colonial Governors and their subjects. Critically, what was lost in the establishment of the Crown's "direct rule" through the agency of the Governor was the capacity of the colonized to consent and be governed according to their own laws. To British officials, the Colonial Office's exercise of imperial control within the framework of Crown Colony government would be a more effective means for the protection of the supposed interests of the colonized, and a better way to enact the Crown's assumption of guardianship over "backward populations," as Mill (1867, pp. 346-347) would note.

This strange juxtaposition of the authoritarian powers of the Governor with the moralistic notion of the Crown's guardianship of less "civilized" subjects was rendered as part of an emergent racial sociology of empire, in which racially divided Crown Colonies stood at the end of a purported constitutional progression far from the self-governing white settler colonies of Canada and Australia. Within British officials' imagination, imperial trusteeship was necessary for the eventual and orderly grant of self-government because the stubborn maintenance of representative government in a society divided by race only led to outbreaks of violence and social dissolution, as the Morant Bay rebellion seemed to prove. Within this new architecture of empire, legality laid narrowly in colonial officials' adherence to the formal rules and regulations that defined the bureaucratic exercise of imperial control, but colonial officials' "rule *by* law" was also enmeshed in moral understandings that cast the racialized subjects of plural societies as populations in need of protection and the metropole's "civilizing" influence. In this sense, the promise of emancipation was transmuted into a new form of subjection. Constructed thus in the self-understanding of British officials across the empire, the colonial *Leviathan* was dressed in the noble finery of humanitarian intentions.

Theoretically, I argue that the re-ordering of the legal architecture of empire in the wake of the 1865 Morant Bay rebellion demonstrated the institutional bifurcation of Britain's empire upon social grounds rather than the *imagined* constitutional progression of the colonies from Crown Colony government to self-government. The establishment of Crown Colony government in Jamaica meant that "plural societies," as well as "traditional societies" (Mantena 2010), i.e. societies that did not share the same kind of racial organization and character as Britain, would be governed along lines that differed

from English principles of law and government. In this chapter, I have demonstrated how the principle of representative government was surrendered in Jamaica by an Assembly that was persuaded to do so by the disruptive event of the Morant Bay rebellion and the strategic opportunism of officials like Eyre and Taylor. As the most populous and arguably most significant of Britain's possessions in the West Indies,[49] Jamaica's re-constitution as a Crown Colony was soon followed by other West Indian Assemblies, marking the collapse of the old representative system across the empire.

There were other institutional consequences. Within the Parliamentary legislation that defined how English law was related to colonial law, the establishment of a "Representative Legislature," i.e. a "Legislative Body of which One Half are elected by Inhabitants of the Colony," was tied to differences in colonial law-making and justice:

> 5. Every Colonial Legislature shall have…full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have…full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature…[50]

In other words, with representative government, the inhabitants of a colony could alter the way that colonial laws were made and justice administered. But, if we consider the non-representative colonial legislatures, this section left the courts at the mercy of the Governor, as his control of the legislature was held in check only by the Colonial Office. As I demonstrate in the next chapter on the Straits Settlements, the administration and principles of justice in Crown Colonies differed from English ideals of the "rule of law."

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[49] Jamaica's recorded population (441,264) in this period far exceeded the size of the next most populated colony of Baraboes (152,727). Arthur N. Birch and William Robinson, *The Colonial Office List for 1867* (London: Harrison, 1867), p. 9.

[50] Sections 1 and 5 of 28 & 28 Vic. cap. 63.

IV.
Plural Society and the Colonial State: English Law and the Making of Crown Colony Government in the Straits Settlements

Introduction

Did colonial rule mean that metropolitan legal and political institutions were transferred from the imperial center to the colonies? Given that Crown Colony government emerged as a widespread form of colonial rule in the British Empire by the late 19th century, were legal institutions in Crown Colonies then constituted by the direct transfer of English laws and their principles? And, more crucially, did the majority of Britain's colonial subjects benefit from the rights and liberties of English law? The simple answer to these questions is no. Of course, the reception of the English common law and its statutes did indeed occur in British colonies of various kinds. Even so, these laws were "translated" to fit into varying institutional and social contexts (Mawani and Hussin 2014). While English laws and liberties were the claimed "birthright" of British persons whose engagement in trade and warfare established settler colonies across the world, the British also found colonies whose perceived composition and character differed from conditions in England. Therefore, rather than establishing English forms of government and its legal principles in colonies that were divided along lines of race, colonial officials sought to tailor constitutions and laws to local social conditions.

At their core, the institutional forms of the colonial state and law depended on the kinds of persons that populated colonial society and also shaped its supposed character. In colonies mainly populated by British and other European settlers, colonial institutions of government and law evolved to resemble those in England; but, in colonies that were not, racial differences and tensions between the European community and the "natives" justified the need for greater authoritarian control. Scholars of colonialism have explained this divergence in colonial rule by pointing to how non-European colonial subjects were assumed to be both racially different and inferior – the maintenance of the "colonial rule of difference" between European colonizers and their "native" subjects was necessary for elites in the empire to justify the "permanent domination and inequality" that defined colonial rule (Chatterjee 1993; Steinmetz 2007, pp. 36-37; see Halliday and Karpik 2012, p. 13). While the necessity of the "rule of difference" marked official discourse, how and why did it become institutionalized in the constitutions and laws of colonial government despite the supposed universality of English legal principles, such as the "rule of law?"

This chapter examines the tension between the racial differences that marked colonial society and colonial officials and elites' commitment to English ideals of legality as the legitimate basis of colonial rule. For Britain's racially divided colonies, officials responded to this problem by instituting Crown Colony government, which would grant the Governor authoritarian powers of control over the judiciary, legislature and society despite countervailing calls for the protection of judicial independence and *habeas corpus* – use of the writ could be suspended for the suppression of disorder. Therefore, I argue that colonial officials' understandings of racially divided societies as socially fragmented and politically unstable entities lay at the basis of their reluctance to maintain English

legal principles, particularly when confronted with episodic conflicts that threatened British rule. This approach to law-making and statecraft as well as the recurrence of moments of instability explain how and why the government of racially diverse colonies underwent a shift over the mid-nineteenth century as Jamaica and the Straits Settlements were re-constituted as Crown Colonies.

The constitutional framework of the Crown Colonies allowed for the development of laws that granted the colonial state expansive powers to limit the basic individual liberties of "native" subjects if the circumstances demanded it. Hence, for those who were neither natural born subjects of the Crown nor of European origins, their legal personhood was defined primarily by their ascribed racial difference and their individual rights could always be curtailed, unlike the rights of Englishmen. Practically speaking, such differential legal treatment was applied to members of the so-called "native," i.e. non-European communities within the Crown Colonies whose presence and activities might threaten the social order; this even included non-European immigrants who might have become naturalized as British subjects. Within this system of colonial law, the application of the "colonial rule of difference" in this manner meant that an individual's legal personhood ultimately depended on one's belonging to a racial community. With the establishment of Crown Colony government as a standardized way of governing racially divided colonies, we then find colonial states crafting and wielding law as a formal instrument of authoritarian control over "native" subjects even though the partial "reception" of English laws had occurred. In such contexts, the enshrined principles of the English common law would be sacrificed to maintain an always uneasy peace.

To demonstrate the salience of colonial officials' beliefs about the inherent instability of racially diverse colonies in their making of colonial government and law, this study examines the re-constitution of the racially diverse Straits Settlements of Malacca, Penang and Singapore in 1867, when the colony was granted Crown Colony government after the Colonial Office assumed control over its administration from the India Office.[1] Notably, together with the Malay States along the peninsula and British holdings in Borneo, the Straits Settlements would form the post-colonial nation-states of Malaysia and Singapore in the mid-twentieth century; while Singapore separated from Malaysia in 1965, both Malacca and Penang remained as states in the latter. Beyond the importance of understanding the constitutional history of the Straits Settlements in light of its enduring consequences for modern Malaysia and Singapore, I have elected to focus on the Straits Settlements because its official re-constitution as a Crown Colony occurred in the late 1860s when imperial policy towards the government of racially diverse colonies had undergone a clear shift. As I related in the previous chapter, this paradigm shift was most visible in the West Indies, i.e. the Caribbean, where, following Jamaica, most of the British colonies adopted Crown Colony government after abolishing their representative legislative bodies.

Like these older colonies, the population of the Straits Settlements was racially diverse. In the Census Returns dated 2nd April 1871, the largest racial groups within the Straits Settlements were the Malays (147,188 persons or 48%) and the Chinese (103,936

[1] First ceded to the British between 1786 and 1824 through treaties between various Malay Sultans, the Dutch and the British East India Company, the port settlements of Penang, Singapore and Malacca were administered together as the Straits Settlements in 1826 – these three territories were positioned along the Straits of Malacca, a key maritime trade-route between India and China. By 1866, the Straits Settlements was under the control of the India Office, which administered it through its agents in Calcutta.

persons or 34%), and they were followed by the Indians who were enumerated under various categories.[2] In contrast, those counted as "Europeans and Americans" consisted of 1,730 persons or less than 1% of the population, along with only 675 British military personnel. Given their status as a numerical minority, British dominance and colonial rule in the Straits Settlements would seem to be balanced on a knife's edge. Within this racially divided social context, colonial officials and their European brethren not only assumed the "colonial rule of difference" in justifying colonial rule, they would also assert the pernicious principle in their debates over the appropriate means of colonial government and law. Even though the law of the land was English in its origin, colonial officials translated the institutions of the English common law to suit social contexts unlike those in England, thereby also crafting illiberal colonial legacies.

Between State and Personhood: On the Problem of Difference

The re-constitution of the Straits Settlements occurred within the global shift in British policy towards colonial government, which was not only marked by multi-sited political struggles but also the emergence of a racial sociology of empire that provided the epistemological justifications for the subjection of "native" populations in ways that differed from the treatment of British men and their equally "civilized" peers. In the previous chapter, I demonstrated how colonial officials' negative evaluations and distrust of the diverse inhabitants of a post-emancipation Jamaica underlay and justified their "translation" of the constitutional framework of Crown Colony government from recently ceded colonies like Trinidad to a racially divided colony that was still grappling with

[2] "Straits Settlements Census Reports and Returns 1871," p. P7. CO 277/5.

economic, political and social tensions following emancipation. In the course of this shift, British officials re-articulated the legal architecture of imperial control in two ways: one, by reinforcing the Governor's discretionary powers regarding the declaration and application of martial law; and, two, through the "collective abdication" of Jamaica's planter-controlled Assembly in favor of the Crown (Ermakoff 2008). Jamaica's example was instructive as the old representative system was then gradually abolished across the West Indies in favor of Crown Colony government (Chapter One, Tables 1.2 and 1.3).

Moving from the West Indies to the East Indies, we find pressures for the adoption of new institutions of colonial government in the Straits Settlements coming from the European community in Singapore as early as 1858. They had been keen observers of institutional developments elsewhere in the Empire, particularly in relation to British India. In a petition to the House of Commons, they stated:

> When a few years ago, Parliament established a Legislative Council for India, your petitioners hoped that a beneficial change would take place in the manner of dealing with questions affecting the welfare of the Straits Settlements, but they found that such expectations were fallacious…
> […]
> Your Petitioners therefore humbly pray, that your Honourable House will be pleased to adopt such measures as may be necessary for removing the Government of British India from the East India Company, and substituting in its place the direct government of Her Most Gracious Majesty the Queen; and further, that the Straits Settlements may be constituted a separate government directly under the Crown, and not, as at present, under a delegated authority in India.[3]

Like colonial officials, British subjects employed formal means to appeal for the constitutional reform of colonial government. Turnbull (1972, p. 348) reports that the

[3] The House of Commons.1862 (259). East India (Straits Settlements). Copies of all correspondence between the Government of *India* and the Secretary of State for *India*, and between the Secretary of State for *India* and the Colonial Office, and any other Departments of the Government, relative to the proposed TRANSFER OF THE STRAITS SETTLEMENTS TO THE COLONIAL OFFICE: And, of COMMUNICATIONS from Parties in this Country to the Colonial Office on the same subject, pp. 3-6.

European merchants in Singapore had learned of an earlier petition sent to Parliament from their counterparts in Calcutta for the direct control of India by the Crown. By sending their own petition, the European merchants of Singapore did not act merely to support the petition from Calcutta; they also waged a campaign for the Straits Settlements to be directly governed by the Crown. Their petition was supported by John Crawfurd, who had previously been Resident of Singapore. In a note in support of the merchants' petition, he stated, "it has not escaped their observation that the administration of the Crown Colonies to the eastward of the Cape of Good Hope is conducted in a more liberal, popular and constitutional spirit than…in their own case."[4] Crawfurd's earnest note seemed to ignore the fact that Crown Colony government would hardly be as "liberal, popular and constitutional" as supposed!

Despite these early efforts, the Straits Settlements was not re-constituted as a Crown Colony until 1867. The eventual re-constitution of the Straits Settlements would demonstrate how the Colonial Office administered far-flung colonies through the formulation of their constitutions and laws, weaving a long-distance mechanism of imperial control and wielding expansive powers over the governance of racially diverse societies. Crown Colony government meant authoritarian rule for the Governor wielded powers over the executive, legislative and judicial arms of the colonial state. Instead of institutionalising principles such as parliamentary supremacy or the "rule of law," colonial officials oversaw the formation of colonial states that were more akin to Hobbes' monstrous Leviathan in the Crown Colonies. Why?

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[4] *Ibid*, p. 6.

Drawing from sociological theories of the colonial state, I observe that the precarity of colonial domination and British officials' negative images of "native" populations generated widely shared ideas regarding the political implications of racial pluralism in colonial society. Wight's (1946, p. 89) pithy formulation is indicative of such assumptions: "In a plural society everything makes for constitutional retardation." As formulated by J.S. Furnivall (1956) in his writings, "plural society" was essentially everything that English society was perceived not to be.[5] Nevertheless, even before Furnivall's career as a colonial official, ideas analogous to his concept of "plural society" had already surfaced in official discourse, as evident in the correspondence regarding constitutional changes in the Straits Settlements, as well as in other racially diverse colonies like Jamaica. In these discourses, a "plural society" was marked by the existence of distinct racial groups. Each group, in turn, was defined by "a uniform cultural essence beneath the shimmering surface of indigenous practice" (Steinmetz 2007, p. 43).

When viewed as a whole, such a racially divided society could not provide the necessary social conditions for the institutionalization of English principles of law and its liberties in the eyes of elites in both the metropole and the colony even if some of their peers would contest such a view. Furthermore, since British rule in the Straits Settlements had been threatened by repeated episodes of violent conflict. e.g. riots involving Chinese secret societies that controlled the trade of coolies, opium and prostitution, over the mid-nineteenth century, local officials and leading members of the European community were certainly sensitive to the possibility that colonial rule could always be threatened by

[5] The following features define a plural society: "the society as a whole comprises separate racial sections; each section is an aggregate of individuals rather than a corporate or organic whole; and as individuals their social life is incomplete." Furthermore: "In each section the sectional common social will is feeble, and in the society as a whole, *there is no common social will*." Furnivall (1956), pp. 306 and 308, italics mine.

unrest that emerged from the colony's "native" communities (Turnbull 1972, pp. 106-139).[6] Such uncertainty prompted varying responses from factions among this local elite with regard to the kind of legal institutions that were needed for effective government in the colony. In particular, while both colonial officials and leading members of the European mercantile community supported measures that would allow the colonial administration to suppress sources of disorder, some of them were also concerned by the colonial state's encroachment upon individual liberties.

Evidence of their resulting debates corroborate Wilson's (2011, pp. 1445-1446) theory of colonial state-building, for the constitution, statutory powers and institutions of the colonial state in the Straits Settlements were indeed shaped by extended debates over whether English institutions and principles of law and government were suitable for this racially divided colony; critically, these debates pivoted upon "alternative understandings of the same society." As Steinmetz (2007) powerfully argues, colonial officials' ethnographic representations of "native" society shaped their struggles over the classification and treatment of "native" communities. This study thus extends sociological theories of colonialism to the making of colonial constitutions and law, linking the former's theoretical mechanisms of the making of the colonial state to socio-legal concerns with the curtailment or protection of the legal rights of persons. In relation to the latter, colonial law remained a double-edged sword that was significantly weighted toward the preservation of order.

[6] See Yen (1986), chap. 4 for a discussion of the social and economic roles played by the Chinese secret societies in the Straits Settlements.

Having presented the theoretical framework of my argument, the following sections of this chapter will first elaborate upon the changing historical significance of Crown Colony government through a comparative legal history of its use within the empire. In light of this context of change in imperial policy towards colonial government, I will then examine the discourses that preceded and followed the establishment of Crown Colony government in the Straits Settlements in 1867. Namely, I focus on how the "official mind," as defined by colonial officials' reasoning, beliefs, sense of duty, orientation toward others and method of problem-solving, responded to appeals from the predominantly European mercantile community and local officials like the Chief Justice for changes in colonial government and the law (Robinson and Gallagher 1981, p. 20).

Meanings of "Crown Colony," Legal and Political

Let us start our investigation with a simple question: what did British officials mean by the term, "Crown Colony?" The definition of the term, "Crown Colony," was ambiguous, as noted by one Legal Advisor for the Colonial Office, Sir Kenneth Roberts-Wray (1966, pp. 44-45).

> Let it suffice to say that the essence of a "Crown Colony" is that the authority of the Crown is unimpaired. While the Governor bears the primary responsibility for administration, close supervision and control are exercised by the Government (nearly always that of the United Kingdom) to whom the Governor is answerable in both the legislative and executive fields. This is vague enough to demonstrate that the term is one which it is better to avoid.

Furthermore, Roberts-Wray notes that its designation expanded over time – from colonies that the British had either conquered or gained through cession to including those that

they deemed to be unfit for "representative government" on various grounds.[7] The broad and imprecise meaning of the term was congruent with a range of colonial constitutions, and the composition of the legislative bodies of such colonies could be established in various ways. Some Crown Colonies, like Jamaica and Ceylon, later came to possess limited political franchise in the election of the unofficial members of their Legislative Councils. Despite the vague, and evolving, meaning of the term, the Colonial Office did seek to state its meaning clearly in the course of administration. In the *Rules and Regulations for Her Majesty's Colonial Service*, Crown Colonies were defined in contrast to colonies with representative institutions.[8] Hence, Crown Colonies are Colonies, "in which the Crown has the entire control of legislation, while the administration is carried on by public officers under the control of the Home Government."[9] Defined politically, Crown Colonies met two necessary conditions: heteronomy in the making of law and in the appointment and service of colonial administrators.

In the making and application of law, Crown Colonies were undoubtedly subject to the Crown and its agents – practically speaking, this meant the Colonial Office's exercise of imperial control. I stress this point because it provides us with a way to understand the significance of Crown Colonies in the making of British colonialism and its legacies. While comparative scholarship have brought much needed social scientific attention to the different developmental trajectories of British post-colonies in the

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[7] Wight (1946, p. 47) locates the origins of Crown Colony government in the Anglo-French War of 1793-1815, for Britain's acquisitions from the war, which were either conquered or ceded, were the prototypes for the development of Crown Colony government (also see Chapter Two). In these cases, the necessity of controlling potentially hostile foreign populations and British attempts to abolish the slave trade prompted the establishment of a new system of colonial government.

[8] Her Majesty's Stationery Office (H.M.S.O.), *Rules and Regulations for Her Majesty's Colonial Service.* (London: Eyre and Spottiswoode, 1867)

[9] *Ibid*, p. 1.

twentieth century, they have underemphasized differences in how the politics of colonial rule shaped the establishment of "centralized and territory-wide legal administrative institutions" and the seeming "*universality* of the rule of law" – albeit one marked by the colonial state's routine use of emergency powers and the endurance of racial inequality in colonial law (Lange 2009, p. 29; Halliday and Karpik 2012, pp. 11-13, italics in original).

The thoughtful comparison of British post-colonies by Halliday, Karpik and Feeley assumes the "putatively common histories" of British influence upon colonial law and legal professionals as their starting point for analysis even though they do highlight the fact that "Britain unevenly exported to its colonies some semblance of the rule of law." (Halliday and Karpik 2012, p. 4 and 12) Drawing from Lange's (2009) work on the developmental legacies of British colonialism, the key distinction in colonial law and state formation they recognize is the one between direct and indirect rule. These studies of British colonial legacies thus contrast the penetration of the "bureaucratic and judicial arms of the colonial state" with the maintenance and use of indigenous institutions, such as customary courts and law (Halliday and Karpik 2012, p. 12). However, this emphasis has elided variations in how direct rule was established in various colonies. While Lange (2009, pp. 29-30) observes that directly ruled colonies included "settler colonies," "plantation colonies" and "directly ruled colonies with large indigenous populations," he merely states that these British colonies varied according to "the inclusiveness of the colonial state and its active incorporation of local communities," overlooking more meaningful differences in their translations and uses of English law.

My point is that these so-called directly ruled colonies differed in their institutions of government and law according to the perceived character of their societies. Instituted

in racially divided colonies, Crown Colony government granted the Colonial Office and its agent, the Governor, a monopoly over the making of legislation and the appointment of officials, including judges. Unlike the white settler colonies that possessed powers of self-government, Crown Colonies were defined by their disavowal of English liberties.

One illustration of the distinct and enduring way that the institutions of English common law had been adapted in the Crown Colonies is the 1953 Privy Council judgment, *Terrell v. Secretary of State*. Here, the guarantee of judicial independence within the *Act of Settlement of 1701* was found to be inapplicable when a judge of the Straits Settlements challenged his forced retirement.[10] This ruling reinforced the fact that, unlike their professional counterparts in Britain and colonies possessing "responsible government,"[11] e.g. Australia and Canada, judges in the Crown Colonies served at Her Majesty's pleasure (McLaren 2011, pp. 276-277). Given such terms of appointment, even Chief Justices could be suspended or dismissed by the Governor. Not only does such a state of affairs provoke questions about the institutionalization of the principles of English common law in the Crown Colonies, it also prompts us to ask questions about the causes and consequences of the Crown's singular control over colonial judges and law.

The legal significance of Crown Colony government is better understood in relation to an earlier way that the Colonial Office distinguished between its possessions. The form of government and law of a colony had depended, in the first instance, on its method of acquisition: settlement, conquest or cession. And, as I noted, the official term,

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[10] *Terrell v. Secretary of State* [1953] 2 Q.B. 482 and *Act of Settlement 1701*, 12 & 13 Wm. III c.2, cited in Bartholomew (1991, p. 62). For more, see Roberts-Wray (1966, pp. 496-7).

[11] Roberts-Wray defines (1966, p. 64) "responsible government" as "a system of government by or on the advice of Ministers who are responsible to a legislature consisting wholly, or mainly, of elected members; and this responsibility implies an obligation to resign if they no longer have the confidence of the legislature."

"Crown Colony," had been used in reference to colonies that had been conquered or ceded. In contrast, settled colonies would typically possess elected legislatures with the authority to pass their own laws. To grasp the significance of this legal distinction for colonial law and government, we may turn to a judgement of Sir Peter Benson Maxwell, who became the first Chief Justice of the Straits Settlements.

> The general rule of law determining what is the law of a territory is, that if the new acquisition be an uninhabited country found out by British subjects and occupied, the law of England, so far as it is applicable [1 *Bl. Com.* 107], becomes, on the foundation of the Settlement, the law of the land [2 *P. Wms.*75], but that if it be an inhabited country obtained by conquest and cession, the law in existence at the time of its acquisition, continues in force, until changed by the new Sovereign. In the one case the settlers carry with them to their new homes, their laws, usages and liberties, as their birthright. In the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will of the conqueror.[12]

As the Recorder of the Prince of Wales' Island [Penang] at that point, Maxwell R. established that English law was the *lex loci* of the Straits Settlements despite the earlier possession of the island by the Rajah of Quedah [Kedah]. This had presented a legal problem precisely because the Settlement did not fall neatly into the distinction between ceded, conquered and settled colonies. While the Prince of Wales' Island had not been "settled" by British subjects since a British garrison had landed first to take possession of the ceded territory, the British did not consider it to be inhabited because only "four Malay families were found encamped upon it."[13] Since the law of Quedah could not be the *lex loci* due to the "uninhabited" state of the island, Maxwell R. reasoned that the

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[12] *Regina v. Willans* [1858] 3 Ky. 16, p. 20.
[13] *Ibid*, p. 20. Notably, this legal fiction of *terra nullis* was also applied during the British settlement of North America and Australia.

"reception" of English law in the Straits Settlements was based on the *Second Charter of Justice*,[14] a royal instrument, rather than the "birthright" of British settlers.

In contrast to the noted vagueness of the official term, "Crown Colony," the distinction between ceded, conquered and settled colonies made greater sense in judicial understandings of colonial law and government in the mid-nineteenth century. Even so, major changes in the constitutions of several significant British colonies occurred in this period. In 1850, the imperial Parliament passed the *Australian Colonies Government Act*, increasing the scope of the law-making powers and the degree of elected representation of the Legislative Councils of New South Wales and Victoria while making it possible for Van Diemen's Land [Tasmania] and West Australia to establish similarly constituted Legislative Councils in due time.[15] Similarly, the passing of the *British North America Act, 1867* in Parliament united the provinces of Canada, Nova Scotia and New Brunswick with "a constitution similar in principle to that of the United Kingdom."[16] Notably, such positive developments contrasted with the loss of political franchise and the abolishment of the Legislative Assembly in Jamaica after the Morant Bay rebellion in 1865. The meaning of the term, "Crown Colonies," should be understood against such changes in imperial policy.

We may now turn back to the Straits Settlements to better understand the significance of this turn in imperial policy for colonial law and justice. In the very same year that Jamaica's nominated Legislative Council was constituted, the British Parliament

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[14] The Charter was dated 27 November 1826. As Bartholomew (1991, p.13) notes, "the only copy known to me is a photocopy in the Law Library of the National University of Singapore."
[15] 13 & 14 Vic. Cap. 156.
[16] 30 & 31 Vic. Cap. 3.

also passed the *Straits Settlements Act*,[17] authorizing the transfer of the administration of the Straits Settlements from the India Office to the Colonial Office. In the royal Charter dated 4th February 1867, the Straits Settlements was re-constituted with a nominated Legislative Council under the control of the Governor.[18] Based on these legal foundations, the Straits Settlements, which had been mostly settled by Chinese, Malay and Indian migrants, became a Crown Colony. Notably, the resulting changes in the government of the Straits Settlements would lead to political struggles over the issue of judicial independence as the new Governor sought to re-constitute the colonial courts in ways similar to those of other Crown Colonies.

This conflict would highlight two aspects of law under Crown Colony government. Firstly, imperial policy toward the administration of colonial courts was defined by generalizable formal rules that standardized governmental practices in patterned ways across the empire; Crown Colonies were thus administered in a similar fashion.[19] Secondly, judicial administration was not to be made independent of executive control; should colonial judges prove to be troublesome, the Governor had the power to suspend or remove their appointment. As my examination of official discourses in the Straits Settlements will show, metropolitan colonial officials and the Privy Council, the highest court for the colonies in the British Empire, would justify judicial subordination in the Crown Colonies on the grounds of their social conditions – conditions that were

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[17] 29 & 30 Vic. Cap. 115.
[18] Enclosure in Ord to Buckingham and Chandos, 1st May 1867, CO273/10.
[19] *Cf.* "The crown colony system was a *development and universalization* of the system under which the conquered and ceded colonies were governed at the time when their government was distinguished from that of settled colonies." (Wight 1952, p. 15) The rules of Crown Colony government were formalized in various ways, from imperial acts and colonial ordinances to the internal rules and regulations of the Colonial Service.

different from those in England. Consequently "Crown Colony" signified a category of colonies that were ruled without the constraints posed by elected colonial legislatures and, as I demonstrate, misbehaving judges.

Uses of Comparison in Colonial Governance: A Methodological Note

Given how the institutional meanings of Crown Colony government evolved in relation to multi-sited changes in the constitutions of various colonies, how did such localized events come to bear casual significance in shaping the political and legal institutions of Crown Colonies throughout the empire? In this regard, I note that the answer may be found in colonial officials' uses of comparison in their shaping of imperial policy and the Colonial Office's central organizational role in the exercise of long-distance imperial control. Methodologically, the value of an individual event like the re-constitution of the Straits Settlements lies not only in its similarity to previous events in other colonies that officials could use as models to formulate their policies, but also in its far-reaching consequences for the government and law of other Crown Colonies as the institutional outcomes of this event then became precedents that shaped subsequent imperial policy.

This was due to the bureaucratic structure of imperial administration, as centred in the Colonial Office, which not only created a centralized source of knowledge regarding Britain's diverse colonies but also sought to formulate standardized rules in its exercise of imperial control. Hence, the Colonial Office's resolution of local conflicts could produce outcomes that would be binding on other colonies. When colonial officials or subjects, e.g. the European merchants in the Straits Settlements, held grievances against

the current Governor and his administration, they could, and did, seek to appeal directly to the Colonial Office or even Parliament as they sought forms of redress. In these petitions, both the petitioner and the metropolitan officials who were frequently the targets of such efforts would typically address the problem at hand with reference to other colonies. This, in turn, could shape the entire course of imperial policy with regards to a particular issue if, for instance, such petitions resulted in the issuance of circulars or instructions that would then apply across the empire. Within such an administrative web, the use of comparison was central in re-making Crown Colony government into the standardized means for the imperial control of racially divided societies.

Comparison, as rooted in the administrative practices of colonial officials, thus had the political and legal consequence of making the colonies more similar in form and purpose, effacing differences in their constitutional development and laws that had been the result of distinct histories. Upon the re-constitution of the Straits Settlements, the newly transferred colonial officials and their subjects could expect governance to be similar to other Crown Colonies despite its previously different form of government under British India. If they were not the same, colonial officials and subjects could, and did, point to other Crown Colonies as examples to devise and justify administrative reforms. Moreover, both colonial officials and laws could also be "transplanted" from colony to colony; as I discuss in the next chapter, the translation and modification of laws across the empire was based upon officials' comparative knowledge of the laws and practices of the colonies.

Methodologically, my analysis of these changes in colonial government and law inverts the typical assumptions of a positivist approach to sociological comparison

(Steinmetz 2004, pp. 381-383). Rather than seeing the colonies as standard units of analysis whose differences or similarities may be accounted for by universal laws – as typically stated in the form, "if X then Y," I observe instead that the *standardization* of colonial government and legislation in the Crown Colonies was a consequence of empire-wide policies formulated by the Colonial Office in response to local events in the colonies. To use Hirschman and Reed's (2014, p. 268) terms, the institutionalization of Crown Colony government across the British Empire at this historical juncture was a "formation story" about the transformation of the political character of the colonial state in racially divided societies and the emergence of the racial sociology of empire. Indeed, the establishment of Crown Colony government meant that the Governor would dominate the legislature and judiciary, putting in doubt cherished English legal principles tied to the "rule of law" like judicial independence.[20]

Plural Society and Colonial Government: On the Re-Constitution of the Straits Settlements

When J.S. Furnivall, a colonial official and scholar of Burma, developed the concept of "plural society," he drew upon his own practical experiences as well as ideas about colonial societies that had developed amongst the British elites of his time, the twentieth century (Pham 2005). Likewise, in racially diverse societies such as Jamaica and the Straits Settlements, colonial officials had viewed the various racial groups as

[20] In Singapore and Malaysia, the legacies of Crown Colony government and the authoritarian use of colonial law provide a point of departure that might help account for Harding's (2001, p.213) assertion regarding the fate of legal transplants in South East Asia. As he states, "*the more public law is, the more it has diverged from Western law; but the more private or commercial law is, the less it has diverged.*" To use Rajah's (2012, pp. 50-51) characterization of law in colonial and modern Singapore, Crown Colony government established the foundation for the extension of "modernist, bureaucratic technologies that were, in essence, power-serving 'rule by law'."

distinct groupings, the defining feature of "plural societies." According to Furnivall's (1956, p. 306) conceptualization, a racial section would be "an aggregate of individuals," each of whose "social life is incomplete." As such, these individuals were only held together by "colonial power and the force of economic circumstances." (*ibid*, p. 307) Politically, the resulting lack of a common social will also implied that institutions of representative government could not be maintained. In this regard, Furnivall's views were analogous to those of British policy-makers in the mid-nineteenth century, who were willing to deprive Jamaica and other West Indian colonies of elected representation based on their view that their colonial subjects, who were mostly black, were not fit to exercise self-government. To the British official mind, racial difference was a problematic social fact that called for direct rule by the Crown.

The Straits Settlements could also be seen as a "plural society," and its re-constitution as a Crown Colony stemmed not only from the problems directly brought by its highly diverse mix of peoples, but also from the paradigm shift in imperial policy toward colonial government in the mid-19th century. Against this historical context of a changing British Empire, we may partly understand why European merchants in the Straits Settlements, particularly Singapore, saw Crown Colony government – rather than the old representative system – as the apposite solution to problems that were recurrent under the rule of the Indian government. Another factor to consider would be the demographic similarities between the Straits Settlements and the relatively proximate Crown Colonies of Ceylon and Hong Kong, where "native" communities that were unfamiliar with English law formed a majority.

Social life in a plural society like the Straits Settlements was a source of social fears and tension partly because of the potential for misunderstandings or conflicts between communities. Turnbull (1972, pp. 348-349) identifies the 1857 petition by Singapore's European merchants for direct rule from London as the culmination of a long campaign by the influential W.H. Read and other like-minded merchants against the rule of the British East India Company. This petition was the first to articulate their calls for the Straits Settlements to be made a Crown Colony. As Turnbull (1972, p. 350) relates, "The basic objection was the lack of representation in government and of a local legislative council, because the difficulties and discontent in the Straits stemmed mainly from over-centralization in Calcutta." Such "difficulties and discontent" included a range of concerns: namely, the taxation of trade; the administration of the courts and the police; the lack of protection from the potential dangers posed by the Chinese secret societies; and the transportation of Indian convicts, "whose crimes are of the deepest dye," to the colony.[21] In their petition, the European merchants' sense of unease toward the Chinese, who composed the "great bulk of the population," was also well expressed:

> Belonging chiefly to the lowest class, the Chinese immigrants are ignorant and turbulent, bringing with them from their own country those prejudices and feelings which animate their nation generally against foreigners. Here they find their secret societies and confederacies in full operation, and they fall into that system of self-government which…is found to interfere so seriously with public order and the proper administration of justice…To control such a population requires a firm and consistent, though conciliatory course of action on the part of the Government.[22]

Given their concerns, Read and other European merchants viewed Crown Colony government as a means for them to have a greater say in the protection of their own

[21] House of Commons.1862 (259). East India (Straits Settlements). TRANSFER OF THE STRAITS SETTLEMENTS TO THE COLONIAL OFFICE, p. 5.
[22] House of Commons, *ibid*.

community's interests, and to establish an administration that would be more responsive to local problems. These mercantile elites were partly justified in these beliefs. Nevertheless, while the establishment of Crown Colony government in 1867 did enable colonial officials to be more responsive to local needs, the newly constituted government would only be accountable to the Colonial Office, whose initial primary concern was the fiscal health of the newly established Crown Colony rather than the protection of European merchants' interests. In relation, the official decision-making process that led to the transfer of the Straits Settlements from the India Office deserves brief scrutiny, for the circumstances of the adoption of Crown Colony government contrasted with the political conflicts and rebellion that eventually forced the outcome in Jamaica. The matter was decided administratively after the Colonial Office sent Sir Hercules Robinson, the then-Governor of Hong Kong, to Singapore to report on the feasibility of the transfer. Robinson's report, according with the Colonial Office's instructions, focused firstly on the finances of the colony. As for the form of colonial government, he recommended:

> For these reasons [the fiscal stability of the Settlements] I am of opinion that the three Settlements [Singapore, Penang and Malacca] should be incorporated into one Crown Colony, under one Governor, and that for legislative purposes there should be one Council, composed, *as in Ceylon and Hong Kong*, of Official and Unofficial Members nominated by the Crown.[23]

The manner of the Straits Settlements' transfer to the Colonial Office as a Crown Colony reveals, to a greater extent, how colonial officials understood Crown Colony government as a standard form of colonial constitution by the mid-19th century. While colonial officials looked to Crown Colony government as the solution to the problem of

[23] Robinson to Newcastle, Jan 25 1864, CO 273/8; italics mine.

racial difference in Jamaica, such concerns were borne instead by the European merchant community in the Straits Settlements. For the Colonial Office, their taking on the administration of the Straits Settlements pivoted mainly around fiscal concerns. Constituted at a juncture when Crown Colony government had increasingly become accepted as a legitimate way to govern racially diverse societies, the Straits Settlements provides a strategic lens to again examine how the shift in imperial policy towards colonial government was related to social tensions and political struggles that were rooted in a specific local context. Crown Colony government was accepted as the ideal solution for the government of a "plural society" since unimpaired Crown control was needed in a society composed of different racial groups in order to assure political order and stability.

Inaugurating Crown Colony Government, "that direct and intimate connection"

In 1st April 1867, a new colonial government was thus inaugurated in Singapore, which was the administrative center of the Straits Settlements. The ceremony was marked by much public interest, and members of the European community were particularly enthused since they had played a leading role in petitioning for this change. Even so, they found themselves outnumbered by the so-called "natives," who were also drawn to the event. In the words of the *Straits Times*, "At an early hour in the morning, the roads adjacent to the Town Hall were crowded with a miscellaneous assemblage of natives who appeared to gather considerable amusement from the contemplation of one another and the prospect of the show they were about to witness."[24] The paper then noted: "The

[24] "Inauguration of the New Government," *Straits Times Overland Journal,* Vol. V. No. 119, 8 April 1867. Enclosure in Ord to Carnarvon, 3 April 1867, CO 273/10.

ceremony was, as compared with previous demonstrations here, an imposing one, and will serve to fix in the minds of the Natives the date of a political change, of which, though of the full effects they can only have a meager conception now, it is to be hoped they will in all time to come participate in the advantages."[25] In other words, while its meaning was apparently clear to the European residents of the colony, the inauguration's significance might only be unveiled to the colony's other inhabitants in time to come. So, what kind of change did this event herald for the Straits Settlements? How did the inhabitants of the colony understand the new form of government?

We might draw further clues about the inauguration's local significance from its elaborate staging. The Town Hall was filled with various official dignitaries, including the Maharajah of neighboring Johore, the incoming official and unofficial members of the new Legislative Council, as well as the military and naval officers in the colony. The incoming Governor, Colonel Harry St. George Ord, was placed at the center of the proceedings, seated on a "canopied Throne" as the "Queen's Representative."[26] To the elites of the Straits Settlements, there was much to celebrate…after decades of perceived mismanagement by the British authorities in India. Ord thus reported the day's drama.

> The ceremony of reading the Charter and the Governor's Commission and the taking the oaths was performed in the presence of a very large assemblage, including almost every European in Singapore and a great number of natives. All places of business were closed, and by general consent the day was observed as a holiday. The Chinese inhabitants went to considerable expense in illuminating their part of the Town, and in giving a public display of fireworks; and throughout the community there was evinced a desire to testify in the strongest manner their satisfaction with the change which has been effected.[27]

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[25] "Summary," *ibid*.
[26] "Inauguration of the New Government," *ibid*.
[27] Ord to Carnarvon, 3 April 1867, CO 273/10.

Ord's pleasure at the positive local sentiments he encountered was echoed among members of the European community, who saw the establishment of the Crown's rule over the colony as a change that would allow them greater influence. As the *Straits Times* concluded with confidence,

> the change of regime will prove good…by giving us that which we have so long wanted, a representative Legislature and a system of self and independent government able and ready to supply at once the requirements of a community rapidly increasing in numbers and prosperity, and giving us that direct and intimate connection with the Imperial Government whereby our position will be recognized, and our representations have their full weight.[28]

In this light, was the *Straits Times* right and the European community's optimism about the establishment of Crown Colony government deserved? Unfortunately, Ord's inauguration proved to be the highest point of the Straits Settlements' beginnings as a Crown Colony. While a "direct and intimate connection" with the Crown was indeed desired in the Straits Settlements by local European elites who felt neglected by the Indian government, Ord's tenure in the Straits Settlements was quickly fraught with conflict. Not all the institutional changes that came with direct rule by the Crown were welcome, as the Straits Settlements' European community and, particularly, its incumbent officials, particularly its Chief Justice, came to realize. The colony's newly established Legislative Council proved to be less representative of local interests than it initially seemed, and Ord's attempts to reform his administration in ways that assimilated practices in other Crown Colonies was met with various accusations that the new laws fell short of English legal principles.

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[28] "Inauguration of the New Government," *Straits Times Overland Journal*. Vol. V. No. 119, 8 April 1867. Enlosure in *ibid*.

Between Colonial Government and Justice: The Case of Sir P. B. Maxwell CJ

Law was not merely an instrument of social control within Britain's colonies, for legal ideas and principles also shaped the language and ideals of political struggles with regards to colonial government. For British political elites, English law and its principles formed the idiom of their political struggles. While the common law tradition properly refers to "the pattern of judicial prerogative and initiative that developed in England during the late Middle Ages," its influence upon the "official mind" cannot be dismissed out of hand despite the differing social conditions and politics of the Crown Colonies (Selznick 1992, p. 448). Like in other Crown Colonies, the Straits Settlements' Legislative Council included the colonial government's top legal officers, namely the Attorney General and the Chief Justice, as Official members alongside the nominated Unofficial members, which could include leading lawyers and merchants in the colony. Higher up the imperial chain of command in the Colonial Office, Sir Frederic Rogers, who was the highest-ranking official as the Permanent Under-Secretary of state for the colonies between 1860 and 1871, was a lawyer who had been called to the bar in 1837 (Beasley 2005, p. 44). Not surprisingly, legalistic language and considerations permeated official correspondence, and officials like Rogers could draw upon their own expertise in their supervision and exercise of control over colonial legislation and the courts.

The establishment of Crown Colony government meant that the appointment of the Legislative Council and the judiciary would have to come under the supervision and control of the Governor in his role as the Crown's representative; this was a state of affairs unlike Britain and those colonies with "responsible government." Furthermore, the

Colonial Office could issue instructions to the Governor to pass or repeal statutory laws as desired. Did these differences mean that an alien legal system developed in the Crown Colonies – one bearing only basic similarities in form to England's common law system but ultimately crafted upon a set of principles that had no relation to the former? This is not the case, and I note that the divergent legal developments of the Crown Colonies stem instead from the practical, and thus political, basis of the common law tradition.

As a legal tradition, the English common law offered ideas and rhetorical resources that allowed legal and political actors across the empire to make claims for greater powers relative to each other. As McLaren (2010, pp. 71-72) recognizes, the rule of law was "a highly tensile notion" that could be mobilized by legal and political actors in varying ways depending on "the political and legal culture of imperial governance, as well as the politics and law in various colonial jurisdictions." In fact, two models of the rule of law can be identified within the common law tradition, as respectively formulated by Sir Edward Coke and Lord Francis Bacon (McLaren 2011, p. 11). While the former subjects the Crown to the dictates of the courts of law, the latter views judges instead as the "loyal servants" of the ruler (*ibid*). Within colonial contexts, the Baconian model was dominant and the subordinate status of colonial judges in the Crown Colonies reflected the general position of judges within British colonies over the last decades of the eighteenth century (McLaren 2010, p. 73). Despite such common beginnings, judicial independence in the white settler colonies emerged gradually with the development of self-government, or "responsible government," while it remained an elusive ideal in the Crown Colonies (McLaren 2011, pp. 276-277). Being partly dependent upon politics, the principle of judicial independence was an object of political struggle in the colonial state.

The conflict between the Chief Justice and Governor of the Straits Settlements over the constitution of the Supreme Court is a case in point. Prior to his appointment as Chief Justice, Maxwell had begun his service in the Straits Settlements as a judge in Penang in 1856 (Turnbull 1972, p. 68). When the Straits Settlements were finally handed over to the Colonial Office in 1867, he was the Recorder of Singapore before becoming the first Chief Justice of the new Crown Colony upon the transfer. Notably, as the Recorder of Penang, Maxwell had built up a reputation as a reformer and, on more than one occasion, became a source of ire to then-Governor Edmund Blundell (*ibid*, pp. 69-70 and 355-356). More importantly, his long period of engagement in the Straits Settlements meant that the local mercantile community saw him as an ally. These connections would prove to be important in his subsequent disagreements with the incoming Governor Ord.

Among their various disputes, their main disagreement centred upon the *Supreme Court of Judicature Act 1868*.[29] Before its passage, Maxwell had asked for the Governor to include an amendment to the bill so that the Governor would not be able to suspend judges.[30] Ord disagreed, stating that it was opposed to his "Commission, Instructions, and the Colonial Regulations and a departure from the rule of the Colonial Service."[31] Maxwell's disagreement with Ord was understandable to some extent. After all, prior to the transfer, the constitution of the courts in the Settlements had been established by the *Third Charter of Justice* dated 10th August 1855.[32] The Letters Patent issued by the Queen stated that judges (then known as Recorders) held their offices "during the pleasure of us, our heirs and successors." Since the courts were constituted in this

[29] Straits Settlements Ordinance No. 5 of 1868.
[30] Ord to Buckingham and Chandos, 15 June 1868, CO 273/19.
[31] *Ibid*.
[32] This Charter was ratified and confirmed by 18 & 19 Vic. Cap. 93.

manner, it was the Crown – not the Governor or the Indian Government – that held the power to appoint, suspend or remove judges in the Straits Settlements. Thus, the power of the Governor to suspend judges, while they were certainly granted by Ord's Commission and Instructions, had not existed prior to the transfer. However, it should be noted that, even before the transfer, Maxwell and his fellow judges served "during the pleasure" of the Crown – the Charter was no formal guarantee of judicial independence. Rather, Maxwell's primary concern was the subordination of judges to the Governor.

Given his long service and social ties in the Straits Settlements, Maxwell's opposition to this provision was shared by the European and Asian merchant community. Shortly after the Governor sent the bill for the Queen's assent, a public meeting was held in Singapore to express their disagreement with Ord. This meeting led to a petition addressed to the Secretary of State for the Colonies dated 30th June 1868, which stated:

> …the Straits Settlements have enjoyed the inestimable advantage of having justice being administered by Judges entirely independent not only of the local Governors but even of the Governors General of India, and that position of dignified independence secured to the judges the entire respect and confidence of the various communities both Native and European.[33]

This meeting and petition followed a tradition of "persistent extra-constitutional anti-government opposition" that had developed from European merchants' earlier attempts to agitate for the Settlements' transfer (Turnbull 1972, p.391). As Governor Ord also noted:

> It is a curious fact that of the Ten Gentlemen, who, exclusive of the Attorney General, compose the bar of the Settlement, only two Mr. Atchinson and Mr. A. Baumgarten signed the petition. Mr. Atchinson who has been the principal Speaker and mover in the Meeting is usually supposed to possess the confidence of the Chief Justice.[34]

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[33] Enclosed in Ord to Buckingham and Chandos, 15th July 1868, CO 273/20.
[34] Ord to Buckingham and Chandos, *ibid*.

The principle of judicial independence, as rooted in the common law tradition, thus provided rhetorical grist for Maxwell and the mercantile community to express their opposition to Ord. Raising their appeal for colonial judges' independence from the Governor to be maintained directly to the Colonial Office, Maxwell's allies employed the normative weight of this principle against Ord, whose position accorded instead with the Colonial Office's standardized rules and practices.

The outcomes of Maxwell's struggle to prevent the Governor's control over the judiciary would fail for the same reasons that I have identified for the institutionalization of Crown Colony government across the Empire. In the Crown Colonies, colonial judges were to be subject to some measure of discipline and suspension by the Governor without the need to await official instructions from Whitehall. In response to Singapore's petition, the Secretary of State stated: "whatever is, in this respect, best for the Straits Settlements, would also be best for Ceylon or Hong-Kong, and other Colonies not possessing Responsible Government."[35] As the Permanent Under-Secretary of State for the Colonies, Sir Frederic Rogers, also explained in a memorandum:

> …Judges should be appointed formally during good behaviour, where…there exists a sufficient combination of the following conditions: a reasonably extended public opinion, a tolerably efficient press, colleagues, an intelligent Bar, and a society large enough to make the Judge's personal habits no great element in the improvement or corruption of colonial society.[36]

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[35] Enclosed in "Correspondence respecting the removal and suspension of colonial judges," *Parliamentary Papers*, C. 139, 1870, p. 3.

[36] Undeterred by the Colonial Office's negative response, Singapore's mercantile elites submitted another petition to the House of Lords two years later. The Judicial Committee of the Privy Council then settled the question through a memorandum that corroborated Roger's position. *Ibid*, pp. 4 and 6-9.

The terms of appointment of colonial judges, like the constitutional form of the legislature under Crown Colony government, would have to fit the social conditions of the colonies. In relation to plural societies that seemed to lack a common social will, would colonial officials find "a reasonably extended public opinion" or the other conditions Rogers identified? Given colonial officials' increasingly consolidated beliefs regarding the plural societies they governed, judges in the Crown Colonies never came to possess the same independence as their professional counterparts in the metropole or those colonies with "responsible government."

Conclusion: On Law and Personhood in the Government of Plural Society

In this chapter, my claim is that the re-constitution of the Straits Settlements as a Crown Colony rested on colonial officials and subjects' shared understandings of the fragmented and unstable character of racially diverse societies. Such understandings were analogous to Furnivall's concept of "plural society" and justified the establishment of a monocratic form of government – simply put, because such societies lack a common social will, order and stability could not be secured without the force exerted by the Crown and a Governor with expansive powers to discipline and punish. Consequent to such notions, the Colonial Office and its agents, colonial Governors, justified their claims to their monopolistic control over the making, implementation and judging of laws. Unlike the legal and political institutions of England, the constitutional rules and institutions of Crown Colony government rejected liberal principles that would justify the circumscription of state power in favour of individuals' basic rights.

To expand further in this direction, conceptions of personhood, within the framework of a plural society, were based on one's belonging to a racial community – not upon the fundamental equality and liberties of individuals. Such ideas were indeed expressed in the laws of the colonial state. As Steinmetz (2008, p. 593) observes, the central function of colonial government, its "native policy," was to "compel the colonized to adhere to a constant and stable definition of their own culture" and to reinforce the inferior standing of the so-called natives. In this regard, because of the recurrence of violent conflicts, or riots, involving the Chinese secret societies in the nineteenth century, the "native policy" of the colonial government of the Straits Settlements was first concerned with the suppression of their activities. Notably, a major "riot" involving these societies had occurred in Penang just months after Ord's assumption of control over the colony. On this matter, Chief Justice Maxwell clashed once again with Governor Ord.

Shortly after their conflict over the independence of colonial judges, Maxwell and Ord found themselves in disagreement over the extension of the 1867 *Preservation of the Peace Act*,[37] a measure that had been passed in response to the riot and was due to expire in August 1868. Notwithstanding the passage of the 1868 *Preservation of the Peace Extension Ordinance*,[38] Maxwell wrote to the Secretary of State for the Colonies to protest against the law's provisions. The first of his objections was the law's infringement of individual liberties due to the powers granted to the Governor to detain and deport both aliens and naturalized subjects at will and the suspension of *habeas corpus*

[37] Straits Settlements Act No. 20 of 1867
[38] Straits Settlements Ordinance No. 10 of 1868.

whenever the provisions of the law were proclaimed to be in force.[39] In responding to Maxwell's objections, Ord justified the act by pointing to information he had received from Penang, "stating that considerable apprehension existed that an outbreak was likely to take place between [two Chinese secret societies,] the Ghee Hins and the Toh Peh Kongs."[40] Unlike Maxwell's opinion that such episodic occurrences were factional fights and did not threaten colonial rule, Ord viewed the possibility of another outbreak of violence as a real threat particularly in light of the 1867 Penang riots. Hence, in defending this colonial ordinance, he asked:

> …is the preservation of the public peace and the protection of property a primary duty of the Government and has it a right to demand that it shall be furnished with the means of carrying out these duties, or is the right to be hampered with the restriction that it must always be exercised in conformity with the fundamental principles of English law?[41]

As the Secretary of State for the Colonies, the Duke of Buckingham and Chandos agreed with Ord on the necessity of granting the colonial executive exceptional powers in controlling the seemingly unstable plural society of the Straits Settlements. However, in acknowledging the validity of some of Maxwell's objections, he also observed that "in passing Laws which give a large measure of discretionary power to the Executive, the Government is desirous not only of guarding against the abuse of those powers, but also of removing, as far as consists with the security of the public[,] all apprehension of such abuse."[42] While he had misgivings over the suspension of the writ of *habeas corpus* for those detained under the provisions of the ordinance, the Secretary of State's response to

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[39] Maxwell to Buckingham and Chandos, enclosed in Ord to Buckingham and Chandos, 11 Sep. 1868, CO 273/21.
[40] Ord to Buckingham and Chandos, *ibid*.
[41] *Ibid*.
[42] Buckingham and Chandos to Ord, *ibid.*

Ord was more concerned about the *perceived* legality and legitimacy of the law rather than its substantive implications for the loss of individual liberties. Hence, in their subsequent amendment of the provisions of the1867 *Preservation of the Peace Act* in 1869, the Legislative Council, over the express objection of both Maxwell and W.H. Read, then modified the law in accordance to the Secretary of State's instructions and limited the discretionary powers granted to the Governor in Executive Council to deport foreigners whose removal was deemed necessary for public safety.[43]

Finally, it might be noted that the provision in the 1867 law that authorized the suspension of the writ of *habeas corpus* for those detained during the proclamation of the law was not repealed; this provision was only removed by the revision of this law in 1870 after the passage of the *Dangerous Societies Suppression Ordinance, 1869*, which instituted measures for the registration and regulation of the secret societies.[44] Tellingly, the draconian measure of suspending *habeas corpus* to quell social disturbances was abandoned only when the colonial government was legally empowered to exercise greater control over the activities of the Chinese secret societies. While both metropolitan and local colonial officials recognized the significance of protecting individual liberties, they again prioritized the protection of social order when confronted by the challenge of maintaining British rule in a colony with social conditions that seemed unfitted to the liberal principles of English law. Similar to the metaphorical figure of Hobbes' Leviathan, the Colonial Office and its local agents wielded colonial laws as instruments of domination and control across the Crown Colonies.

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[43] Straits Settlements Ordinance No. 7 of 1869.

[44] See Ord to Granville, 3 January 1870, CO 273/36; Ordinance No. 19 of 1869. Notably, the 1869 *Dangerous Societies Suppression Ordinance* specifically excluded European societies of Freemasons from such control.

Chapter Four, in part, is revised from the material as it appears in "Plural Society and the Colonial State: English Law and the Making of Crown Colony Government in the Straits Settlements," Asian Journal of Law and Society, vol. 2, 2015. Lee, Jack Jin Gary. The dissertation author was the primary investigator and author of this paper.

V.
Protecting Soldiers and Morals? Carnal Practices and the Transformation of the Contagious Diseases Ordinances

Prologue: A Letter on "curious things" and the Changing Letter of the Law

THE CLOSE, WINCHESTER
October 8th, 1887

MY DEAR MR. JOHNSON,

I thank you heartily for the useful letter you sent me on the Government paper. I am studying your letter in connection with the latter; there are many curious things in it certainly.

I note particularly that action in this matter was taken in anticipation of the question in Parliament. We were very happy to be able to report at Lausanne the fact that abolition of ordinances had been passed in Trinidad, Jamaica and Barbadoes. The announcement was received with cheers; a missionary of the Social Purity League has gone, or is going, from England to Gibraltar. I see there are special difficulties in that place.

I have again communicated to the heads of the Wesleyan Missionary Society in London the statement concerning Fiji: I think they ought to deny it authoritatively, if not true; regulationists sometimes fancy they will satisfy us by including men in the working of their ordinances. It is certain that they would only be poor men, and two wrongs cannot make a right. The question of Hong Kong is very interesting.

[…]

I am so glad to think that you are a member of the Federation.[1]

Writing from her home at Winchester, Josephine E. Butler, leader of the abolitionist movement against the regulation of prostitution, thus expressed her gratitude

[1] The "Federation" Butler mentions was "The British, Continental and General Federation for the Abolition of Government Regulation of Prostitution" and, later, "The International Abolitionist Federation." Butler referred to her and her husband's attendance of the Conference of the Federation at Lausanne in 1887. Butler to Johnson, 8 October, 1887; enclosed in Appendix I in George W. Johnson and Lucy A. Johnson (eds.), *Josephine E. Butler: An Autobiographical Memoir*, 3rd ed., (Bristol: J.W. Arrowsmith Ltd., 1928).

to George William Johnson, who served as a clerk in the Eastern Department of the Colonial Office, for keeping her informed of the Colonial Office's efforts to repeal the Contagious Diseases Ordinances in the colonies. Having won the political battle over the repeal of the Contagious Diseases Acts in Britain, Butler and her liberal allies turned their attention to the colonies, where the scourge of the regulation of prostitution remained like a stain upon their conscience. Upon the extension of their crusade to protect the personal liberties of disadvantaged women across the rest of the empire, the abolitionist movement directed their criticism towards local colonial officials who insisted upon the necessity of regulation for the protection of "native" communities – a rationale that differed from the professed aims of the Contagious Diseases laws to shield British soldiers from the threat of venereal diseases. As Butler wrote to Johnson later in the same month, "I am delighted with the firmness of Sir H. Holland [the Secretary of State for the Colonies] in his replies to the tortuous and often illogical arguments of Colonial Officials [in the colonies]."[2] Butler's praise would have pleased her fellow abolitionist Johnson, whose hand in the drafting of Holland's correspondence with the "Eastern" colonies was unmistakable.

In her private exchanges with Johnson, Butler observed that Parliament's repeal of the Contagious Diseases Acts in April 1886 had, rightfully in her view, set forth a succession of legislative acts across the empire "in anticipation of the question in Parliament." Indeed, the then-Secretary of State for the Colonies, Edward Stanhope, had written to the Governors of Crown Colonies on October 25th, 1886, requesting that he might be "furnished with any special reasons" if they and their governments thought the maintenance of the Contagious Diseases Ordinances in their colonies to be necessary

[2] Butler to Johnson, 20 October 1887; *ibid*.

since "the policy…will no doubt be called in question in Parliament."[3] Stanhope's preemptive request proved prescient, as James Stuart, a Member of Parliament and another ally of Butler, soon asked the Secretary of the State for the Colonies about the policy of the British Government towards the Contagious Diseases Ordinances in the colonies in the latter half of 1887. Stuart's questioning of the Secretary in Parliament led to the printing of a series of parliamentary papers on the ordinances and their repeal; notably, one of these papers was the subject of Butler's abovementioned correspondence.

These papers, which reproduced the correspondence between the Colonial Office and the colonies, provided official evidence of the routine regulation of prostitution across the empire and they gave substance to the "long-distance advocacy" of the abolitionist movement, as mediated through Johnson's efforts as a colonial official (Stamatov 2013). To officials in the Colonial Office, the publication of these documents proved their dutifulness in the exercise of imperial control over colonial legislation. Crisscrossing the span of the empire, these official dispatches enabled the abolitionists to marshal the Colonial Office's formal means of imperial control to curb the misguided uses of law by seemingly morally bereft officials and elites in the colonies.

Despite the strenuous efforts of abolitionists like Butler, Johnson and Stuart to outlaw the regulation of prostitution, the repeal of the Contagious Diseases Ordinances proceeded at an uneven pace across the colonies. While the West Indian colonies swiftly repealed their laws upon their receipt of Stanhope's despatch, the Legislative Councils of Hong Kong and the Straits Settlements only repealed their ordinances belatedly under the

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[3] Stanhope to Governors of Crown Colonies, 25 October 1886; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies). Copies of correspondence, or extracts therefrom, relating to the repeal of contagious diseases ordinances and regulations in the crown colonies*.

forceful instructions of the Secretary of State by 1889. With respect to these colonies, their extended debates with the Colonial Office over repeal revolved initially around the compulsory medical examination of women suspected of prostitution. Whereas officials and elites in these colonies were insistent on the need to maintain this measure to protect "native" prostitutes from being forced to work while diseased, Secretary Holland and his staff, particularly Johnson, were insistent on the abolition of the ordinances and their provisions for the forced medical examination of "prostitutes." Despite their conflict, the parties at both ends of the debate recognized the significance of their arguments: at stake was the "freedom" of these exploited women and the moral standing of British rule.

For these colonies, where the Colonial Office experienced the greatest pushback, an unstable compromise was reached. The repeal of the Contagious Diseases Ordinances, as well as their provisions for the compulsory medical examination of "prostitutes," in the Straits Settlements and Hong Kong took the form of ordinances that were meant for the protection of women and girls – nomenclature that echoed the stated purpose of Britain's 1885 Criminal Law Amendment Act.[4] However, far from being a retreat from the regulation of prostitution, these colonial laws maintained the registration of brothels and their "inmates." The regulation of prostitution then proceeded under a different guise, and it would not be until late 1894 before the Women and Girls' Protection Ordinances of Hong Kong and the Straits Settlements were amended – again under instructions from the Colonial Office – to abolish brothel registration. Despite these repeated purges of

[4] Straits Settlements ordinance no. 14 of 1888; Hong Kong ordinance no. 19 of 1889; 48 and 49 Vict. c.69. As Walkowitz (1980, p. 247) noted with irony, the British Act did not merely raise the age of consent for girls to sixteen, but it also "gave police far greater summary jurisdiction over poor workingwomen and children – a trend that Butler and her circle had always opposed." Likewise, we might view the ordinances to protect women and girls as a reformulated means of policing the bodies of "native" women and children.

regulationist measures,[5] male colonial officials in the Crown Colonies of Hong Kong and the Straits Settlements maintained their regulation of female bodies and carnal practices through their respective Women and Girls' Protection Ordinances. Given that the cause of abolitionism was the protection of the "liberties" of disadvantaged women, the abolitionists' ideals seemed to be corrupted again and again by governmental practices in the colonies. Critically, also puzzling was the fact that the Colonial Office sanctioned the transformation of the Contagious Diseases Ordinances into the Women and Girls' Protection Ordinances, paving the way for the continued policing of women's bodies under the aegis of law.

On Carnal Practices and the Subversion of Imperial Control

> If we take a defining feature of imperial formations to be the evasive quality of their nomenclatures, the arbitrariness of their rules, their capacity to call things by other names, then precisely in this corporeal space that smudges distinctions between the carceral and the carnal–here guarded, there unintended, here besieged, there abandoned, here desired, there repulsed–we might find their arts of governance most chillingly honed as they morph and their affective landscapes change. (Stoler 2010, p. xxvi)

Why did the realization of the ideals of the abolitionists prove to be so elusive? As the transformations of the Contagious Diseases Ordinances in the Straits Settlements and Hong Kong revealed, the goal of the abolition of the colonial state's regulation of women's bodies continued to evade the dictates of the Colonial Office even when it seemed that the abolitionists had the apparatus of imperial control at their disposal.

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[5] Following Howell (2009, p.3), my use of "regulation" and "regulationism" refers to "the measures introduced at various times, in various places, to control the perceived dangers of uncontrolled female prostitution – principally public disorder and the propagation of sexually transmitted diseases."

Whereas the debates over the enactment and repeal of the Contagious Diseases Acts in Britain had rested upon the "fundamentally ambiguous" relationship between the liberal principles and procedural safeguards of law and the discipline of public health (Ogborn 1993, p. 33), the debates over the fate of regulationist laws in the colonies were also marked by arguments over the significance of English liberties in relation to the differences in culture and society that obtained in the colonies. The "rule of difference" – a defining characteristic of the modern colonial state (Chatterjee 1993; Steinmetz 2007) – clearly figured in the foreground as officials at Whitehall and the colonies contended over the applicability of the sacred personal liberties of the individual to "native" populations, which were classified and characterized in ways that emphasized their cultural difference and inferiority. Even so, officials' recognition of local cultural and racial differences did not prevent the prompt and complete repeal of the Contagious Diseases Ordinances and its attendant institution, i.e. the Lock Hospital where women were detained for the treatment of venereal diseases, in the West Indian colonies of Barbados, Jamaica and Trinidad. Given such, we need to go beyond the mere recognition by officials of the pernicious "rule of difference" in understanding how and why regulationism transformed and persisted in other forms within some colonies. A rule, as Taylor (1993, p. 57) argues, "doesn't apply itself; it has to be applied and this may involve difficult, finely-tuned judgments." Such judgments are typically precipitated by the suspense and uncertainty about consequences that envelops any course of action in the social world (*ibid*). Therefore, to explain why the abolitionists and their allies faced recurrent problems in realizing their ideals across the empire, we need to understand the conditions under which officials in the Colonial Office and the colonies evaluated colonial policy at each turn.

In this chapter, I argue that the answers to the varying outcomes of the repeal of the Contagious Diseases Ordinances across the empire lie in the *carnal* practices of imperial control. In using the term *carnal*, I am not only stressing the cultural and political importance of intimate relations, which "figured so prominently in the perceptions and policies of those who ruled" in the context of colonialism and empire (Stoler 2010, p.7). Drawing inspiration from, and expanding upon, Stoler's (2010) exemplary investigations of the manifold significance of the "carnal," I also emphasize the secular,[6] or temporal, meanings of the word – an understanding that resonates with the "landscape of meaning" of carnality within the Christian tradition[7] (Reed 2011). Beyond the word's broader etymological associations with "the sensual and affective, passion and compassion, and the unsanctioned and the flesh" (Stoler 2010, p. 18), to be of the flesh is also to be bound by time and the irreversibility of human action.

Indeed, counter-posed to a transcendental sacred being (or absolute values), the promptings and imperfections of the social world render human action as being fraught with resistance, uncertainty and unintended consequences. Thus, abolitionists like Butler did not only recognize the tension between their ideals and the intransigence of others; they also recognized the significance of human dispositions and contingent circumstances in pursuing their goals. As Butler once wryly noted to Johnson, her trusted ally, about the stubborn, masculine "official mind," against which he had proved to be an exception,

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[6] In my use of the term "secular," I draw upon Taylor's (2007, p.194-195) insightful discussion of secularity: "For the original sense of 'secular' was 'of the age,' that is, pertaining to profane time."

[7] St. Paul's epistles have been a particularly rich source of meanings for the distinction between the spiritual and the flesh within the Christian tradition of thought. The writings of another Christian thinker, St. Augustine, also provide poignant discussions of the way that matters of the flesh encumber human will and faith; in particular, see his *Confessions*.

> Do you remember when the *women* told the disciples that Jesus Christ has risen, their words "seemed to them as idle tales." So it has been ever since, and so it will be to the end. The cry of the bitterly wronged is never generally believed when uttered by a *woman*. There are, however, some men whose ears are always open to those cries, thank God.[8]

Butler's discussion of the "official mind" points us to how the practices of government were defined, in part, by the gendered dispositions, or "habitus," of officials (Bourdieu 1980). In this sense, the practices of imperial control were co-constituted by the embodied sensibilities of male colonial officials and their uses of the formal rules and regulations that dictated the actions to be taken in relation to events in the colonies.[9] Given such, despite the centralized and formal nature of imperial control, the outcomes of imperial control, e.g. colonial ordinances, could still subvert the original intentions of the colonial officials who drafted them. As I demonstrate in this chapter, this was because the practices of imperial control were marked by their carnality, i.e. their taking place under affective structures and temporal conditions that allowed officials and elites in the colonies to reformulate the Colonial Office's instructions in their own terms. In the case of the repeal and transformation of the Contagious Diseases Ordinances by the enactment of the "Women and Girls' Protection" Ordinances, we find that the ideals and practical goals of the abolitionists were displaced, at various turns, by male officials and elites' diffuse concerns over the policing of "native" women's bodies and the tactical uses of time by British officials, whether situated within the colonies or the Colonial Office, to affect and transform the forms and meanings of colonial laws.

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[8] Italics in original. Butler to Johnson, May 16 [year not stated, but likely to be dated between 1888 and 1891]; enclosed in Appendix I in Johnson and Johnson, *Josephine E. Butler: An Autobiographical Memoir*.
[9] I have drawn from Taylor's (2016, p. 273) insightful discussion of the elements that foster the reproduction of social practices; in his terms, these are the constituents of the "modern social imaginary" that allow for the mutually intelligible understandings of a common social life.

Ideals in Comparisons: The Shadows of Liberty in Empire

The enactment, repeal and transformation of the Prevention of Contagious Diseases Ordinances throughout Britain's colonies from the 1860s to 1894 was an affair punctuated by the circulation of laws and letters across, and sometimes even beyond, the British Empire. Given colonial officials' formalistic approach to colonial law-making, this extended legal saga also engendered colonial officials' recurrent use of comparisons to evaluate and justify the enactment or repeal of the provisions of these statutory laws. Rather than dismiss these emic acts of comparison for their subjective biases, my examination of the spread and abolition of the Contagious Diseases laws across the empire highlights the ways that colonial officials used the comparison of past policies and present conditions to articulate their ideals, cultural understandings and interests. As John Dewey (1910, pp. 220-221; italics in original), revealing his deep commitment to the fragmentary realization of ideals in the imperfect grounds of practical life, argued:

> …memory must work by retail – by summoning *distinct* cases, events, sequences, precedents. Dis-membering is a positively necessary part of re-membering. But the resulting *disjecta membra* are in no sense experience as it was or is; they are simply elements held apart, and yet tentatively implicated together, in present experiences for the sake of the most favorable evolution; evolution in the direction of the most excellent meaning or value conceived.

Historical comparisons, in this sense, are necessarily subjective acts because they are purposeful engagements with the past that are meant to project present actions towards a desired future. Hence, as metropolitan officials like Johnson and his subordinates in the colonies debated the benefits and harms of regulation, they rendered their recollections and evaluations of policies in selective, meaningful and instrumental ways.

My approach in this chapter builds upon Stoler and McGranahan's (2007, p. 15; italics in original) approach to treating "comparison *as an active political verb*." Hence, in drawing from their insights into the political uses of comparison by colonial actors as "an act of governance" and "a located political act of analysis," my purpose is to highlight the tensions between liberal ideals, cultural differences and practical interests that can be found within these acts of comparison. While I have argued that the institutions that constitute Crown Colony government departed from English ideals of individual liberties in order to facilitate imperial control, this chapter illustrates the recurrent, even if unrealized, significance of these ideals in the empire, as the liberal-minded members of the Colonial Office worked to counter the authoritarian tendencies of local officials and elites who sought to consolidate their rule over "native" populations.

Here, we might recall Penson's (1926, p.111) claim that the institutional elements of Crown Colony government had first been devised to facilitate "the suppression of the slave trade and the amelioration of slave conditions" within the West Indian colonies ceded to the British at the cusp of the nineteenth century. In this regard, these purported institutional designs of Crown Colony government continued to resonate after the so-called "age of abolitionism" at the turn of the nineteenth century. As Lambert and Howell (2003, p. 5) note, the term "slavery," with its polyvalent meanings, continued to mark "the unacceptable in imperial culture" beyond the specific context of plantation slavery in the American and West Indian colonies. However, caught between the pursuit of humanitarian goals and the maintenance of the racialized political order of the colonies, the Colonial Office's exercise of imperial control was a double-edged sword that could protect the weak, or reinforce colonial domination and the "rule of difference."

Because the official debates over the regulation of prostitution in the colonies centered upon the colonial government's role in the "protection" of the female "inmates" of brothels and their "freedom," the circuitous translations of the Contagious Diseases Ordinances across the empire present a useful lens that can elucidate the pivotal tension between the Crown's duty to protect the "liberties" of its subjects and the imperative to reinforce colonial rule. Therefore, instead of examining other colonial laws that were also enacted across the multiple jurisdictions within the Colonial Office's control, this chapter demonstrates and explains the institutional character of imperial control over colonial legislation through a study of how the Contagious Diseases Ordinances were enacted and then repealed, or transformed, in varying ways across the Crown Colonies.

By treating officials' political uses of comparisons as the subject of this analysis, my methodological approach will identify and analyze the presuppositions and practices that made it possible for colonial officials, at Whitehall and the colonies, to justify and establish similarly- or differently-worded legal provisions across jurisdictions. And, since the puzzling repeal and transformation of the Contagious Diseases Ordinances by the Protection of Women and Girls' Ordinance was first mooted and implemented in the Straits Settlements and then in Hong Kong, my account will give particular attention to events in these Crown Colonies. In addition, I examine the contrasting case of Jamaica to understand why and how the repeal of regulation occurred according to imperial design when it did. Following Steinmetz's (2004) critical realist approach to the theoretical uses of comparison, my purpose is to understand how the commonly established structure of imperial control, Crown Colony government, worked in relation to the variegated events linked to the making and un-making of the Contagious Diseases laws across the empire.

In the broader scheme of things, the secondary aim of this chapter is to evaluate the significance of English liberal ideals in relation to claims of cultural difference in the making of ordinary laws in the colonies *after* the institutionalization of Crown Colony government as the standard form of imperial control across the empire. By examining the operation of this framework of long-distance imperial control in relation to its legal and political consequences, this chapter and the next builds upon my prior analysis of the constitution of the governments of Crown Colonies. While claims for the protection of English liberal ideals resonated in debates over the Contagious Diseases Ordinances across the empire, the recurring traces of the regulation of prostitution in Crown Colonies like Hong Kong and the Straits Settlements reveal how the carnality of imperial control, as manifest by colonial officials' gendered dispositions and the temporal politics of colonial law-making, resulted in the corruption of abolitionists' ideals.

In other words, the transformation of the Contagious Diseases Ordinances was a product of the felt tensions between liberal ideals, officials' anxieties over racial and gender difference and the temporal politics of imperial control. Dewey's (1922, p. 263) understanding of the significance of ideals provides a deeper sense of why these tensions continued to matter: "The ideal is not a goal to be attained. It is a significance to be felt, appreciated." In this sense, Kestenbaum (2002, p. 52) likens the significance of the ideal to that of works of art, both of which "involve enactments of meaning which are commitments to meaning." Hence, for the abolitionists, the shadows of liberty were to be found within their continual political struggle against the unjust system of regulation across the empire. In turn, British officials navigated the contrary ends of the "colonial rule of difference" and liberal ideals through their transformation of colonial law.

The Spread of Contagious Diseases Laws: Patterns of Imperial Control

On the surface, the enactment of Preservation of Contagious Diseases Ordinances across Britain's colonies was a textbook case of imperial control, as the passing of these colonial laws mostly followed Parliament's enactment of the Contagious Diseases Acts from 1864 to 1869. The metropolitan acts were enacted to tackle the problem of the increase of venereal diseases within the military, and they regulated the activities of prostitutes who were frequented by soldiers or sailors within specific military districts. Similar laws were passed by colonial legislatures, bearing names that expressed the like intent to prevent the spread of contagious diseases. In a set of official returns presented to Parliament in 1886 and 1887, the colonies of Barbados, the Cape of Good Hope, Canada, Ceylon, Fiji, Gibraltar, Hong Kong, Jamaica, Labuan, Malta, Queensland, St. Helena, the Straits Settlements, Tasmania, Trinidad, Victoria and New Zealand submitted the measures they had used to apply the "principle" of the Contagious Diseases Acts.[10] Passed between 1861 and 1885, this set of Contagious Diseases laws seemed to indicate the colonies' conformity with the policy of the metropolitan state, signifying the efficacy of imperial control or, in the case of the colonies not subject to centralized control via Crown Colony government, the overarching influence and prestige of British statutes.[11]

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[10] House of Commons, 1886 (247) Con*tagious diseases ordinances (British colonies)*; House of Commons, 1887 (20) *Contagious diseases ordinances (British colonies)*.

[11] This list contained ten Crown Colonies. The Colonial Offices' list of Crown Colonies in 1886 consisted of the following 23 territories: Gilbraltar; St. Helena; Heligoland; Ceylon; Mauritius; Hong Kong; Labuan; Trinidad; St. Lucia; Fiji; Jamaica; Straits Settlements; Sierra Leone; Gambia; Gold Coast and Lagos; Grenada; Falkland Islands; Honduras; St. Vincent; Tobago; British Guiana; Leeward Islands; and Malta. Unlike the Colonial Office, I classify British Guiana, the Leeward Islands and Malta as Crown Colonies despite the presence of partly elected legislatures because the Crown retained its control over legislation. Chapter 1 of the "Rules and Regulations for Her Majesty's Colonial Service," enclosed in Edward Fairfield and John Anderson, *The Colonial Office List for 1886* (London: Harrison and Sons, 1886), pp. 303-304.

We might first turn to Jamaica's enactment of its Contagious Diseases Ordinance in 1867 for a glimpse of how key provisions in the British acts were enacted and understood in those colonies that followed the terms of metropolitan policy. To illustrate, Jamaica's *Law for the Better Prevention of Contagious Diseases* stated:

> Thirteenth – Where an information on oath is laid before a justice by an inspector of police, charging to the effect that the informant has good cause to believe that a woman therein named is a common prostitute, and either is resident within the limits of any place to which this law applies, or being resident within five miles of those limits, has, within fourteen days before the laying of the information, been within those limits for the purpose of prostitution, the justice may, if he think fit, issue a notice thereof addressed to such a woman, which notice the inspector of police shall cause to be served on her.
>
> Fourteenth – […] The justice present, on oath being made before him substantiating the matter of the information to his satisfaction, may, if he thinks fit, order that the woman be subject to a periodical medical examination by the visiting surgeon, for any period not exceeding one year, for the purpose of ascertaining at the time of each such examination, whether she is affected with a contagious disease, and thereupon she shall be subject to such a periodical medical examination, and the order shall be a sufficient warrant for the visiting surgeon to conduct such an examination accordingly…[12]

These sections authorized the conduct of periodic medical examinations of women suspected of being prostitutes, and they were almost a verbatim transcription of sections fifteen and sixteen of *An Act for the better Prevention of Contagious Diseases at certain Naval and Military Stations*,[13] the 1866 Contagious Diseases Act that had been passed by Parliament. Nevertheless, given differing social conditions, officials in Jamaica saw their law as a means to control the sexual practices of the larger black civilian population – an application that deviated from the metropolitan law's express aim to protect soldiers.[14]

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[12] Jamaica Law No. 29 of 1867.
[13] 29 & 30 Vict. c.35.
[14] See the next section on the official discourse regarding the repeal of Jamaica's ordinance.

Beyond such localized understandings of the Contagious Diseases laws or their differential applications in the colonies, another deviation from the apparent conformity of colonial laws to imperial policy is that the passing of some of these ordinances preceded the acts of Parliament. The most obvious example of the colonial precedents of the imperial acts was the case of Hong Kong.[15] In her path-breaking comparative history of British attempts to police prostitution and control the spread of venereal diseases, Levine (2003, p. 40) observes that the earliest law aimed at the spread of such diseases within the empire was enacted in Hong Kong in 1857,[16] several years before the first Contagious Diseases Act was even passed in Westminster in 1864.

Unlike the parliamentary statutes that subjected individual "streetwalkers," i.e. what the acts identified as "common prostitutes," to compulsory medical examination, the *Ordinance for Checking the Spread of Venereal Diseases* in Hong Kong controlled prostitution through the registration of brothels (ibid). Hence, Levine (ibid) notes that the ordinance "was a far cry from the British version of the law, and such was the case in most colonies." However, the distinctive cast of Hong Kong's regulationist policies did not mark an "essentialist colonial/metropolitan divide" in regulationism across the empire (Howell 2009, p. 242). Notwithstanding officials' rhetoric of colonial difference, this ordinance was a product of British thought and its purported success helped to justify the passing of Britain's Contagious Diseases Acts.

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[15] While Gibraltar and Malta also possessed measures that regulated prostitution, Hong Kong's ordinance was the first instance of a Contagious Diseases statute directed against prostitution. The regulation of prostitution in Malta and Gibraltar had relied on other legal and customary measures that subjected prostitutes to medical surveillance (Howell 2009, chapter 5).

[16] Hong Kong Ordinance No. 12 of 1857.

As Howell (2009, p. 199-201) notes, Hong Kong's ordinance was introduced by Governor Sir John Bowring, who was an "avowed Benthamite" – and also the late Jeremy Bentham's friend, biographer and executor of his literary works – committed to the use of strict measures to establish public order. In this regard, the law was Bowring's "assertively utilitarian solution" to the problem of prostitution, which had been linked to the influx of Chinese workers into the colony; it required the licensing of brothels by the Registrar General and the periodic medical inspection of prostitutes (ibid). This ordinance received the "enthusiastic support" of the Colonial Office; and the then-Secretary of State for the Colonies, Henry Labouchere, viewed the ordinance as a measure that would ameliorate conditions for the victims of the "un-English practices" of "brothel slavery," i.e. the sale of women to brothels – a policy goal that seemed to be "entirely consistent with the unimpeachable British mission to eradicate the stain of slavery…" (ibid)

The far-reaching significance of Hong Kong's ordinance can also be understood through an examination of the professional and public discourses surrounding the introduction of the Contagious Diseases Act in Britain. The "immediate origins" of these acts, according to Howell's (2009, p. 36-37) reading of the public debates about them, could be "traced to responses to concerns raised by the British armed forces, concerns that drew upon military experience in the service of British imperialism." Advocates of regulationism, particularly the medical and military establishment, also drew on the seemingly successful precedents of the medical surveillance of prostitution in colonies like Malta, Hong Kong and British India to justify the introduction of similar measures in Britain (ibid). As Howell (2009, p.20) argues, the intra-empire mobility of ideas, professional knowledge and officials demonstrate that "[t]he regulation of prostitution in

Britain and the rest of the Empire was…part of the same project, home or away." While Howell's assessment of regulationism as an imperial project is sound, I add that more can be said about the significance of the underlying assumptions of social character and sexual practices that these laws expressed and reinforced. As I have demonstrated in past chapters, colonial officials' comparative understandings of the social character of the populations that they ruled mattered in their formulation of colonial institutions and laws.

Despite their connections with the early colonial ordinances, the British acts were crafted in ways that differed from the more expansive measures that had been introduced in colonies like Hong Kong; specifically, the licensing and inspection of brothels would be unviable, since it would entail the official recognition of a illicit practice rather than the regulation of its harmful effects. This point of contrast in the British acts could also be attributed to the widespread view that prostitution in Britain was associated more with the activities of individual women than with the existence of an organized system of "brothels." Critically, these understandings, while partly founded in local realities, were also a product of British elites' willful indifference to the presence of brothels in their cities. Citing the characterizations within William Acton's influential 1857 report on prostitution in London and other cities in continental Europe, Walkowitz (1980, p. 24) highlights how British opinions on the domestic practice of prostitution were shaped in contrast to their understandings of the open system of prostitution in cities like Paris:

> …[N]umerous observers, police officials, and rescue workers denied the existence of English brothels that at all resembled the continental model. Prostitutes tended to reside in dwellings with two or three other women that were "scarcely distinguishable" from "low class lodging houses," or sometimes in "externally respectable establishments," where the inmates had achieved a "quiet" truce with the police.

Even though the social practice of prostitution in Britain did indeed differ from the Continent and in British colonies that regulated prostitution, such dwellings could be legally classed as "brothels" even if they were not the main targets of regulation. As such, Parliament's avoidance of the term demonstrated an aversion to the assimilation of the terms commonly used by regulationists in other parts of the empire and Europe.

Given such comparative understandings of British conditions, the word "brothel" did not appear in the first Contagious Diseases Act that was enacted by Parliament in 1864. While this act did establish criminal penalties, i.e. a fine or imprisonment, for anyone who allowed women with contagious diseases to engage in prostitution in their premises, such persons were not legally classed as "brothel-keepers" even though an offender "induces or suffers" the conduct of prostitution. Section 18 of the act stated:

> If any Person, being the Owner or Occupier of any House, Room, or Place…, or being a Manager or Assistant in the Management thereof, knowing or having reasonable Cause to believe any common Prostitute to have a Contagious Disease, induces or suffers such common Prostitute to resort to or be in such House, Room, or Place for the Purpose of Prostitution, every such Person shall be guilty of an Offence…[17]

A similarly worded provision was re-enacted in the 1866 Contagious Diseases Act,[18] which also specified the gender of the persons ("he") whose premises were used to harbor the practice of prostitution by women. This latter provision was maintained in the amendment of the law in 1869.[19] Notably, Parliament's legalistic formal description of places that were akin to "brothels" stood in contrast to the significance of brothels as both the targets of registration and sources of funds in the colonial regulation of prostitution.

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[17] 27 & 28 Vict. c. 85.
[18] Section 36 of 29 Vict. c. 35.
[19] 32 & 33 Vict. c. 96. There was a prior amendment of the 1866 Act (31 & 32 Vict. c. 80), but it was minor and did not affect the law's main provisions.

To illustrate, Hong Kong's pioneering ordinance began with the designation of a "Prostitute" as "any woman who shall live or reside in a registered or a declared brothel;" whereas the broad definition of "brothel," whether registered or declared by the authorities, included houses where women lived, resided, were kept, or merely *frequented* for the purposes of prostitution.[20] The colonial law not only evinced British officials' interpretation of the social practices that constituted prostitution in this predominantly Chinese society; the recognition and registration of "brothels" also meant that the expenses for the implementation of the ordinance could be sourced from the various fees, e.g. for registration and the treatment of diseased women, levied upon brothel keepers. However, possibly to preempt criticisms that the colonial government would profit from, or become complicit in illicit activities, the Hong Kong law included a provision that limited the use of any monies "raised under the provisions of this Ordinance by way of any fee" to the statute's stated purposes.[21] In Britain, the expenses of policing and treatment under the Acts were borne by Parliament, and they were to be paid under the direction of the Admiralty and the Secretary of State for War.[22]

The registration of "brothels" and the extraction of fees from their keepers to finance the regulation of prostitution thus constituted the key markers that distinguished the Contagious Diseases Ordinances in Hong Kong.[23] Nevertheless, this did not mean that the British approach of policing individual "common prostitutes" were insignificant in the subsequent amendments of the Contagious Diseases Ordinances in Hong Kong or

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[20] Section 1 of Hong Kong Ordinance No. 12 of 1857.
[21] Section 23 of Hong Kong Ordinance No. 12 of 1857.
[22] See Section 4 of 27 & 28 Vict. c. 85 and Section 5 of 29 Vict. c. 35.
[23] The Hong Kong model of regulation could also be distinguished by its inclusion of provisions dealing with Seamen and keepers of licensed boarding houses for Seamen. These provisions regulated seamen and the keepers of their boarding houses in ways similar to prostitute women and brothel keepers.

in those colonies that followed the latter's approach. In fact, Hong Kong's enactment of a new Contagious Diseases Ordinance in 1867 expanded upon the policing of brothels, and incorporated those sections of the metropolitan acts that subjected individual women who were suspected of being "common Prostitutes" to examination.[24] Despite the adoption of these provisions, it should be noted that it constituted part of a new "extensive and energetically prosecuted" regime of regulation that retained the previous law's focus on the inspection and registration of brothels and their "inmates" (Howell 2009, p. 203). Besides the incorporation of the metropolitan measure for the examination of "common prostitutes," the new law granted the police increased powers against unlicensed brothels and their prostitutes, punished outdoor prostitution and even removed the "liberal nicety" of hearing cases related to the law in "open court" (*ibid*). As the latter measure revealed, English liberal norms of procedural justice could be circumscribed, as colonial officials stressed the existence of "racial, cultural and political differences" (Howell 2009, p. 204).

Largely due to the assumed similarities in the practice of prostitution in colonies with significant populations of Chinese migrants, Hong Kong's model of regulation was adapted in the geographically proximate colonies of Labuan and the Straits Settlements, both of which were also administered by the Eastern Department of the Colonial Office.[25] In his report on *An Ordinance to prevent the spread of certain Contagious Diseases*,

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[24] Sections XLIV and XLV of the Hong Kong Ordinance 10 of 1867.

[25] Unlike Hong Kong and the Straits Settlements, Labuan's ordinance was repealed in mid-1887,occurring soon after the Secretary of State's initial request for "special reasons". Labuan's lack of opposition to repeal might be due to the size of its total population (about 6000 in 1886). Labuan Ordinance No. III of 1887. Fairfield and Anderson, *The Colonial Office List for 1886*, p. 130. Also, with the exception of Malta (see note 15) and Fiji, the other colonies that maintained laws aimed at containing the spread of venereal diseases followed the British model. In Fiji, the 1885 amendment of its Contagious Diseases Ordinance also allowed District Medical Officers to visit plantations and examine indentured immigrant workers, both male and female, for venereal diseases. This law made the costs of treatment of diseased workers payable by their employers. Fiji Ordinance No. V of 1885.

Thomas Braddell, the Attorney General of the Straits Settlements, noted that it was "framed principally on that in operation in Hong Kong, the prostitutes are not registered or licensed but a license is required for keeping a Brothel, and the license is to specify the number of women to be permitted in the house…"[26] This was a regulationist approach adapted from Hong Kong's even though the Governor of the Settlements, Sir Harry Ord, also drew the Colonial Office's attention to the provisions dealing with prostitutes, which he believed to avoid the objectionable aspects of "similar measures passed elsewhere."[27] Hence, while the perceived similarities in both colonies' social conditions supported their adaptation of the Hong Kong model, the Straits Settlements' lawmakers did not enact all of its provisions; at its heart, colonial legislation was tailored to parochial concerns.

The localized nature of colonial ordinances was tied to how colonial lawmakers understood "native" culture and practices. As the Select Committee noted during the Straits Settlements' Legislative Council's deliberations of the law:

> It would appear from the evidence obtained, that the Chinese women [prostitutes] are not free agents, in many instances. They cannot leave their houses [brothels] unattended, and every impediment is placed in their way to prevent them laying any complaint of detention of ill-treatment before a Magistrate. Moreover, most of, if not all the Chinese Brothels are under the protection and control of the Secret Societies, and heavy sums of money are obtained from the inmates in support of the principal Hoeys [the Secret Societies].[28]

The members of the Committee thus linked the problem of prostitution to the influx of Chinese migrants and to the seemingly entrenched practices of their "Secret Societies."

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[26] Straits Settlements Ordinance No. 23 of 1870; Ord to Kimberley, 15 December 1870, CO 273/41.
[27] Ord to Kimberley, 15 December 1870, CO 273/41.
[28] "Report of the Select Committee on the Contagious Diseases Bill." Appendix 28 of the 1870 *Short-Hand Report of the Proceedings of the Legislative Council of the Straits Settlements,* CO 275/12. This report also stated that the majority of prostitutes in Singapore were Chinese: in 1867, there were 1,580 Chinese prostitutes out of a total of 2,454; in 1868, there were 1,644 Chinese prostitutes out of a total of 2,052.

Notably, these observations were akin to the orientalist ideas of Chinese culture that also shaped the regulation of prostitution in Hong Kong (Howell 2009, pp. 207-212). Even so, colonial officials and elites' orientalist understandings of Chinese prostitution were not homogenous as they sought to maintain parochial differences in the colonial regulation of categorically similar "native" practices. As Said (1994, p. 7; italics mine) argued, orientalism was premised on the "*flexible* positional superiority" of the colonial power.

In this regard, the limited legislative powers that the Governor as well as the official and unofficial members of the Straits Settlements' Legislative Council wielded allowed them to formulate colonial ordinances based upon their specific assessment of local practices. As Ord noted of their adaptation of Hong Kong's law, the Straits Settlements' legislators left out seemingly problematic measures that would extend the scope of regulation beyond the confines of brothels. These omitted measures, i.e. sections XXX to XXXIII and XLIV of Hong Kong's 1867 ordinance,[29] provided, respectively, for the punishment of women who conducted prostitution outdoors and the mandatory physical examination of women who had been identified by the police as a "common Prostitute." To officials at Whitehall, the discrepancy between the Straits Settlements and Hong Kong's laws required further justification. Consequently, in relaying the Crown's confirmation and allowance of the ordinance, the Secretary of State for the Colonies noted the absence of provisions that provided "for the medical examination of women who frequent the streets" and asked to be "informed whether there are any local reasons against the introduction of clauses similar to those in the Hong Kong Ordinance…"[30]

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[29] Hong Kong Ordinance 10 of 1867.
[30] Draft of Kimberley to Ord, 24 February 1871; enclosed in Lugard to the Under Secretary of State, Colonial Office, 16 February 1871, CO 273/53.

As outlined by Sir H.T. Holland, the then-Under Secretary of State for the Colonies in his memorandum on this issue, the Colonial Office was primarily concerned with the omission of the single provision, section XLIV of Hong Kong's 1867 ordinance, that provided for "the examination of common prostitutes."[31] The Colonial Office's request for more information about the omission of this provision had been, in turn, prompted by the War Office, which thought that the ordinance "would be more complete were such provision made."[32] While the War Office's role in this exchange highlights the political ascendance of the regulationists and the militarist rationale of regulation across the empire at this point in time, the Colonial Office's official response to the Governor – the confirmation and allowance of the ordinance with a request for "local reasons" – suggest that their exercise of imperial control over colonial legislation was also receptive to the needs of local conditions, as judged by the officials on the ground.

Given the Colonial Office's responsiveness to "local reasons," local elites and officials' claims of substantive knowledge regarding the character of "native" populations could then justify their deviance from policies in Britain and other colonies. At a juncture when imperial policy was weighted towards the regulation of prostitution to curb the rise of venereal diseases among soldiers as well as for the "good" of vulnerable prostitutes, the orientalist mode of regulation in Hong Kong and the Straits Settlements was then aligned – albeit uneasily – with liberal ideals since their ordinances presented a way for the colonial government to tackle the purported evils of venereal diseases and the apparent lack of physical freedom among many of the "inmates" of Chinese brothels.

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[31] Minute by Holland, 20 February 1871; enclosed in *ibid*.
[32] *Ibid*.

Nevertheless, while based on diffuse understandings of "native" culture, local officials' claims of cultural and racial difference could be contradictory. Measures thought to be necessary to police prostitution in the predominantly Chinese society of Hong Kong were deemed to be objectionable to the Chinese communities in the Straits Settlements.

In his response to the request of the War and Colonial Offices, Governor Ord thus defended the omission of provisions for the physical examination of prostitutes who operated in the streets: "it is not the custom of women to frequent the streets for the purposes of prostitution, such a proceeding being entirely opposed to the feelings and customs of the Chinese and Native populations."[33] To buttress his point, he added that the exclusion of the measure avoided "the difficulties which have attended the enforcement of this important point [i.e., the "necessary examination of all public women"] in the home acts."[34] Claiming his authority as a local expert and likely also alluding to the abolitionist opposition to regulationist measures at home, Ord's defense of the law on cultural and political grounds was accepted. Nevertheless, his reasoning contained a latent tension between his orientalist approach to regulation and his implicit recognition of the abolitionists' advocacy. Indeed, due to later concerns that the ordinance placed extensive powers, including judicial ones, in the hands of its administrators, the law was amended to establish that offences would be heard before a Magistrate rather than the Registering Officer – a change that faintly echoed the magistrate's role as the "ultimate referee" in the British acts and the ideal of the "rule of law" (Ogborn 1993, p. 45).[35]

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[33] Ord to Kimberley, 6 May 1871, CO 273/55.
[34] *Ibid*.
[35] Straits Settlements Ordinance No. 8 of 1875. This law was swiftly confirmed and allowed by the Crown. In an interesting turn of events, the Colonial Office then advised the Governor of Hong Kong to adopt a similar law. Jervois to Carnarvon, 20 September 1875, CO 273/81; Hong Kong Ordinance No. 2 of 1876.

Imperial Control and the Significance of Colonial Differences

With the passing of the Contagious Diseases Ordinances across various colonies, regulation as an *imperial* project took on patterned forms across the modern empire. While the roots of colonial regulation lay in the interconnected but parochial concerns of officials and medical professionals across the empire (Howell 2009), the establishment and operation of a centralized apparatus of long-distance imperial control facilitated the spread of the Contagious Diseases Ordinances, which varied in form and content despite bearing family resemblances, across Britain's dependencies. In turn, the diffusion of regulationism expanded the administrative powers and social reach of the colonial state. Likewise, the extension of the Crown's authority in the form of the Contagious Diseases Acts was manifest in Britain. Josephine Butler's critique of the acts included her condemnation of the Acts' centralization of authority and the "establishment of a system of police espionage" that these statutes "introduced" into English life.[36] Among their claimed moral deficiencies, these laws granted administrative powers over the regulation of prostitution to the Admiralty and the Secretary of State for War – agencies that were involved in the extension of executive power through the use of force. In Butler's view, the Contagious Diseases Acts ran contrary to England's legal and political traditions.

As Butler and the abolitionist movement gained political support across Britain, their characterization of these laws as illiberal also gained ground. This shift in elites and the larger British public's understandings of regulationism reshaped imperial policy as officials at Whitehall sought to pre-empt and respond to abolitionists' public criticisms of

[36] J.E. Butler, *The Constitution Violated: an Essay*, (Edinburgh: Edmonston and Douglas, 1871), p. 112.

colonial policies. Specifically, for the colonies of Hong Kong and the Straits Settlements, the uneasy alignment of the liberal sentiments that justified the protection of prostitutes from "brothel slavery" and the regulationist tendencies of "native" policy came undone as the Contagious Diseases Acts in Britain were subject to repeated parliamentary critiques and challenges by the abolitionist movement over the 1870s and 1880s. What changed in particular was the Colonial Office's acceptance of regulationism as a measure that was needed to protect "native" women against brothel keepers. In other Crown Colonies like Jamaica, the turn in metropolitan sentiments against the regulation of prostitution meant that their Contagious Diseases ordinances, as modeled after the British acts, could not be justified on previous grounds. After the repeal of the metropolitan acts, it was no longer plausible to claim that the regulation of prostitution, with its measures for the detention and treatment of diseased women, was unproblematic, or even aligned with liberal ideals.

Even though Josephine Butler's influence over the course of colonial legislation should not be overstated, her writings did communicate the moral and gendered views of the abolitionist movement and their specific policy goals. As Butler implored in her essay, *The Constitution Violated*, "*a woman's honour* is a point of grave importance to her, and that no State can thrive in which it is not regarded as a sacred question;" therefore, by placing "the determination of the fact as to a woman's honour solely in the hands of a single justice of the peace," the Contagious Diseases Acts infringed upon the constitutional rights of women.[37] As Butler noted of the acts' violation of female dignity,

> But let it be observed that when the case is decided against the woman, the deprivation of her honour is followed immediately, under these Acts, by those consequences…which shall ensue to no one except after trial by

[37] *Ibid*, pp. 26-27; italics mine.

> jury…She is in fact deprived of her liberties for the space of a year. She is outlawed practically during that period, inasmuch as she is handed over to the irresponsible action of surgeons, at whose simple fiat she may be detained and imprisoned…Her whole liberty is curtailed, inasmuch as she is liable to be summoned for a repetition of this ordeal at whatever times and as frequently as the surgeon thinks fit…[38]

Within the worldview of Butler and the abolitionists, the Contagious Diseases Acts contained a double standard as they targeted women – rather than male soldiers – as the sources of venereal diseases, and their measures placed women, particularly working-class women, under a regulatory regime that was not checked by procedural safeguards that would protect their dignity as women and their liberties. Practically, their objections to the Acts focused on the compulsory medical examination of women, which they found particularly repugnant for the "ordeal" and moral affront that the examinations inflicted.

As I related in the prologue, the abolitionists won the full repeal of the Contagious Diseases Acts in April 1886 and they turned their attention to the colonies, forcing the Colonial Office to reform colonial policies. However, even in colonies where the repeal of their ordinances occurred soon after, repeal did not always happen without protest. This was because some of these ordinances, despite their having similar provisions as the English acts, had been understood and applied in differing ways by local officials and elites, who viewed them as necessary means to protect "native" populations from their perceived lack of sexual discipline or entrenched social practices. As a result, when the Colonial Office issued its despatch to the governors of Crown Colonies that possessed laws aimed at the prevention of "contagious diseases," requesting that they justify the maintenance of these measures, these agents of the Crown responded in varying ways.

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[38] *Ibid*, pp. 27-28.

Out of the ten colonies that received the Secretary of State's instructions in 1886, only four colonies, St. Helena, Trinidad, Barbados, Labuan, reported the repeal or lapsing of their ordinances by the end of 1887 without expressing reasons to justify their maintenance of these legal measures (see Table 5.1).[39] The other six colonies sought to maintain their Contagious Diseases Ordinances, and their Governors provided specific, local grounds for the colonial regulation of prostitution. When met with such resistance, the then-Secretary of State for the Colonies, Sir Henry T. Holland (later Lord Knutsford), was firm in his response. However, Holland's insistence on the abolition of the physical examination of prostitutes was not absolute, and he tolerated the continuance of this practice within Malta and Fiji. While Holland's instructions for repeal eventually came to naught in Malta because constitutional changes in 1887 had allowed for a majority of elected representatives on its Council of Government, he accepted local officials' claims that the measures contained in Fiji's Contagious Diseases Ordinance were necessary to protect "native" Fijians from the venereal diseases brought by Indian and Polynesian immigrants – the imperative of the protection of a "native" race resonated with regards to a Crown Colony where "indirect rule" was practiced (Go 2011, pp. 94-97).[40] In the rest of the colonies that expressed their disagreement with the Colonial Office's instructions, their Governors stressed the likely consequences of repeal, i.e. the anticipated rise in venereal diseases among military *and* civilian populations. This was a losing argument as concerns over military welfare and public health had been defeated in Parliament.

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[39] The Colonial Office's treatment of Barbados as a Crown Colony supports my argument that the "colonial rule of difference" shaped imperial policy towards colonial government. Nevertheless, Barbados retained its elected assembly under the old representative system, and it could, but did not, reject orders for repeal.

[40] House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*; House of Commons, 1889 (59) *Contagious diseases ordinances (colonies). Copies of correspondence, or extracts therefrom, relating to the repeal of contagious diseases ordinances and regulations in the crown colonies*.

Table 5.1: Outcomes of the Repeal of the Contagious Diseases Ordinances, 1886-1894

Colonies	Targets of regulation (Brothels/Individuals)	Immediate repeal without protest?	Title and year of ordinance used to repeal forced physical examination	Maintenance of regulation in other statutory forms?
St. Helena	Individuals	Y	Original law lapsed in 1879.	N
Trinidad	Individuals	Y	An Ordinance to repeal "The Contagious Diseases Ordinance 1869" (1887)	N
Barbados	Individuals	Y	An Act to repeal "The Contagious Diseases Act, 1868, and all other Acts altering or amending the same." (1887)	N
Labuan	Brothels	Y	An Ordinance to repeal Ordinance, No. I. of 1880 (1887)	N
Jamaica	Individuals	N	The Contagious Diseases Laws Repeal Law (1887)	N
Ceylon	Individuals	N	An Ordinance repealing Ordinance No. 17 of 1867 (1888)	N
Straits Settlements	Brothels	N	The Women and Girls' Protection Ordinance, 1888	Y
Hong Kong	Brothels	N	The Protection of Women and Girls Ordinance, 1889	Y
Fiji	Individuals and employers of immigrants	N	An Ordinance to repeal the Contagious Diseases Ordinances, 1882 and 1885 (1893)	N
Malta	Individuals	N	None. Repeal ordinance was rejected in Council in 1888	N.A.

House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*; House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*; House of Commons, 1890 (242) *Contagious diseases ordinances (colonies). Copies of correspondence, or extracts therefrom, relating to the repeal of contagious diseases ordinances and regulations in the crown colonies*; House of Commons, 1894 (147) *Contagious diseases ordinances (colonies). Copy of correspondence which has taken place since that comprised in the paper presented to the House of Commons in 1890 [H.C. 242] relating to the repeal or enactment of contagious diseases ordinances and regulations in the colonies*.

In their correspondence with Governors over repeal, the Colonial Office was also not necessarily receptive to claims that insisted upon the differing nature of the colonies. Except for Fiji, where the Governor argued that repeal "may, and probably will, seal the doom of a fine race over whose welfare the English Government is specially pledged to exercise a watchful supervision," claims regarding the difference in conditions in colonies like Jamaica and Ceylon were regarded at Whitehall as insufficient grounds for the maintenance of their Contagious Diseases Ordinances.[41] This was the case even when local elites and officials noted the perceived greater vulnerability of "native" populations to venereal diseases and the lack of opposition to the regulation of prostitution. Faced with sustained pressure from the abolitionists and even from within the Colonial Office, Secretary of State Holland sought to deny the significance of such differences and to align colonial policies with the imperial Parliament's repeal of the metropolitan acts.

In the case of Jamaica, the Governor responded to the Secretary of State's request with "special reasons" to maintain the law, which had taken on uses beyond the protection of soldiers. In one of the reports from military officials enclosed in the Governor's reply, H. Knaggs, the Brigade Surgeon and Senior Medical Officer, stated:

> 2. Of late the proportion of women in the population has largely increased…and there is reason to believe that a large amount of indiscriminate intercourse has resulted, and every effort should be made to prevent the spread of a disease like syphilis among the civil population.
>
> 3. Black men are more liable to venereal diseases than whites, because their habits are not cleanly, and they are not compelled to be circumcised by custom or religious observance.[42]

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[41] Even then, Fiji's ordinance was repealed much later under the instructions of the Colonial Office in 1893. In particular, the significance of Fiji's circumstances diminished over time after the Straits Settlements and Hong Kong repealed their long-standing ordinances; see Table 5.1. Mitchell to Stanhope, 13 January 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*.

[42] Enclosure 1 in Norman to Holland, 29 January 1887; enclosed in *ibid*.

Knagg's support for the ordinance was supported by other arguments, such as Commodore Henry Hand's opinion that the law ought to be applied across the colony rather than just Kingston, Spanish Town and St. Andrew, where troops were stationed.[43] Noting the military's involvement in regulation across the empire, Jamaica's Governor, Sir H.W. Norman, stated that the colony's law "was certainly enacted at the instance of the naval and military authorities for the protection of the two services, and is primarily kept up for their benefit…"[44] While the rationale of Jamaica's law had run parallel to those of the British acts before the repeal of the latter, Knagg and Hand's statements also demonstrated how the narrow militarist logic of the law had expanded in practice to encompass the medical surveillance of the largely black civil population in Jamaica.

Nevertheless, these local statements of support of the ordinance fell on deaf ears as Jamaica's ordinance was repealed in May 1887 according to the instructions of the Colonial Office. Governor Norman's response to the Secretary of State's orders was revealing of the operation of the ordinance and the proximate reasons for repeal:

> It was pointed out to the Council that the laws had been originally enacted in 1867, at the instance of the Imperial Government, for the protection of the soldiers and sailors stationed in the island, and that the like legislation at home having been repealed by a decisive opinion of Parliament, the contribution from Imperial funds towards the expenses of carrying out the law would be withdrawn, and the whole cost would fall on Colonial Revenues if the institution should be maintained. Further, it was a novel proceeding to apply such laws to a purely civil population in a British dependency, and that it would be unfair to confine its advantages to one part of the island, while its more general extension, apart from questions of policy, would involve an expense which the colony cannot well bear at the present time.[45]

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[43] These areas were located in the south of the colony. As such, Hand observed that venereal diseases seemed to be contracted in the north. Enclosure 2 in Norman to Holland, 29 January 1887; enclosed in *ibid*.
[44] Norman to Holland, 29 January 1887; enclosed in *ibid*.
[45] Norman to Holland, 23 May 1887; enclosed in *ibid*.

Critically, the repeal of the Contagious Diseases Ordinance in Jamaica reflected the significance of imperial control in the regulation of prostitution for the rationale and funding of the law originated from the executive agencies of the Crown. Imperial support for the detention and treatment of diseased women in the Lock Hospital, in particular, was crucial for the medical surveillance of prostitutes especially since Jamaica's law did not have provisions that allowed for the regular extraction of fees – unlike Hong Kong's and the Straits Settlements' ordinances. In this regard, given Parliament's repeal of the British acts, the War Office had informed the colony that it would discontinue its grant to fund the operation of the Lock Hospital. This meant that the continued application of the ordinance would fall solely upon the colony, creating an additional fiscal burden that Governor Norman was unwilling to bear. Jamaica's situation was unlikely to be unique. Colonies that had adopted the metropolitan approach to regulation were likely to be similarly dependent upon the fiscal support of the imperial government. Since their ordinances had been enacted to protect the health of soldiers, they were repealed.

As a principle that animated colonial government and policy, the justificatory force of the colonial "rule of difference" could indeed fall away when opposed by the changed political realities in the metropole. Confronted by the political ascendance of the abolitionists and Parliament's repeal of the Contagious Diseases Acts in 1886, the pro-regulation elites and officials in colonies like Jamaica were unsuccessful in their attempts to claim that the different conditions and social characteristics of their territories required the maintenance of their ordinances. Because of the original design and purpose of these laws, the Colonial Office remained indifferent to the significance of colonial claims of

difference since the overarching militarist and public health rationales of the ordinances could no longer be defended in Parliament after abolitionists like Butler had established that these measures were illiberal in their treatment of women. The Colonial Office's centralized control of colonial legislation, in this regard, was effective with respect to the six colonies where the repeal of the Contagious Diseases Ordinances occurred without resistance or the continuation of regulation in other forms. This was because the newly reformed politics of regulation in the metropole and, in particular, the Colonial Office's anticipation of the likely objections of the abolitionists overrode local officials and elites, who had reinforced the colonial "rule of difference" in their regulation of prostitution.

Carnal Practices, Act I: Gendered Sovereignty

The Colonial Office's long-distance structure of sovereign command and control, as founded on the constitutional arrangements of Crown Colony government, did not produce uniformity in legislative outcomes. Among colonies under the Colonial Office's control, the exceptions to the immediate repeal of regulation were Fiji, Malta, Hong Kong and the Straits Settlements because their local elites and officials were able to resist or subvert the Secretary of State's instructions.[46] Whereas the situation in Fiji and Malta reflected, as noted, the use of regulation to protect a "native" race within a system of "indirect rule" and constitutional changes that fettered imperial control over law-making, the transformation of the Contagious Diseases Ordinances of the Straits Settlements and Hong Kong revealed how carnal concerns subverted the exercise of imperial control.

[46] Another exception was Gibraltar, which did not enact a Contagious Diseases Ordinance. Instead, the regulation of prostitution stemmed from the Governor and his Council's powers to control the entry of foreign prostitutes into the colony through the issuance of permits (Howell 2009, pp. 166-173).

In the imperial campaign to repeal the Contagious Diseases Ordinances, metropolitan actors were called to evaluate and act on the arguments of local elites and officials, and they did accede to some demands of these relatively less powerful actors. These recurrent moments of judgment and compromise are critical to our understanding of the institutional character of imperial control, and they came to the forefront in the extensive debates over the transformation of the Contagious Diseases Ordinances in Hong Kong and the Straits Settlements.[47] Since the Secretary of State for the Colonies exercised the Crown's authority to confirm or disallow colonial laws, his and his staff's engagement in the empire-wide debates over the regulation of prostitution in the colonies were pivotal in defining the course of action to be taken. Because the "men on the spot" in the colonies were required to present their opinions to Whitehall in formal matters of legislation (*cf*. Galbraith 1960), their metropolitan superiors had to judge the veracity, political feasibility and moral propriety of their claims. And, by this time, the staff of the Colonial Office also had to contend with the competing claims of the British abolitionists, many of which were articulated by George William Johnson in his official role as clerk in the Eastern Department.[48] In this sense, the formal procedures of colonial law-making and imperial control required colonial officials to exercise their political judgment over colonial policy, and it is in such moments of judgment that we observe how they framed a legislative compromise based on diffuse concerns for the protection of "native" women.

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[47] In the four parliamentary papers that were printed on the repeal of the Contagious Diseases Ordinances, the correspondence between the Colonial Office and the colonies of the Straits Settlements or Hong Kong amounted to more than half of the 130 individual dispatches that were printed for Parliament. Not including one entry of a dispatch sent to both colonies with the same instructions, there were 45 entries involving the Straits Settlements alone while the official dispatches to and from Hong Kong accounted for 29 entries. Author's count based on sources for Table 5.1.

[48] Johnson was first appointed as a Second Class Clerk in the Colonial Office on 28 March 1881. Fairfield and Anderson, *The Colonial Office List for 1886*, p. 14.

Why did the repeal of the Contagious Diseases Ordinances occasion extended debates in the Straits Settlements and Hong Kong? The contentiousness of repeal and the transformation of the laws, I argue, can be best understood in relation to the efforts of the Straits Settlements' first Protector of Chinese, William Alexander Pickering, who helped frame the initial debates over repeal. Since he was appointed as an Interpreter and Teacher of Chinese in 1871 due to his fluency in multiple Chinese dialects, Pickering rose in standing within the colony and became the Protector of Chinese in 1877 after the enactment of the Chinese Immigrants Ordinance and the Crimping Ordinance.[49] As Jackson (1965, pp. 59-65) detailed, Pickering's ascension could be attributed to his engagement – one that exceeded his original position as Interpreter – in British efforts to undo the apparent stranglehold that Chinese Secret Societies held on migrant labor in the colony. While he was only one of many officials involved in the formation of the Chinese Protectorate (Thio 1960, pp. 73-77), Pickering's efforts to broaden his official duties and powers became singularly intertwined with the elaboration of the colonial state's "native" policy towards the Chinese. Drawing from King's (2009) rethinking of the premises of prior scholarship on Pickering and the establishment of the Protectorate, we might understand Pickering as an enterprising actor who was instrumental in coupling the issue of the protection of "native" women and girls to the colonial problem of prostitution.[50]

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[49] Straits Settlements Ordinance No. II of 1877 and No. III of 1877. "Crimping" referred to the entrapment, by force or fraud, of another person in a contract to work as a laborer outside the colony. Hence, the Crimping Ordinance dealt with the protection of the mostly-Chinese emigrants who were removed from the Settlements to work within nearby territories. On Pickering's appointment as Interpreter, see Ord's letter of recommendation to the Colonial Office; Ord to Kimberley, 6 December 1871, CO 273/55.

[50] Responding to previous accounts of the establishment of the Chinese Protectorate as well as Pickering's role as the first Protector as a solution to the colonial government's problems in governing the Chinese (e.g., Thio 1960; Heussler 1981), King (2009, p. 430; italics in original) argues, "I want to consider the *creation of translation as a colonial problem*, rather than the Chinese Protectorate as a colonial solution."

In modern sociological terms, Pickering was an "institutional entrepreneur" involved in a social process of "bricolage," i.e. the creation of new meanings and uses of things, e.g. legal provisions, as they are adapted from one context to another (Lévi-Strauss 1966, pp. 18-19; DiMaggio 1988, p. 14; Campbell 2004, pp. 74-77). In this sense, the transformation of the Straits Settlements' Contagious Diseases ordinances into an ordinance aimed at the protection of women and girls emerged, ironically, from Pickering's failed attempt to justify the improvement and continuance of the law in its original form. When the then-Governor of the Straits Settlements, Sir Frederick Aloysius Weld, responded to the Secretary of State's request for "special reasons" to maintain of the Contagious Diseases Ordinances, he presented Pickering's report on the workings of the ordinance as the centerpiece of the Straits Settlements' reply, stressing the latter's opinion that the law was "absolutely necessary for the protection of women and children, and that to abolish them would be to relegate a very large number of females to a state of slavery…"[51] As Pickering elaborated in his moralistic plea for maintenance of the law without "radical change," the compulsory medical examination of women was necessary:

> 26. …it is because an experience of five years [of administering the law] has shown me that the Contagious Diseases Ordinance, judiciously carried out, does to a great extent what I wished, and that, *with the addition of the new Ordinance for the protection of women and children*, the Government will be able to do everything possible towards abolishing altogether sad abuses now only partially suppressed… […]
>
> 28. Before the Ordinance was brought into force, the prostitutes were obliged by their owners to carry on their profession in spite of sickness or contagious disease, and when thoroughly worn and too bad for this colony, they were sold off to die...Take away the power to enforce medical examination and these unfortunates will be left again to this sad fate.[52]

[51] Protector of Chinese to Colonial Secretary, 9 December 1886; enclosure 1 in Weld to Holland, 2 April 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*.
[52] *Ibid*; italics mine.

Pickering's impassioned argument for the enhancement – not repeal – of the law was not the only opinion on the Contagious Diseases Ordinance amongst the colony's elites and officials. Dissenting opinions were voiced in the colony's Executive Council, which was an advisory council to the Governor filled with senior officials in the colony. Even though Pickering's call for the continuation of the ordinance received support from most of the Executive Council, there was a significant minority that took the opposite stance. This group included the Attorney-General, J.W. Bonser, the Commissioner of Land Titles, W.E. Maxwell, and the Colonial Treasurer, A.M. Skinner. Significantly, the opinion of the legal-minded Maxwell, who was the son of the colony's first Chief Justice, later resonated with the Colonial Office.[53] To Maxwell, Pickering's report was "wide of the mark," and it overlooked the "real question" of the protection of women and children:

> All that he [Pickering] says about the special protection needed by *ignorant women and children*, who are used as so much merchandise by people of their own race, can perfectly well be met by legislation having nothing to do with the suppression of venereal disease. The registration of brothels and their inmates, their periodical [non-medical] inspection, &c., seem to be essential if we are to avoid the worst kind of slavery from flourishing in a British possession. I can see no difficulty in keeping all these safeguards and still giving up the principle of the Contagious Diseases Ordinance. To maintain the liberty of the subject here we shall very likely want special means and powers unknown in England, just as we want gunboats to put down the slave trade on the coasts of Africa...[54]

By accepting the need for registration while rejecting the medical examination of women, Maxwell's dissent was premised upon the distinction between the social and medical aspects of regulation. Critically, he was not opposed to the regulation *per se*.

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[53] Before being called to the bar (Inner Temple) in 1881, Maxwell had served in various roles in the courts, from clerk to judge, in the colony. Fairfield and Anderson, *The Colonial Office List for 1886*, p. 425.
[54] Maxwell to Colonial Secretary, 29 January 1887; enclosure 2 in Weld to Holland, 2 April 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*; italics mine.

Regulation, from Maxwell's utilitarian perspective, needed to be justified by its effectiveness and also carried out in a way that avoided the abuse of the legal powers granted to officials. Like Bonser and Skinner, Maxwell argued that there was no evidence that the Contagious Disease Ordinance had reduced the incidence of venereal diseases among soldiers and in the wider population. Furthermore, in noting the racially diverse mix of peoples within the colony, Maxwell then highlighted how the ordinance could enable misconduct by subaltern officials in the targeting of women of other races.

> Section 41 defines a "brothel" to mean "any house or place occupied or used by any woman for the purpose of prostitution." This has been the means of placing women (Malay and others) who lead irregular lives, but are not necessarily prostitutes, at the mercy of a set of informers who threaten them with open shame in the police court if they do not give them money or *yield to their solicitations*. I have reason to believe that this law has been the means of great cruelty to women of a class [i.e. prostitutes] against whom the Ordinance was more directed, while enabling inspectors and informers to practice *gross immorality*.[55]

Assuming (like many other local officials) that the majority of Chinese women in the colony were prostitutes, Maxwell's concerns lay with male officials' immoral treatment of non-Chinese women, who might be falsely accused of prostitution. In highlighting the significance of racial diversity within the colony, he also highlighted the limits of Pickering's claimed expertise in Chinese affairs. Nevertheless, despite his argument for greater care to be exercised in the governance of other "native" groups, Maxwell's understanding of "native" women did not differ from Pickering's. Both men viewed "native" women and children as passive subjects who required the protection of the colonial government; their policy disagreement lay in the methods of protection.[56]

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[55] *Ibid*; italics mine.

[56] My interpretation differs from Warren (1990, p. 369; 2003), who argued that Maxwell expressed an "administrative ideology" that saw the law as a means to maintain the supply of "cheap Chinese labour."

At their heart, the moral concerns over the consequences of the repeal or continuation of the Contagious Diseases Ordinance expressed by Pickering and Maxwell, respectively, were derived from similarly gendered notions of the protective role of the colonial state in relation to "native" women and children. The "liberties" of these subjects were to be guaranteed in one way or another: it was either necessary to secure the physical freedom and welfare of the "inmates" of brothels from their keepers through the continued enforcement of medical examination, or it was critical that "native" women no longer suffered the abuses wrought by male subaltern officials armed with legal powers to subject "native" women to forced medical examination as "prostitutes." This was a debate about the appropriate means to protect vulnerable "native" women rather than one on the propriety of regulation itself. As suggested by Maxwell's vivid analogy between regulation and the deployment of "gunboats to put down the slave trade on the coasts of Africa," "liberty" in the context of empire was founded upon the use of sovereign power to protect vulnerable subjects. In other words, the freedoms of colonial subjects could only be constituted by the colonial state's extension of its authority over "native" society.

Given local officials' concerns with the protection of "native" women and children, how were these gendered notions of sovereignty first rendered as a subject of policy in the Straits Settlements? While the prior parliamentary enactment of Britain's 1885 Criminal Law Amendment Act established the protection of women and girls as a potential subject of colonial governance, it remained for local officials and elites to take its up as a problem.[57] In this regard, Pickering's earlier attempts to devise legislation for

[57] The imperial act was also known as "An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes." 48 and 49 Vict. c.69; also see note 4 and 84.

such purposes were significant, for his pioneering efforts to introduce a bill for the protection of women and girls in January 1886 shaped how colonial officials in the colony and Whitehall understood their legislative options during their debates over the repeal of the Contagious Diseases Ordinance.

As Chairman of the Committee of the Po Leung Kuk Society for the protection of Women and Children,[58] Pickering had written to the colony's Colonial Secretary that the Society had passed a resolution to propose legislation, based on a similar bill recently proposed in Hong Kong, to tackle the problems of the trafficking of women into the colony "for the purposes of prostitution" and the keeping of children in brothels for "immoral purposes."[59] Even though he highlighted the agreement of local Chinese elites on the Committee to the resolution, Pickering's role as Chairman of the Society's meetings on the matter in Singapore, as well as his presentation of the resolution to the Penang branch, suggest that the proposed bill was his initiative. In his opinion, the bill would enable the colonial government "to check and minimize the present unsatisfactory state of things, and the Po Leung Kuk Societies…would obtain free scope for the exercise of any beneficial power which they now have, or by future experience may acquire."[60] Moreover, this initiative would also broaden Pickering's powers as Protector, fitting a pattern of institutional entrepreneurship that marked his career as a colonial official.

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[58] On the translation of "Po Leung Kuk" (保良局), Levine (2003, p. 213) notes that "Po Leung" signifies the Cantonese phrase, 保赤安良 (*bo chik on leung*), meaning to protect the young and support the innocent. "Po Leung Kuk" thus means the Office for the Protection of Innocents (Yen 1986, p. 257). Established in Hong Kong and the Straits Settlements separately around 1878, the Po Leung Kuk Society provided an asylum for women and girls who had fled, or were rescued from, brothels. Levine (2003, p. 215) adds that the colonial governments of Hong Kong and the Straits Settlements "had carefully nurtured the idea that these were locally administered institutions" despite the involvement of British officials like Pickering.

[59] Not to be confused for the Secretary of State for the Colonies, the Straits Settlements' Colonial Secretary served under the Governor. Pickering to Colonial Secretary, 19 January 1886, enclosure 2 in Weld to Stanley, 18 March 1886, CO 273/139.

[60] *Ibid*.

Pickering's efforts to shape colonial legislation and governance soon bore fruit and the colony's first Women and Girls' Protection Ordinance was enacted in 1887.[61] The timing of the legislative deliberations over the bill proved to be fortuitous, as it came under consideration in the Legislative Council while officials debated the repeal of the Contagious Diseases Ordinance. As Pickering argued, the application of both ordinances would be necessary to curb the ills of prostitution involving Chinese women and children. However, the significance of this coincidence was also not lost on a local opponent of the Contagious Diseases Ordinance, Attorney-General Bonser, who argued instead that the benefits of the regulation of prostitution "could be better secured by legislation on the lines of the Bill…to make further provision for the protection of women and girls."[62]

In Pickering's efforts to preserve the Contagious Diseases Ordinance and to expand his official powers, he was engaged in an extended and collective law-making process that involved exchanges with other officials, e.g. Bonser and Maxwell, who were not aligned with him. The bricolage of different legal elements in the resulting ordinance that repealed the colony's Contagious Diseases Ordinance thus emerged through their interactions over time, while such interactions were mediated by the exchange of documents like bills, ordinances, reports, and letters between elites and officials across the empire. Indeed, the flow of paper within the Straits Settlements was tied to the administrative and political debates within Britain through the to-and-fro exchange of dispatches between the colony and Whitehall. As such, the debates of local officials over repeal then framed the views and judgments of officials at the Colonial Office.

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[61] Straits Settlements Ordinance No. 1 of 1887. This law preceded the similarly named successor Ordinance No. 14 of 1888, which was the legal means for the repeal of the Contagious Diseases Ordinance.
[62] Bonser to Colonial Secretary, 10 January 1887; enclosure 2 in Weld to Holland, 2 April 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*.

Upon their receipt of the Straits Settlements' response to the Secretary of State's request for "special reasons" to maintain the Contagious Diseases Ordinance, officials at the Colonial Office soon deliberated over the collated opinions that they obtained. Notably, Johnson, as clerk in the Eastern Department, was first to respond. The freedom of prostitutes to seek treatment was the leading issue that he addressed and, contrary to Pickering, he did not think the compulsory examination of women was necessary.

> …I confess I am not convinced by…[Pickering's] arguments; for we do not propose to shut up the Lock Hospital and we must I think use other means…gradually to convince the women that they are free to come and go when they like (including the hospitals)…[63]

Johnson, the ardent abolitionist, did not stop at rebutting Pickering's arguments for the continuance of the forced examination of women. His target was the entire system of regulation and he opposed the registration of brothels. In this regard, he expressed concern over the potential for abuse of the powers granted to local subaltern officials.

> …Mr, Pickering…cannot perform the whole duties of visiting brothels, and receiving visits at his Office by himself, but must depute a great part of his work to inferior officers, and it has been found in all countries, where the Police des Moeurs [the moral police] exist, that these officials become more the friends of the brothelkeepers (who are rich and can bribe them with money *or with the pick of the inmates of their establishments*) than of the prostitute class. The arbitrary powers conferred on these Inspectors may possibly in some cases…be used to diminish the slavery of the women to the brothelkeepers, but only by substituting another slavery, viz. *slavery to the police*…[64]

To support his argument against the system of registration with evidence, Johnson then cited Maxwell's opinion to highlight "the [supposed] abuses thereof occurring in the Straits Settlements as everywhere else, where it [registration] has been tried."[65]

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[63] Minute by Johnson, 21 May 1887; Weld to Holland, 2 April 1887, CO 273/144.
[64] *Ibid*; emphasis (underlined text) in original, italics mine.
[65] *Ibid*; emphasis in original.

Writing to his superiors at the Colonial Office, Johnson concluded his argument for the complete repeal of the Contagious Diseases in both the Straits Settlements and Hong Kong by pointing to the likely opposition and agitation of the abolitionists against registration because of the powers granted to the police. He then proposed that the Secretary of State respond that he "concurs with the attorney general [Bonser]…that the benefits claimed by the Ordinance can be better secured by legislation on the lines of the Bill for the protection of women and girls…"[66] However, in translating the local debates over the ordinance for his colleagues, Johnson conveniently elided Maxwell and other local officials' support for the continued registration of brothels. Instead, he presented a critique of regulation that was shaped by the knowledge gained in his involvement in Britain's abolitionist movement, which was linked to abolitionists across Europe.[67]

In his brief response to Johnson's minute, John Bramston, the Assistant Under-Secretary of State for the Colonies, opposed the former's proposal to repeal regulation altogether. While Bramston accepted that "medical reasons are not sufficient grounds" to continue the examination of women, he maintained the necessity of brothel registration:

> …if registration is abolished, no brothel will be open to the police and it will be practically impossible to get at the girls *for their own protection*…
>
> Vice is of course not necessary, but until human nature changes it will continue to exist, especially among *these Eastern peoples who do not look upon it in the same light as Christians do*, and who form the great preponderance of males in the Straits…[68]

Bramston's critique did not only reveal a shared, stubborn belief in "native" immorality; he, like Johnson and local officials, then reinforced the need to protect "native" women.

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[66] *Ibid*.
[67] Johnson's minute contained unfavorable comparisons of the colonial system of regulation with those that had been utilized in Continental Europe, highlighting in detail the abuses that had been found in the latter.
[68] Minute by J. Bramston, 15 June 1887; Weld to Holland, 2 April 1887, CO 273/144; italics mine.

Carnal Practices, Act II: On the Temporal Politics of Agency

Could "native" prostitutes be "free agents?" This question hung like an albatross across the continuing deliberations over the fates of the Contagious Diseases Ordinances of the Straits Settlements and Hong Kong. To local officials like Governor Weld and Pickering, metropolitan officials were veiled by their indifference to Chinese customs and practices, and supposed incorrectly that diseased prostitutes would be willing and able to seek treatment of their own accord. But, in the view of their metropolitan superiors at the Colonial Office, it was not merely Chinese culture that was the issue, as the problem lay with the failure to carry out the Secretary's wishes that local officials "bring to the knowledge of the women that they can make complaints without fear of consequences, *and to make them feel that they are free agents*."[69] Given this conflict, Weld's response to the Secretary of State's orders to repeal the ordinance and suspend the practice of compulsory medical examination was one of hesitance and anger. He argued,

> The Protector of Chinese does what he can…[but] without the doctors he is helpless…he cannot change the relations which exist between the mistresses and the girls under a system where girls are brought up in China to be prostitutes, and are then bought by their mistresses, who bring them here. *Here by law they are free, but they have no where to go*; they have no money till they have earned it in the brothels; they are dependent on the brothel-keepers for food and clothing, and, in fact, call her "Mother"…in fact, any one going into one of these places…would, under the present state of the law, whereby they are protected from disease by medical supervision, find nothing in their appearance or manner to indicate that they are prostitutes, nor would he see any signs of discontent or unhappiness, *so readily do the Chinese accept any custom or position which is in accordance with traditional usage*.[70]

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[69] Holland to Weld, 2 July 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*; italics mine.
[70] Weld to Holland, 10 September 1887; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*; italics mine.

As Weld's caricature of Chinese customs and traditions indicated, local officials had naturalized the practice of prostitution among the Chinese and claimed that the dependency and docility of prostitutes in relation to their keepers prevented them from seeking treatment freely when they were diseased. In other words, Chinese prostitutes were simply incapable of being "free agents" because of their supposed lack of independence and their habituation to prostitution. As he was persuaded of the need for medical supervision as a necessary measure to prevent brothel keepers from forcing diseased women to work to their likely deaths, Weld did not proceed with the Secretary of State's instructions and sought again to justify the continuation of the measure.[71]

Writing in about ten days of his receipt of the dispatch indicating the Governor's unwillingness to implement the Secretary's orders, Johnson dismissed Weld's claims and argued that they showed "more clearly what I had suspected before that the Protector of Chinese, with the best intentions and with theoretically excellent rules, has hitherto failed to make these women realize that they are 'free.'"[72] Altogether, the prolonged debate about the "free agency" of Chinese women did not only reveal the recurrent significance of British ideals of liberty in colonial discourse; this set of correspondence between Whitehall and the colony also revealed that officials in both places assumed that the immoral practice of prostitution was culturally ingrained in Chinese prostitutes and with the Chinese in general. Here, the rearing of the ugly head of the "rule of difference" allowed the British to assume a position of moral superiority and rightful sovereignty.

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[71] Historians have understood Weld's argument with the Colonial Office as "a substantive breach of discipline" that led to his replacement in October 1887 (Warren 1990, p. 370; Levine 2003, p. 101). This is inaccurate, as Weld knew of the Colonial Office's plans to replace him before expressing his disagreement on this issue. Telegram to Weld, 26 July 1887; enclosed in Holland to Herbert, 26 July 1887, CO 273/149.
[72] Minute by Johnson, 27 October 1887; Weld to Holland, 10 September 1887, CO 273/146.

Sovereignty meant the Crown's provision of protection to its subjects. Therefore, as Secretary Holland sought to communicate to Weld in the conclusion to his minute and drafted instructions on the repeal of the Contagious Diseases Ordinance, "I shall be glad to receive…suggestions as to…any additional steps which may be taken by legislation for the better protection of girls and women."[73] When Holland's draft instructions reached his hands, Johnson added to them, suggesting the form and content of the desired law:

> It will probably be convenient that the new Ordinance should repeal the whole of the existing Contagious Diseases Ordinance, and should re-enact, with the necessary modifications, the clauses relating to registration and supervision of brothels, and the provision of free Lock hospitals; and the preamble of the Ordinance should show that its whole object is the general protection of women and girls…[74]

Consequently, Holland's instructions repeated the Straits Settlements' Attorney General and Johnson's prior suggestions that the legislative solution for the repeal of the Contagious Diseases Ordinance ought to be an ordinance for the protection of women and girls – an idea that borrowed its framing and purpose from the similarly named law that had been proposed a year ago under Pickering's initiative and, not coincidentally, the rationale of Parliament's 1885 Criminal Law Amendment Act.

Weld's opposition to the Secretary's instructions did not take issue with this proposed legislative form and rationale. Instead, as I related, he and Pickering had fought to maintain the compulsory physical examination of women with the view that this measure was necessary to tackle the problem of "brothel slavery." The point of contention between Whitehall and Singapore was centered on the colonial state's role as

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[73] Minute by Holland, 23 June 1887; Weld to Holland, 2 April 1887, CO 273/144.
[74] Holland to Weld, 2 July 1887; enclosed in House of Commons, 1887 (347) *Contagious diseases ordinances (colonies)*; see Minute by Johnson, 27 June 1887, *ibid* for the changes made by Johnson to Holland's initial draft in the final dispatch. Johnson's changes, which included the continuance of registration, reflected his concession to his superiors' opposition to complete repeal in the colony.

the local agent of the Crown, as officials differed over the apposite way to enact the sovereign duty of the protection of "native" women and girls. Within the parameters of this debate, while officials' concerns with the "free agency" of Chinese prostitutes vaguely echoed Butler's calls to protect women's liberties, their understandings of the "free agency" of these "women were based on the presupposition that it could not be obtained without colonial intervention to alter "native" practices and social dispositions.

Viewed as a product of colonial policy, the "free agency" of Chinese prostitutes was a red herring that allowed officials to justify preferred courses of action that were better aligned with their moral self-understanding as the agents of the British Empire. Whether viewing oneself as an abolitionist committed to the ideals of liberty for both men and women or as a regulationist invested in the improvement of social conduct, colonial officials in both the imperial center and periphery defined the moral meaning of empire through their making of colonial law and policy. The "British Empire" thus spoke in many voices and its "trusteeship" of subject peoples and their territories could be expressed in more than one way even if British officials shared a common set of ideals. For the regulationists, administration along the lines of English principles could be futile – a fact that Weld's replacement, Governor Sir Cecil Clementi Smith, noted wryly in reporting his execution of the orders to cease the forced medical examination of women.

> The inmates of brothels are certainly free agents in the sense that they are not under physical duress. They can go in and out…as they please. They can, and do, go for assistance or advice to the Protector of Chinese or the police. But their actions are subject to a moral force exercised by the keepers of the brothels *which it is not in the power of any British Agency, working under English principles of administration, to overcome*.[75]

[75] Smith to Holland, 30 December 1887; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*; italics mine.

Seen in this light, the transformation of the Contagious Diseases Ordinances into the Protection of Women and Girls' Ordinances in the predominantly Chinese colonies of the Straits Settlements and Hong Kong was the result of British officials' diffuse, gendered (and racialized) understandings of the sovereign duty of protection and the extended conflict between officials over how this duty could be rendered in the form of an ordinance. Since the outcomes of this series of debates typically hinged upon the way that the local agents of the Crown responded to the instructions that they were given by the Colonial Office, more needs to be said about the concrete way that local officials exercised their agency on behalf of the Crown.[76] Situated across the long-distance apparatus of Crown Colony government, officials at Whitehall and in the colonies were separated by both distance and time, which afforded officials room to negotiate policy.

Due to their temporal separation, local officials could delay their responses or the implementation of instructions in the hopes of changing imperial policy. For example, Weld's resistance to the application of the Secretary's instructions, which were sent at the beginning of July 1887, meant that these orders were not executed until the end of 1887 after his replacement as Governor – a delay that opened another window for officials at the Colonial Office to re-evaluate things. Conversely, metropolitan officials could also use delay to prevent prior decisions from being affected or overturned by local events.[77]

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[76] My understanding of "agency" follows Shapiro's (1987, p. 626) definition of trust "as a social relationship in which principals…invest resources, authority, or responsibility in another [an agent] to act on their behalf for some uncertain future return." At its core, the relationship between principal and agent is characterized by both informational asymmetry between principal and agent and uncertainty regarding agent's fidelity to their principal's interests as well as the determination of the principal's interests itself.

[77] Alternately, metropolitan officials could surmount the typical delay in the drafting of colonial legislation by meeting with senior local officials when the latter returned to Britain on leave from their postings.

The politics of delay worked both ways. For example, soon after the effective suspension of compulsory medical examination in the Straits Settlements, Governor Smith reported that almost all the women who had been detained in the Lock Hospitals in the colony (Singapore: all 150 inmates; Penang: 52 out of 54) left the hospital immediately after the implementation of the Secretary of State's orders. This occurred despite the fact that officers of the Chinese Protectorate and the Medical Department "did their utmost to persuade the women to remain their *of their own free will* until cured…"[78] As the Governor's dispatch implied, the exercise of "free agency" meant something different to the detained women, and the outcomes of suspension were disastrous in terms of public health. Upon receipt of this news, Johnson's response noted that this outcome "is to be regretted but is not altogether surprising as nearly the same thing happened in England."[79] Writing to his superiors, Johnson argued that women would likely seek treatment voluntarily at the Lock Hospital in increasing numbers over time, as had been the case in England. Adding that they had not yet heard from Hong Kong, which had been issued the same orders, he then suggested that the appropriate thing to do was to wait to respond. His advice was heeded, and it deprived Smith of the opportunity to challenge Johnson's reasoning, which was then accepted without further question. Hence, months later, when Smith wrote to report again on the negative effects of the suspension of compulsory medical examination, the Secretary of State simply reiterated Johnson's

[78] Smith to Holland, 30 January 1888; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*; italics mine.
[79] Minute by Johnson, 9 March 1888; Smith to Holland, 30 January 1888, CO 273/151. Interestingly, in his following minute dated 16 May 1888, Johnson stated that no answer had come from Hong Kong's officials, who "have on previous occasions also been very dilatory in answering despatches on this subject."

observations and noted, "it is to be hoped that the moral effects in the direction of discouraging prostitution will largely counterbalance the initial increase of disease."[80]

Beyond the politics of delay, the temporal conjunctures of the colonial debates over the regulation of prostitution also mattered in how colonial officials' turned to the Women and Girls' Protection Ordinance as a legislative compromise. Embedded in the flow of long-distance legislative processes that traversed the empire, British officials were confronted by a "policy context" that was formed by existing statutes, other bills under consideration and nascent policy proposals in the Legislative Council as well as Parliament.[81] At the cusp of the repeal of the Contagious Diseases Ordinance in the Straits Settlements, this policy context was constituted not only by the Secretary of State's (or Johnson's) written directions to "repeal the whole…Ordinance, and…re-enact, with the necessary modifications, the clauses relating to registration and supervision of brothels, and the provision of free Lock hospitals;" any new legislation would also have to be aimed at the protection of women and girls, given colonial officials' recognition of this sovereign duty and the salience of similarly named laws in the colonies and Britain.

In colonial law-making, timing and context mattered. In this vein, similar to the formative influence that the Contagious Diseases Acts had exercised across the empire, the 1885 Criminal Law Amendment Act figured significantly in the crafting of the new Women and Girls' Protection Ordinance in the Straits Settlements. However it was not the only existing statute that was salient. As Johnson observed of the first draft of the bill,

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[80] Knutsford to Smith, 30 November 1888; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*.

[81] Martin (2010, p. 7) defines a "policy context" as consisting of the "limited set of other policies and policy proposals that are salient, or readily available to the foreground of policy makers' attention." In the context of colonial law-making, the policy context was typically manifest in terms of prior statutes and the formal instructions issued by authoritative actors.

the new ordinance was also an amalgamation and adaptation of provisions from the colony's Penal Code, the expiring 1887 Women and Girls' Protection Ordinance and the 1870 Contagious Diseases Ordinance as well as its subsequent amendments.[82]

Within this policy context, Johnson and other officials at the Colonial Office used the provisions of the 1885 Criminal Law Amendment Act as a strategic point of comparison to procure desired changes in the bill. Among the various changes that Johnson suggested to the text of the bill, he highlighted the absence of a set of provisions that existed in the 1885 Criminal Law Amendment Act that defined the age of consent for sexual conduct – provisions that punished men who resorted to child prostitutes less than sixteen years of age.[83] In suggesting the inclusion of these measures, he noted, "otherwise, while we heavily punish the brothel-keepers or procurers, who aid and abet, we shall let the principals in the crimes go free."[84] Here, Johnson's approach to punishment was again aligned with the abolitionists, who were antagonistic to the *crime* of organized child prostitution as well as their male perpetrators. The Secretary of State, Lord Knutsford (Sir H.T. Holland), agreed to Johnson's suggestion, and it was expressed to the Straits Settlement's Attorney General. Even so, Knutsford also indicated his interest in the Governor's input regarding the appropriate age of consent in the colony, revealing his grasp of the political significance of apparent local cultural differences.

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[82] Minute by Johnson, 17 May 1888; Smith to Knutsford, 15 March 1888, CO 273/152.

[83] Johnson's concern for the punishment of such men was likely affected by the "cultural paranoia" over the prostitution and trafficking of young girls that afflicted abolitionists and their allies during the early half of the 1880s (Walkowitz 1980, p. 247). Provoked by exposés of British child prostitution in Brussels and London (which involved older aristocratic men), middle-class abolitionists in Britain sought to punish the male perpetrators of "aristocratic vice" and such concerns were significant in the making of the 1885 Criminal Law Amendment Act (*ibid*, p. 250). Nevertheless, Johnson, like his abolitionist peers, retained a blind spot to the use of governmental powers to remove child prostitutes and, in the case of the colony, detain them under the care of the state under sections 6 and 7 of the bill and the ordinance.

[84] See note 82.

> Lord Knutsford desires that a clause should be added (corresponding to Clauses 4 and 5 of the Criminal Law Amendment Act, 1885), making it an offence for a man to have carnal knowledge of a young girls under sixteen years of age and over ten years, which is the limit for rape in the Penal Code. His Lordship proposes to consult the Governor…as to whether this age, which appears in the Penal Code, ss. 372-3, as the minimum age for prostitution, should be adopted in this case…[85]

The Secretary's request for the Governor's input regarding the age of consent for sexual conduct reflected the prior feedback that the Colonial Office, or more specifically Johnson, had recently received in person from Attorney General Bonser, who was in England while on leave from the colony. By taking advantage of the latter's presence in the country, the Colonial Office had been able to surmount the normal delays in the process of colonial legislation and dictate how the new law was written. In particular, they could identify and pre-empt issues that might lead to further conflict and delay in the legislative process, and request for changes to be made *before* the reformulated bill was even returned to the Straits Settlement. The age of consent was one such issue that could provoke opposition from local elites and officials, as Bonser had expressed his doubts…

> ...whether the protection should be as high as 'sixteen years of age,' and pointed out that the provision would not merely affect those who had intercourse with young girls in a brothel, *but also those who lived with young girls as concubines and mistresses (marriage proper being not much in vogue with the Chinese and others in Singapore)*…[86]

Knowing this, the Secretary of State was willing to accede to potential objections to the new law's definition of sixteen as the age of consent despite Johnson's insistence on maintaining the age of sixteen. Knutsford's final instructions then stated, "I desire that

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[85] Bramston to Bonser, 23 July 1888; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*.

[86] Even though Johnson, who was dismissive of the practice of concubinage, was unwilling to accede to Bonser's doubts, his superiors in the Colonial Office stood on Bonser's side and also thought sixteen to be too high for the colony. See the minutes by Johnson, 11 July 1888, Bramston, 12 July 1888, and Knutsford, 14 July 1888; Smith to Knutsford, 15 March 1888, CO 273/152; emphasis in original, italics mine.

the age 16 should be retained in the new Sub-section (5) of Clause 4 (1), *unless you have any special reasons to urge against it, or unless strong objection is raised against it in the Legislative Council*."[87] Drafted in this way, these instructions reflected the Secretary of State's unwillingness to "carry that age by an official vote should strong objection be made in the Legislative Council."[88] Simply put, he would not risk more delay in repeal.

Despite the legislative control granted to the Crown and its agents by the constitutional structure of Crown Colony government, Lord Knutsford's hesitance to compel the Straits Settlements' Legislative Council to establish the same age of consent in the colony and Britain was borne of two considerations. First, unlike Johnson's disdain for the purportedly common practice of concubinage, Knutsford and other officials were receptive to the need to allow the continuance of local customs even if they were un-English and immoral – a policy that reinforced the "colonial rule of difference." Second, the Colonial Office's experience of conflicts and delays in dealing with local officials and elites over the unpopular repeal of the Contagious Diseases Ordinance likely dissuaded the Secretary from actions that could occasion further opposition. Knutsford's concerns proved to be prescient. When the Women and Girls' Protection Bill was read in the Straits Settlements' Legislative Council at the end of 1888, the unofficial members did not only protest against the repeal of the Contagious Diseases Ordinance; one of them, Thomas Shelford, also argued against the punishment of men who resorted unwittingly to a child prostitute for "[a] man has no right to be exposed to such a position as this…"[89]

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[87] Knutsford to Smith, 12 October 1888; enclosed in House of Commons, 1889 (59) *Contagious diseases ordinances (colonies)*; italics mine.
[88] Minute by Knutsford, 6 October 1888; Bonser to Colonial Office, 17 September 1888, CO 273/157.
[89] Short-Hand Report of the Proceedings of the Legislative Council of the Straits Settlements, 28 November 1888, CO 275/34, p. B109.

Epilogue: Time and Law's Secular Transformations

By the time the bill reached the chambers of the Legislative Council for debate, the repeal and transformation of the Contagious Diseases Ordinance by the passage of the Women and Girls' Protection Ordinance in the Straits Settlements at the end of 1888 was a *fait accompli*. This was because of the Colonial Office's prior exercise of its powers of imperial control over the principles, form and content of colonial legislation. Within the constitutional framework of Crown Colony government, which typically established an official majority in the colonies' Legislative Councils, the Colonial Office could direct, supervise and ultimately sanction or disallow the enactment of ordinances. Nevertheless, as the persistence of brothel registration and other regulationist measures in the 1888 Women and Girls' Protection Ordinance showed, the colonial regulation of prostitution continued in the Straits Settlements under a different name despite the persistent efforts of Johnson to obtain the colonies' compliance with metropolitan policy. What stood in his way were not only the stubborn dispositions of male colonial officials towards the protection of "native" women; his efforts were also confounded by the manipulations and contingencies of the temporality of colonial law-making. In this chapter, I argue that these dual aspects of law-making, male officials' enactment of gendered sovereignty in protecting the physical "liberties" of "native" women and their political uses of time in relation to changing policy contexts constituted the carnal practices of imperial control. Critically, without understanding the subjective character of imperial control and the temporal politics of colonial law-making, we fail to appreciate the secular limits to the realization of ideals by an imperial power.

My approach in this chapter, particularly in the analysis of the transformation of regulation, has been to treat temporality, i.e. the social understanding of time and timing, as an institution subject to politics. I depart from positivistic approaches to the institution of time that treat it as an inert and objective element of our social worlds and seek to identify the way that institutions become locked into developmental paths (North 1990; Pierson 2004). Rather, in the vein of interpretive approaches to time and process that stress how social actors' varying understandings of their temporal contexts, e.g. in terms of tradition, progress and revolution, are artificial products of social action and politics (Shils 1981; Sahlins 1985; Krygier 1986; Haydu 1998; Sewell 2005; Abbott 2016; Halliday 2017), I have outlined the ways that officials across the empire used and defined their changing temporal contexts to pursue their respective values and interests. Thus analyzing the temporal politics of colonial law-making is useful, as it offers answers as to how and why evasive and arbitrary "imperial formations" like the colonial regulation of prostitution were repeatedly transformed from one point to another (Stoler 2010).

In this sense, besides identifying the centrality of carnal concerns in colonial law-making and policy, this chapter has identified how practices of imperial control constituted temporality in three main ways: one, timing and initiative in law-making was made subject to manipulation through colonial officials' tactical uses of delay; two, the policy contexts that confronted law-makers at different junctures were rendered in terms of readily available legislative precedents drawn across the empire and the immediacy of the Colonial Office's instructions; and, three, colonial elites and officials' understandings of the cultural and racial difference could be inscribed in terms of time itself, e.g. as the age of consent for sexual conduct (see below).

Understood in terms of the politics of temporality, the enactment, repeal and transformation of the Contagious Diseases Ordinances in the empire also revealed the recursivity of colonial law-making (Halliday and Carruthers 2007). As the cyclical flows of correspondence regarding the repeal of these laws between the Colonial Office and officials in Jamaica, the Straits Settlements and Hong Kong in Figure 5.1 demonstrate, the combination of officials' tactics of delay in correspondence and the concomitant changes to their policy contexts affected the timing, form and content of legal outcomes.

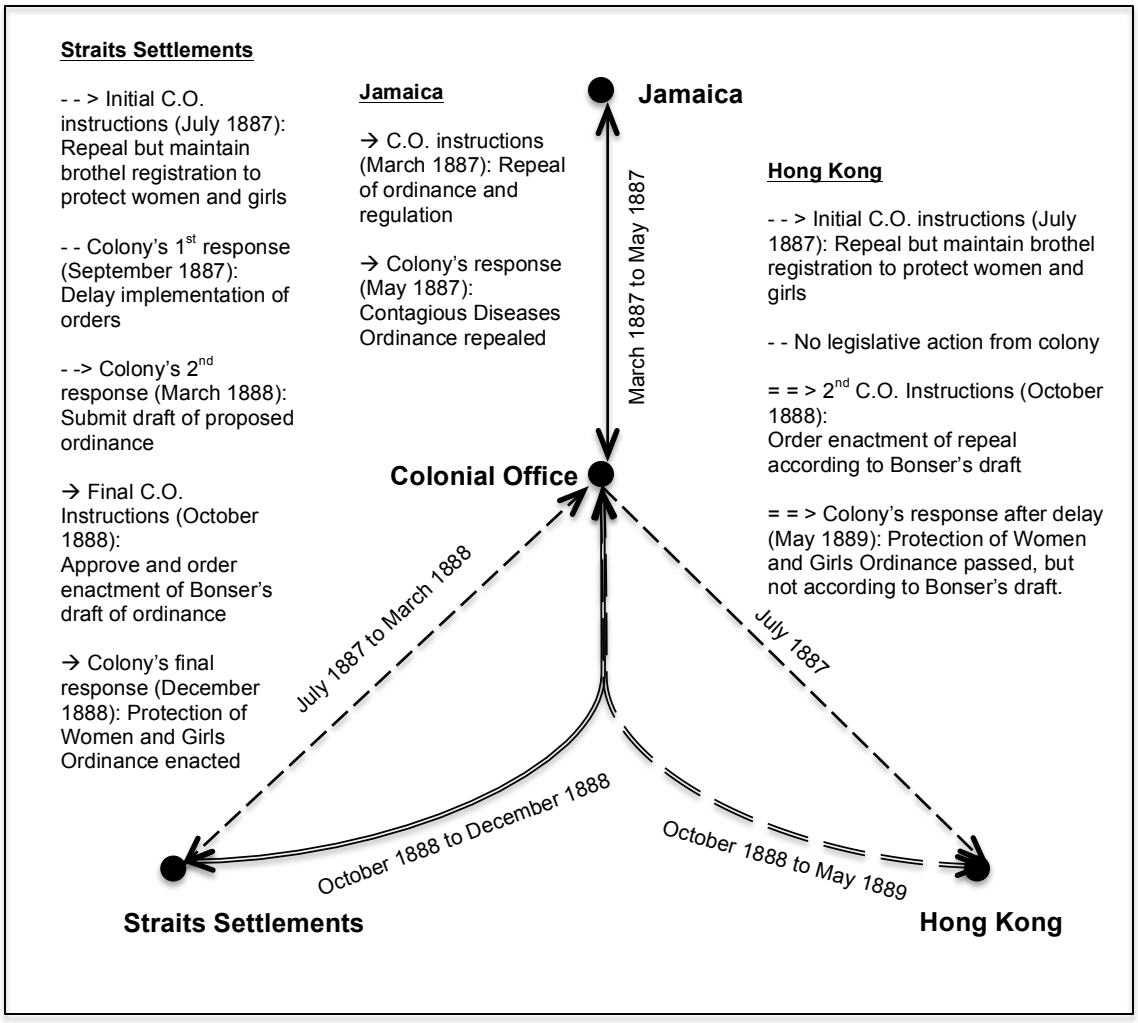

Figure 5.1: The Recursivity of Colonial Law-making and the Varying Legal Outcomes of the Repeal of the Contagious Diseases Ordinances (March 1887 – May 1889).

Within an empire bound by time, the transformation of the regulation of prostitution under the rationale of the Women and Girls' Protection Ordinance in the Straits Settlements by the end of 1888 then rippled back to the original source of the Contagious Diseases Ordinances, Hong Kong, as the Colonial Office sought to craft similar ordinances in both colonies Here, officials' engagement in the politics of delay in relation to a changing policy context again played a role in shaping how law-makers in this Crown Colony responded to the Colonial Office's, and particularly Johnson's, efforts to expedite the abolition of the ordinance and the forced medical examination of women.

Upon the receipt of the ordinance as passed in the Straits Settlements, Johnson highlighted the delay in Hong Kong, stating, "we have had no reply from Hong Kong to the original despatch of July 1887 directing repeal of the C.D. Ordinance…I do not think that the Hong Kong Government will hurry at all in the matter, unless we press them."[90] Secretary Knutsford heeded Johnson's suggestion and a telegram was sent to Hong Kong with instructions to enact an ordinance similar to the one that had been drafted by Bonser. However, Hong Kong's Governor responded only at the end of June 1889 when he sent the colony's Protection of Women and Girls Ordinance, which had been formulated and passed by the Legislative Council.[91] Even though Hong Kong's law-makers were thus able to dictate the terms of repeal, the Colonial Office deemed that their new law did not conform to instructions and James H.S. Lockhart (Pickering's equivalent in Hong Kong), who happened to be in England then, was then tasked to draft an amending ordinance.[92]

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[90] Minute by Johnson, 13 February 1889; Bonser to Colonial Office, 17 September 1888, CO 273/157.
[91] Hong Kong Ordinance No. 19 of 1889; Des Voeux to Knutsford, 29 June 1889; enclosed in House of Commons, 1890 (242) *Contagious diseases ordinances (colonies)*.
[92]Knutsford to Des Voeux, 3 January 1890; enclosed in *ibid*.

Within this to-and-fro circulation of letters and laws between London and the colonies, abolitionists' calls for the protection of the liberty of women across the empire were ultimately overshadowed by the imperative to protect "native" women and girls – what I call gendered sovereignty – and the politics of temporality in the Crown Colonies of the Straits Settlements and Hong Kong. And, ironically, the repeal of the Contagious Diseases Ordinances then created new differences in the colonial regulation of sex.

To illustrate, while almost all of the unofficial members of the Straits Settlements Legislative Council lamented their powerlessness to prevent the eventual repeal of the Contagious Diseases Ordinance, their protestations were consequential in further shaping the colonial regulation of sex. Their amendments to the bill defined the age of consent for non-marital sexual intercourse to be fourteen rather than sixteen – a change that not only reinforced the supposed alterity of sexual practices of the colony but also meant that a smaller group of girls (and men) were subject to the protection of the colonial state.[93] Here, orientalist claims reinforcing the "colonial rule of difference" prevailed since the Secretary of State was unwilling to risk further conflict and delay in repeal. The reverse was true in Hong Kong, as the initial absence of such a provision in the 1889 ordinance and the failure of the Governor's prior tactics of delay provoked the instructions of the Secretary of State to insist on the age of sixteen as the age of consent – instructions that were duly fulfilled in the amended ordinance.[94] In fostering these new rules to govern colonial sexual relations, the carnal practices of imperial control thus produced differing legacies across the British Empire, an issue to which we turn in the concluding chapter.

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[93] Section 4(1)(v) of the Straits Settlements Ordinance 14 of 1888. The age of consent for non-marital sex in the colony was amended to fifteen in 1896 and to sixteen only in 1937.
[94] Hong Kong Ordinance No. 11 of 1890. Fleming to Knutsford, 30 July 1890; enclosed in House of Commons, 1894 (147) *Contagious diseases ordinances (colonies)*.

VI.
Law's Transformations: Imperial Control and its Legacies

Crown Colony Government: The Odyssey of Imperial Control

How did the modern British Empire, the global political power of its time, respond to the problem of difference in far-flung colonies? In this study, I argued that British officials institutionalized Crown Colony government as their solution to the problems of difference and imperial control. As an authoritarian form of colonial rule for "plural societies," Crown Colonies were subject to the "direct" and unfettered powers of the Crown through imperial control over colonial legislation and the appointment of officials. Fashioned and justified according to the racial sociology of empire that emerged by the early nineteenth century, the re-constitution of Jamaica and the Straits Settlements as Crown Colonies marked the paradigm shift from the old representative system and the establishment of Assemblies, which had embodied the *English* "liberties" of colonists in the Atlantic. Therefore, the institutions of Crown Colony government constituted, at their very heart, a rejection of liberal principles of government and law on the grounds of their imagined unfeasibility in racially divided societies. The premise of this monocratic model of colonial government, in which the Governor held expansive powers over a subordinate colonial legislature and judiciary, was the reinforcement of British rule, or the "colonial rule of difference," under the guise of the Crown's protection of a fragile social order.

Seen in a historical light, the illiberal institutions of Crown Colony government were a paradoxical solution to the associated problems of difference and imperial control. First established at the turn of the eighteenth century in part to avert the commission of Assemblies that had become a bulwark for white planters to resist the Crown's abolition and amelioration of slavery, this long-distance framework of colonial governance and imperial control originated from the Royal Prerogative over conquered lands and their inhabitants. Critically, British officials understood the preservation of the Crown's absolute powers upon conquest to be necessary for the freedom, protection and welfare of their racially subordinate subjects; the purported alternative was a descent into inter-racial conflict and violence if a white minority were allowed to abuse their "right" to consensual government and oppress the racialized majority. In light of the racial divisions that were found in the diverse colonies that Britain acquired in the wake of the Anglo-French War of 1793-1815, British officials then translated the Crown's Prerogative powers into institutions of colonial government that enabled the Governor, as the Crown's representative, to enact and implement Parliament and the Colonial Office's policies without the consent of an Assembly. In these developments, the liberal, humanitarian politics of emancipation of the early nineteenth century British Empire became intertwined with the making of an illiberal means of colonial government.

This contradictory logic of colonial governance gained further ground with the sudden, violent outbreak of the 1865 Morant Bay rebellion in Jamaica and, to a lesser extent, the 1867 Penang riots in the Straits Settlements, which cast a shadow over the transfer of the latter's administration from the India Office. As British officials repeatedly emphasized in their extended debates over the re-constitution of these two colonies, the

imagined social ills of racially divided "plural societies" could only be curbed by the projection of the supposedly long, strong arm of *Leviathan*. The institutionalization of Crown Colony government in Jamaica and the Straits Settlements thus occurred in the social crucible of racial conflict, both real and imagined. In turn, their re-constitution as Crown Colonies over the 1860s then expanded the application of this new, direct mode of colonial rule and imperial control beyond the initial group of "Crown or conquered colonies" (see Chapter One, Table 1.2), where the Crown's powers upon conquest had shaped the foundations of Crown Colony government. Having been long removed from the Crown's originary act of conquest and treated *as if* they were "settled" colonies, the re-constitution of Jamaica and the Straits Settlements entailed the reformulation of their governing institutions in ways that reshaped the governance of racially diverse colonies.

Significantly, in contrast to the white settler colonies that were granted self-government, the legislature and judiciary of Crown Colonies, which became the *standardized* form of colonial rule, were made subject to the expansive authority of the Governor. Without the façade of representative government or judicial independence, the legality of the colonial state's activities in the Crown Colonies rested instead upon the Colonial Office's bureaucratic exercise of imperial control over colonial legislation and the activities of its officials on the ground. As I argued in this study, this divergent state of affairs across Britain's colonies manifested the cumulative understandings of officials' racial sociology of empire over the nineteenth century. Because British officials and elites came to understand "plural societies" as lacking in supposedly "traditional" social or cultural restraints and being unfit to assimilate English liberties, such colonies required the heavy hand of the colonial state to maintain the semblance of lawfulness and order.

Given these series of constitutional transformations, what was the fate and significance of what Mantena (2010) calls "liberal imperialism," which was most powerfully expressed by the emancipation of slaves across the empire? Did the "duty of liberal reform" wane and disappear as one of the ends of imperial control, as Mantena (2010, pp. 21-22) contends? Besides the authoritarian cast of Crown Colony government, my findings revealed that English ideals of "liberty" did continue to resonate and spark interminable political struggles over the nineteenth century as colonial officials and elites recurrently contended over colonial governance and law-making. Nevertheless, as the repeal of the Contagious Diseases ordinances showed, even the most earnest efforts to realize liberal ideals were weighed down by the carnal practices of imperial control, i.e. the affective structures of colonial governance and its temporal politics (Chapter Five). In this light, British aims and ideals of "liberal imperialism" were repeatedly overshadowed by pragmatic concerns tied to the affective dispositions, material interests and tactics of the male officials charged with the administration of Britain's dependent empire.

As this circuitous odyssey of Crown Colony government demonstrated, sociologists need to go beyond assumptions of institutional continuity or reproduction between the metropole and its colonies to understand and conceptualize the making of empire and its manifold legacies. In their colonial translations, British institutions of government and law were repeatedly transformed as British officials and elites fought over the interpretations and uses of English traditions of law and government. To use Krygier's (1986, p. 251) words, if "the very traditionality of [the common] law ensures that it *must* change," then sociologists need to focus on the trails taken as social actors *re*-formulate and alter institutional forms and their principles in the winding courses of time.

The Children of Imperial Control: On Law, Social Theory and their Uses

In Homer's *Odyssey*, the narration of Odysseus' journey back to Ithaca begins not with the story of his departure from Troy. Rather, this epic poem commences with the actions of Telemachus, his son, who seeks out his long-lost father under the urgings of Athena, the Greek goddess of war and wisdom. Similarly, as we seek out the origins and transformative journeys taken by the institutions of the colonial and post-colonial state, we might begin with the children of empire: colonial laws and the social understandings of the colonized societies, or "imagined communities," that were formed as a product of the imperial division and control of territories and populations (Anderson 2006).

In this sense, I note that Durkheim's (1997, pp. 24-25) early but erroneous insight into how positive laws reflect the underlying bonds of social life, or "social solidarity," can be usefully turned on its head and re-worked. Indeed, as the orders of a conquering sovereign authority, colonial ordinances were less reflections of existing social bonds than expressions of colonial officials' existing understandings of the social contexts that they confronted; or, to use Wilson's (2011) incisive metaphor, social life was "refracted" in the law through the perceptions and understandings of colonial officials. Furthermore, as Furnivall's (1956, pp. 307-308) theorization of "plural society" formulated, the laws of a colonial power and the "force of economic circumstances" imposed "social union" upon "plural societies" that lacked a "common social will." In other words, beyond their expression of officials' understandings of their social contexts, colonial laws were also constitutive of the colonized society itself. Thus rendered, law was intimately bound up in colonial officials' efforts to *understand* and *control* their (racialized) social milieus.

As the authoritative constructions of colonial power that have been inherited by sovereign nation-states, colonial conceptions of law and social understandings (or theory) continue to shape the post-colonial world. In addition, these express, traditional elements of our social world provide evidential means through which sociologists can analyze the "authoritative presence of the past" or, to put it differently, the pasts of present authorities (Krygier 1986, pp. 245-246). This study has thus taken a different tack in analyzing the institutional origins and transformations of what sociologists identify as the "legacies" of colonialism (*cf.* Lange 2009; Mahoney 2010). Since such prior scholarship has opened up important questions about the institutional origins and causes of the economic and political inequalities of the post-colonial, "developing world," my dissertation study endeavored to cast more light on the origins, making and transformations of the diverse colonial institutions of government and law in the nineteenth century British Empire.

In analyzing both colonial law and officials' understandings of colonized societies in public and private transcripts of law and law-making, I undertook an approach to institutional analysis that examined how the theorized multi-dimensional processes of institutional change – regulatory, normative and cognitive – intersected in the making and translation of the constitutional framework and laws of Crown Colony government (Schneiberg and Clemens 2006, p. 213). To re-illustrate, the public petitions and correspondence that led to the Crown's establishment of Crown Colony government in the Straits Settlements revealed how officials' enactments of its regulatory framework and laws were justified by officials' taken-for-granted understandings that this mode of colonial rule was suited to "plural societies;" also, local mercantile elites' protests for judicial independence then revealed the resonance and later devaluation of liberal ideals.

Sociologically, my dissertation research followed recent moves towards a processual mode of sociological research and analysis that has rejected static and essentialist ways of conceptualizing social entities and institutions in a changing world (Glaeser 2014; Abbott 2016). In doing so, I presented a set of histories of colonial law-making across a changing empire that demonstrate how and why the constitutions and laws of "Crown Colonies" were recurrently transformed in the course of interactions between key actors in Britain and the various colonies. Given the constant flux of law-making and colonial state-building, the meanings and ontology of "Crown Colonies" shifted and changed from one moment to the next. As the plethora of constitutional forms in the late British Empire indicated (see Chapter One, Table 1.1), the basic framework of Crown Colony government could be adapted in ways to allow for both "direct rule" and "indirect rule," or be re-worked to approximate the representative institutions of the "self-governing" colonies without fully relinquishing the Crown's control over colonial law-making and official appointments. Amidst this heterogeneity laid the adaptive workings of a sovereign power in relation to the local acts of protest and rebellion by its subjects. Here, it is apt to recall the classic metaphor of law found in legal positivism: law as the command of the sovereign (Hart 1997). In this sense, colonial laws manifested the will of a conquering "sovereign" even if the projections of such sovereignty were, in practice, assembled from the various decisions of officials and elites, as well as their interactions.

In this dissertation, I examined the other child of empire, social theory, through the British officials' emic and comparative understandings of the social contexts of the colonies. As Mantena (2010) boldly argues, the foundational notions of social theory originated in the project of empire. As she demonstrates, the influential concept of

"traditional society," as contrasted to "modern society," was most clearly articulated in the writings of a leading British official and intellectual, Henry Sumner Maine, whose stint as Legal Member of the Vicerory's Council in British India also allowed him to bridge and work at the forefront of both imperial thought and practice (*ibid*). Like many of his Victorian-era peers, Maine's work was comparative and it "was predicated upon a specifically *anthropological* timescale, one in which differences in place and customs are represented as differences in time." (*ibid*, p. 74) Similarly, as I argued in Chapters Four and Five, British officials across the Colonial Office's dependencies were wont to use the comparisons of colonies to understand their present circumstances and justify policy; their political uses of comparison as a mode of understanding and justification, in turn, had the consequence of assimilating, in parts, the forms of colonial government and law.

Critically, I proposed that British officials and elites' comparative and racialized understandings of the colonized societies that confronted them – their racial sociology of empire – were then expressed in terms of the official typology of colonial government and its scheme of constitutional "development." At one end were the racially different "traditional" and "plural societies" that were subject to, respectively, the "indirect" and "direct rule" adaptations of Crown Colony government, while on the other end stood the "self-governing" white settler colonies that possessed English institutions of government and law. Despite being partly formalized in this manner, the racial sociology of empire was a cumulative and diffuse body of social knowledge that colonial officials recurrently borrowed from each other and reformulated according to a colony's circumstances. British officials' understandings of the racial identities and characters of their subjects and the nature of colonized societies were thus contingent upon the politics of empire.

Colonial Legacies: Between Past and Present

In Stoler's (2016, p. 260) poignant essay that critiqued well-worn narratives on the origins and fixity of racial discourses within nineteenth century European empires, she highlights how racisms, both colonial and (post)colonial, "gain force precisely through the double vision they foster and allow, in the fact that they combine notions of fixity and fluidity in ways that are basic to their grammar." In this sense, British officials' racial sociology of empire was also a product of a "double vision." Notwithstanding the temporal contingencies and politics that shaped officials' changing understandings and expressions of the social organization and racial character of their colonial subjects and their "plural" or "traditional societies," the racial sociology of empire remained premised upon what Chatterjee (1993) and Steinmetz (2007) call the "colonial rule of difference," i.e. the definition and reinforcement of the political subordination of the colonized in terms of "race." In other words, the fixed points within colonial officials' often-changing claims and debates regarding the character and culture of the colonized were the relations of domination between a sovereign actor and their subjects. Hence, as long as the British maintained their sovereign powers over a territory and its inhabitants, the "colonial rule of difference" between colonizer and the colonized would be maintained no matter how officials revised their ethnographic understandings of the colonized and their societies.

This political relationship between imperial sovereign and colonial subject has remained significant even for nation-states that have supposedly thrown off the despised mantle of colonialism and asserted their national sovereignty. After all, the meanings of the word, "legacy," are rooted in the de-*legate*d exercise of power by a person on behalf of another. Similar to how a person's will requires an executor, the determinations of the

legacies of past colonialism depend on those holding authority in the present. Indeed, when sociologists talk of the concept of legacy, I argue that we need to also confront the ways in which relations of domination traverse the historical boundary between the colonial and (post)colonial. While the historical event of decolonization did constitute new nation-states, these new states were also the legatees of various forms of authority, e.g. laws and offices, as well as the accumulated body of social knowledge of their predecessor states. Nevertheless, the present forms and uses of these means of power depend on those who possess positions of authority and their relationship to the governed.

As my discussion of the transformation of the regulation of prostitution and its laws in Chapter Five revealed, colonial ordinances and officials' racial sociology of empire were recurrently subject to transformation because of the affective structures and temporal politics of law-making and governance under the long-distance framework of Crown Colony government. What the mutability of these children of empire, i.e. law and racial sociology, thus suggests is that the sociological analysis of colonial legacies can bridge past and present by examining the recurrent transformations of legal forms and social knowledge wrought by the changing social constructions of sovereignty. Indeed, the transformations and meanings of colonial legacies hinge upon the tentative division and exercise of powers in the relation between sovereign and subject. Therefore, what is first needed in a sociological account of colonial legacies is an analysis of relations of sovereignty, or trust, that accounts for the dynamics of the changing distribution of power between sovereign and subject, or state and citizen. On this note, Tilly's (2005) late work on the salience of trust in democratization might provide new insights into the changing social relations and understandings of sovereignty and their refractions in law.

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