

Occupied Cape Judges and Colonial Knowledge of Crime, Criminals, and Punishment

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Abstract

This article returns to a colonial discourse on crime, criminals, and punishment that the court of justice enunciated and followed during an 8-year British occupation of the Cape of Good Hope in the latter part of 1795. Tapping unusually frank juridical discussions on criminality and punishment in the context of sovereignty politics, it examines three key matters. Commencing with a description of the Cape colony's inquisitorial criminal procedures, the analysis—following Foucault (2000)—conceives of these as powers (political techniques) through which the British claimed an exclusive capacity to enunciate legal “truths” about specific criminal events. Second, it analyzes a unique correspondence between the British military commander and the court of justice members together with two illustrative criminal cases of the day. These provide a sense of the judge's knowledge of crime and criminal punishment in a social context that imagined itself through social differentiation and hierarchy. Third, it reads these colonial power-knowledge formations as generating three congruent political logics that in hybrid combinations have nurtured segmented, racially orientated, and group-based criminal justice arenas. This discussion alludes to the pivotal role colonial discourses of criminal law have played in generating a politics that shaped the criminal justice arenas of subsequent social forms. New, and differently combined, political logics of sovereignty, discipline, and biopolitics have left a decided legacy to which post-colonial arenas continue to respond.

Keywords

sociology of law, sociology, socio-legal studies, social sciences, crime, law, and deviance, cultural studies, sociological theory, criminology and criminal justice

Following an invasion of the Cape of Good Hope late in 1795, the British ended the Dutch East India Company's rule of nearly 150 years (Giliomee & Mbenga, 2007; Ross, 2008). Defining its incursion as an occupation, rather than a settlement, the British, for the most part, retained the Cape's existing Roman–Dutch law and enabled its inquisitorial criminal procedures to frame a distinctive colonial knowledge about crime and its punishment (Botha, 1962; Boucher & Penn, 1992; Fine, 1991). Such knowledge and its enveloping power relations played an important part in British attempts to impose “law and order” over the colony, reaffirming criminal law's direct involvement with an unfolding sovereignty politics (Pavlich, 2013). During these extraordinary times, rulers enunciated remarkably frank views on governance, including exception statements by judges about the politics behind their visions of crime, criminals, and punishment.

Although the British initially occupied the Cape for only 8 years before ceding it to the Batavian Republic in 1803, they reoccupied the colony in 1806 and ruled imperially for the next century.¹ This article turns to the first British occupation, circa 1795 (Boucher & Penn, 1992; Giliomee, 1975), focusing specifically on juridical powers and paradigms that framed the court of justice's knowledge of crime, criminals,

and punishment. It aims to do so in three stages. First, it outlines the colony's criminal procedures, the powers through which the British claimed an exclusive capacity to enunciate the legal “truth” about specific criminal events. Second, it taps selected juridical discourses that detail how to understand crime and the punishment of criminals in the Cape context with its social differentiations and hierarchy (Ross, 1999). Here, the article highlights a unique correspondence between the British military commander and the court of justice members together with a detailed look at two illustrative criminal cases, echoing Weiner's (2009) sense that legal history provides a valued perspectival mirror to an empire in action and Hall's (2000) use of Foucault's *Archaeology of Knowledge* to approach Cape colonial discourse. Third, on the strength of these power-knowledge relations, it charts

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what I read as three congruent political logics that in various hybrid combinations have shaped the segmented, racially orientated, and group-based sovereignty politics reflected by apartheid and later post-colonial criminal justice arenas. Through this analysis, the article alludes to the pivotal role colonial law's discourses have played in generating a hybrid politics of criminal justice framed around sovereignty, disciplinary, and biopolitics—a legacy to which consequent criminal justice approaches enduringly respond. Here, the article questions a tendency to view crime-focused law in the 'postcolony' as deploying unique political logics (e.g., Comaroff and Comaroff, 2006).

Modes of Enunciation: Inquisitorial Techniques of Cape Criminal Law

Imported from the Netherlands in the 17th and 18th Centuries, the Cape's inquisitorial criminal procedures were rooted in canonical law (Dugard, 1977) and stemmed from an Ordinance issued by Philip II of Spain on July 9, 1570, when the Netherlands was struggling for its independence (Fine, 1991). Under a century later, these procedures were imported to the Cape where they remained largely, ". . . in force in the Cape during the time of the Dutch East India Company (1652-1795), the first British occupation (1795-1803) and the rule of the Batavian Republic (1803-1806)" (Dugard, 1977, p. 18).

After the second occupation, they continued to serve as a ground for criminal law, but were increasingly Anglicized over the next three decades (Fine, 1991). Even so, the political foundations for colonial law devoted to crime were established around inquisitorial procedures that molded Cape approaches to criminal justice (Botha, 1915; Dugard, 1977; Fine, 1991; Worden & Groenewald, 2005).

Following Foucault (2002, p. 75), one may describe these procedures as "modalities of enunciation" by which particular truths about crime, criminals, and punishment were privileged, and competing visions of law silenced or displaced (see also Pavlich, 2010). At the time of the first occupation, Cape criminal procedures required subjects to report any suspected wrongdoings to the sovereign's representatives (e.g., landdrosts, fiscal). On receiving such information, designated members of the court of justice, including the "fiscal" or prosecutor, were required to conduct an inquiry into whether a crime had taken place (see resonances with Foucault, 2000, pp. 42-52). The court's secretary recorded testimonies given under oath (Fine, 1991, p. 239), and transcribed records were "verified" before being used in court—a process that involved two deputized judges reading back written statements ("word for word, loudly and clearly") to deponents, often with the accused present (Worden & Groenewald, 2005, p. xxiv). Two basic sorts of proceedings were followed in criminal cases.

On one hand, a seldom-used "ordinary process" guided cases where there was insufficient evidence and the accused denied being guilty of the alleged crime (Dugard, 1977). On

the other hand, Cape law pursued an "extraordinary process," which was—incongruously—more common, when evidence against the accused was stronger (Fine, 1991, Chapter 3). As Worden and Groenewald (2005) note,

The prosecutor at once started collecting evidence from eyewitnesses in the form of *verklaringen* and *relasen* (depositions and statements). These had to be taken down in the presence of two witnesses and, in the case of colonists (but not slaves), also included the promise to swear by the truth of the statement under oath. (p. xxiii)

A secret judicial inquiry reviewed the evidence of preliminary enquiries to assess whether it justified a criminal accusation. If so, the judges interrogated the accused to secure a "free" confession. Where it considered evidence to be overwhelming, and where an accused refused to confess guilt, the court could resort to torture, "in order to extract confessions and both rack and thumbscrew were in use" (Fine, 1991, p. 216). Although the British occupiers neither condoned this practice, nor indeed the tortuous deaths at certain public executions (the first civil governor Macartney abolished torture in 1797), the accused's "free confession" continued to be seen as important to justify findings of guilt (Ross, 1993, p. 164). The fiscal presented the case as a criminal "claim and conclusion" to the court. Behind closed doors, and in the manner of a committee, nine judges decided on the validity of the fiscal's conclusions and their judgment was read out in public before any public execution of its punishments (Botha, 1915).

Several political techniques were embedded in this criminal procedure; through them judges privileged, and sought legitimacy for, their truths about particular crimes and criminal punishments. At base, inquisitorial criminal procedures rested on legally demanded confessions (Worden & Groenewald, 2005, p. xxiv). Like its ecclesial cousin, legal confession rendered subjective perceptions available to designated legal authorities who heard, interpreted, shaped, and reframed witnesses' verbal depositions and information regarding purported crimes (Hepworth & Turner, 1982; Pavlich, 1996). It required participants to account for themselves and others in given criminal events, and—as noted—obligated accused subjects "freely" to confess their culpability in efforts to attach juridical guilt. Silence implied wrongdoing and could attract penalties of its own (Fine, 1991). Following confessions, techniques of transcription translated verbally articulated accounts into written depositions and assembled these as legal statements of fact. Depositions typically assumed a scripted form; they described the deponent through socially imagined notions of personhood, relaying his or her part in a criminal event (offender, victim, witnesses, etc.) before honing in on information the judges considered relevant to the case (Worden & Groenewald, 2005). Once "verified," this evidence served as a textual archive for subsequent legal discussion, argument, and assertion of fact. By creating these transcriptions, sovereign representatives converted oral

claims into handwritten legal narratives and condensed complex life events into law's privileged statements of truth.

The prosecuting fiscal's (or landdrost's) claim and conclusion was drafted on the strength of these transcriptions and included sentencing recommendations for the court's consideration (see Worden & Groenewald, 2005). The claim typically identified categories of persons involved in an event, formulated a more or less chronological account of events leading to a crime, pointed to the evidence of witnesses as enunciated through legal investigations, and morally condemned the criminal act under consideration in the name of justice and the sovereign. It was supposed to proceed on logical grounds, moving from the premises of verified testimonies, and assembling these into a legal logic that allegedly pointed to the accused's guilt, with a recommendation for punishment that preserved the sovereign's order and deterred crime (see Pavlich, 2011). A summary of the case was read out at the Cape Castle, and punishments were usually carried out in public, often in spectacular fashion to impress on the inhabitants' minds the might of the law as a warning and deterrent not to commit crime.

Cape law also fashioned its knowledge of crime and criminals through gatekeeping functions that either refused or ushered subjects into what anachronistically may be called its criminal justice arena; namely, multiple techniques for accusing subjects of criminal acts. Local knowledge of a crime rested on its being reported and conceived as such, relying on subjects' socio-cultural perceptions that a crime had taken place. Penn's slightly earlier account of how Droster gangs came to be criminalized illustrates how people, "who were eyewitnesses to, or participants in, [. . . a] crime, and who were later captured and questioned, had to convince their interrogators of their innocence" (1999, p. 158). One might here refer to a "lore" and local politics that enabled a criminal accusation to attain sufficient credibility in context so as to lead to the arrest of given persons (Pavlich, 2007). Accusations emerged, that is, in social and cultural contexts where claims, and often counterclaims, about an accused's involvement in a crime were proffered. Cape law, as noted above, left final decisions on whether to arrest an accused to court members. Serving as gatekeepers, these judges relied on confessed and transcribed testimony—together with their discretionary sense of crime—to open or close law's criminal processes and force to particular accused persons. Once accused and arrested, several immediate techniques focused on redefining persons as the bare subjects of law. Most importantly, in the criminal justice arena, complex techniques of depersonalization reduced everyday identities to the status of criminal; previously held notions of persons were stripped to the status of "prisoner," exposing them directly to law's procedures and force. In other words, varied depersonalizing techniques followed from the judges' initial description of categories to persons (e.g., "slave," "Burgher," etc.); elements of that ascribed personhood were stripped away with processes that rendered the accused as "prisoners"

and then as guilty and punished "criminals." But, despite the uniform language, as we shall see, different depersonalizing techniques were reserved for different categories of persons of the social hierarchy that defined Cape frames of reference (Lester, 2001; Ross, 1999, 1993).

In sum, legal techniques of confession, transcription, accusation, and depersonalization provided key modalities of power through which Cape law entrenched its exclusive claim to enunciate the truth about particular criminal events. Backed by visible violence, this law claimed a unique ability to define not only the truth in specific cases but to do so with reference to a broader understanding of how justice might arrest criminality in the name of particular sovereigns. Its power was thus indissolubly tied to a broader discourse on crime, criminals, and punishment, the rudiments of which are available from archived judicial correspondence that enunciated the court's view plainly and from court records that summarize—in the official legal parlance of the day—juridical decisions in specific cases. Although I have reviewed records of cases for some 85 accused subjects from 1795 to 1803 (Western Province Archives and Records Service [WCARS], CJ series),² the next section will focus on two selected cases to tap into the local knowledge at hand.

Cape Law's Enunciated Knowledge: Crime, Criminals, and Punishment

What concepts of crime, criminals, and punishment did Cape juridical knowledge use around the turn of the 19th century? Cape judges' lattices of understanding are well reflected in the summary records of two cases where different punishments were prescribed for the crime of stabbing another person to death. Although different in some respects, each case involved a death caused by two legally comparable actions. In the first, we encounter the court's summary of events that took place on January 9, 1800 (CJ 798#131, WCARS). The record depicts the accused as a man "aged about 30 years," as "Jasmyn of Bourbon slave of the Leendert Hagenbrock," and as a "criminal in the Town's jail" who had "freely confessed before the Court of Justice." In October of the previous year, Jasmyn quarreled with a "Hottentot women named Sabina," with whom he had cohabited for a "considerable time," and who was also "in the employ of the said Hagenbrock." He had suspected her of having an "intimate relationship" with their "master" and "employer," referred to as a member "of the Protestant church in the district of Waveren." Having distinguished the persons with reference to social hierarchies then envisaged, the legal summary goes on to describe the crime.

In response to an argument between the accused and Sabina, Hagenbrock asked him pointedly, "What is there now Stirring again?" When he did not receive a reply, he interpreted the silence as marked disobedience and went to fetch a "bamboo cane." After repeating his demand to know the "cause of the dispute," with Jasmyn again refusing to

respond, Hagenbrock “gave the same a few strokes on his back.” Seemingly enraged by the situation, the

Prisoner on receiving the blows, immediately laid hold of his said Master by the hair, extended him on the floor and took a knife with which he gave him several Stabs, whereupon his Master struggling with him and the latter crying out O God!

He also then apparently confronted Sabina and stabbed her in the arm before repeatedly stabbing Hagenbrock and making his escape. We are told that Hagenbrock had “the knife in his back yet out of which it could not be drawn without great pains.” The “Sufferer died at the same instant” as the knife was withdrawn and “the overseer of the district and other witnesses” observed several wounds responsible for his death. The record also notes that Jasmyn hid out for 5 days before being captured. In its summation, the Court of Justice denounced the prisoner’s acts in no uncertain terms:

... such horrid transgressions can never be tolerated and remain unpunished, without rendering Justice almost equally criminal, and ... such action, must be equivalently corrected and the punishment of the same serve as a Notorious Example to others.

Noting the purportedly “free confession” of the prisoner, the Court found the “prisoner” guilty in its pursuit of “justice in the name of His Brittanic Majesty.” It thus condemned,

... said Prisoner Jasmyn of Bourbon, to be brought to the place of public Execution there to be delivered to the Executioner and hanged until death ensueth, and, his body being dragged to the place where the corpses of criminals are deposed, the body to be fixed to the gallows that is there a prey to the Birds and Air untill it shall be consumed by the same condemning moreover the criminal in the costs of this cause.

This record may be compared with another case a month later in February 1800 (though it was heard eventually by the Court on January 19, 1801—see CJ 799 #218, WCARS). It describes the accused as a 49-year-old “Burgher” by the name of Gerrit Bezuidenhout Cornlisse, living in a room on a Swellendam farm owned by a “farmer” who employed both the accused and the victim. The report notes that he “has partly freely confessed” but also claims to rely on what “the rest of the Documents of his Trial evidenced.” The basic events are described as follows:

the prisoner who occupied a room in the House of a Farmer ... Got into a quarrel with a white servant called Willem Drure belonging to the said place, which contest grew so violent that they having laid hold of one another, they did not part Except by the Interference of a Hottentot Platje, who heard the noise and approached.

Drure left the house with Platje, but they noticed that the “delinquent” Bezuidenhout was in pursuit and that

the delinquent, who at the departure of . . . Drure had pulled off his shirt and Breeches and drawn in a treacherous manner Stabbed him in the lower part of the Stomach and the wounded endeavouring to make his escape after this fact had been committed, fell at a distance a few paces, and expired a few moments after.

Subsequently, the

veld Cornet of the District Johannes Nel Willemz: and the Burghers Lourens Breedebach and Andries La Grange having been informed of the action arrived at the place of Breedebach the ensuing day, and having examined the Corps, perceives that the Deceased ... Drure have [sic] been Stabbed with a knife in the hollow part of his stomach.

The accused was interrogated and indicated that he had “only intended to give the deceased a cut and not to kill him,” and expressed remorse over the actions he had “partly confessed” to having committed.

Ascribing categories of personhood to people involved in the crime (the accused and prisoner, the victim, various witnesses), the record also reflects the abolition of torture a few years earlier, allowing a finding of guilt despite the accused’s “partial,” rather than “free,” confession. The court denounced his actions stating that “whereas such crimes deserve rigorous punishment both for correcting the prisoners themselves and deterring others.” Consequently, it endorsed the landdrost’s claim and conclusion in the following idiom:

It is therefore that the court of justice having duly considered the accusation and defense and the Criminal Charge that has been lodged against the malefactor by the Landrost of Swellendam . . . do in the Name and on behalf of his Brittanic Majesty condemn . . . the prisoner . . . to be lead to the Scaffold and being delivered to the Executioner that the same shall place him underneath the Gallows with a halter round his neck for the view of the public, after which, he received a prisoner shall be tied to a Stake, received a Severe Flogging and a mark on his day back with a red hot Iron, and be banished from this Colony for life.

Cases such as these offer unique glimpses into the practices of Cape law directed to crime at the time and to its assumed truths about criminality. They betray how members of the courts understood crime, criminal persons, punishment, and how Cape law sought to defend a sovereignly sanctioned and hierarchical social order. Its discourse ascribed stratified images of personhood to offenders and framed its images of crime and punishment in relation to that order.

Regarding its truths about “crime,” the judges’ discourse adopted a rather specific, contextually framed approach. That much is clear from the way Jasmyn’s silence was framed as punishable disobedience whereas Hagenbrock’s vicious assault may have been noted but escaped any further legal attention. At the Cape, criminal acts were defined in the

absence of “criminal codes”; but those that I reviewed generally echoed Fine’s (1991, pp. 329-330) catalog of crimes for 1806-1827, suggesting that law targeted such “crimes” as murder, assault, treason, rape, housebreaking, theft, robbery, and so on. However, these crimes were neither uniformly, nor consistently, named. As noted in the findings of a later (1827) Commission of Inquiry into criminal law and jurisprudence at the Cape, the judges had in the past tended to privilege ancient Roman codes and procedures when defining crime, offering secondary reference to Dutch jurists and local Cape ordinances, proclamations, and so on. Consequently, it found that “recourse has been more frequently been made in the definition and punishment of crime to the enactment of the Roman Code than to those of the Provinces of Holland or even local statutes” (in Fine, 1991, p. 330).

In turn, this focus on Roman law tended to steer them toward the criminalization of action for which capital punishments could be inflicted (see Robinson, 1995), and these tended to be directed in defense of a putative social order, because “law was used to maintain the social structure of the Cape Colony . . .” (Ross, 1993, p. 156). In particular, judges sometimes followed classifications of crime in the work of jurists Simon van Leeuwen and Johannes van der Linden, who had interpreted Roman law for Dutch contexts (in Fine, 1991). The commissioners noted, however, that these jurists’ definitions were at best vague and general, the upshot of which was to grant Cape judges “great latitude in the application of the law as well as of punishment” (Fine, 1991, p. 330).

Consequently, the judges were granted discretion to decide whether a specific action should be defined as crime, and tended to resort to moral demarcations of crime as something to be denounced in order to preserve law’s justice, the social order, or sovereign power (Penn, 1999). Their prescriptive idioms are evident in the cases discussed above, involving variations on a moral theme evident in the case summaries. For example, randomly referring to other cases around the time of the first occupation, one will likely find versions of statements such as

. . . and whereas such crimes can never remain unpunished in a country where the right of Justice is directed by the hand of equity, but on the contrary severe punishment ought to send as a mirror for detaining others from such unlawful proceedings & a just correction to the offender (CJ 797 #245, 1797, WCARS);

And whereas such roguery cannot escape a punishment which Justice dictates both in regard of the malefactor and for deterring the publick from the life of crimes . . . (CJ 799 #324, 1801, WCARS);

and whereas such Crimes cannot be tollerated in a Country that is Governed by Justice, but should be punished, in order to correct the perpetuate and give an example to the publick. (CJ 799 #304, 1797, WCARS)

These prescriptive moral statements conjured images of “justice” in opposition to intolerable crimes that challenged the sovereign’s social order and “right of justice.” In short, crime challenged justice, social hierarchy, and good governance, and had to be punished to avoid its reoccurrence.

At the same time, despite their reference to the “hand of equity,” the judges did not consider comparable crimes, such as murder, to be equally “atrocious.” They said as much in their terse response to the military commander of the occupying British force Major-General Craig (see Theal, 1897, Vol. 1, pp. 299-309, 320-324). In a letter dated January 7, 1796, he had asked them to consider abandoning the practice of torturing “Blacks” (taken by the judges to mean “slaves”) through gradual death at public executions. The judges’ reply is revealing: They refused Craig’s request on the grounds that gradations of punishment were essential to criminal justice in a context where diverse inhabitants co-existed in a social hierarchy (see Pavlich, 2011, 2013; Ross, 1993). Such punishment had to reflect the “atrociousness” of particular crimes, which they defined through various “particulars,” including motive, premeditation, the number of offenses committed at a given event, location, the persons involved, and so on. Thus, from their vantage, a theft committed in the veld was considered less serious than one that took place in a settler’s private home, just as a crime of passion was less “atrocious” than a planned offense. However, they reserved special emphasis for one “particular”; namely, the “distinction of persons” involved in crimes—hence, for them, the crime of a “slave” killing a “master” was far more serious than vice versa, or a “slave” killing another “slave” or a so-called “Hottentot.” Such an emphasis reflected their concern with preserving the Cape’s social hierarchy to the point that they viewed the atrocity of crime less within an act per se and more by the extent to which it challenged the status quo. In other words, the seriousness of crimes, and its proportionate punishment, was explicitly defined with an eye to preserving the Cape’s unequal socio-economic and political arrangements.

Within this schema, the judges conceived of “criminals” as exhibiting degrees of moral deficiency and, hence, the morally charged denunciations and “condemnation” of accused “prisoners” to harsh punishments. Paralleling their hierarchical concepts of crime, the judges distinguished clearly between categories of persons accused of offenses (“slave,” “Hottentot,” “Burgher,” “European,” etc.). They also ascribed other social markers to persons (age, occupation, employer or “owner,” position in a religious institution, and so on), but the case records consistently reflect the former as primary identities assigned to persons at the beginning of case records. They reflected the court’s view of the Cape social hierarchy; “distinctions of person” placed specific criminals and victims within social strata, and were used to determine how seriously their crimes challenged the order and to calculate what legal force to apply in given circumstances.

With traces of European debates of the time, the court of justice emphasized such “distinctions” of persons because of the diverse makeup of Cape inhabitants who had come from variable “geographies” and “climates,” with different socio-political habits that their “nations” imparted (Theal, 1897, Vol. 1, p. 304ff). For them, different persons revealed variable: levels of social advancement, capacities for moral education, perceptions of pain, and aptitudes to conform to the social order (Bindman, 2002; Elphick, 2012; and Patterson, 1997). A particular prejudice was reserved for the category of “slaves” who were described as heralding from “wild and rude nations” that “hardly considered the privation of Life as a punishment, unless accompanied by such cruel circumstances as greatly aggravate their bodily Sufferings” (Theal, 1897, Vol. 1, p. 304). From this bigoted assumptive framework, the court described Jasmyn as an unforthcoming “slave” man who brutally stabbed his “master” many times, then Sabina, before running out and hiding away rather than facing the consequences. By contrast, Bezuidenhout, assigned to the category of “Burgher,” was described as a “delinquent,” but nevertheless as one who proved himself capable of remorse over his actions, signaling an ability to reason morally. The relative ascription of these accused persons to categories in different strata within a social hierarchy significantly determined how judges perceived the relative seriousness of their legally comparable murders. As such, the depersonalizations and kinds of punishment directed to variously conceived criminal persons were marked by difference.

The judges viewed punishment as a way of engendering fear into the hearts and minds of the public through massive public spectacles, and as a way of correcting, or deterring would-be, lawbreakers. However, they argued that depending on the status of persons who committed crimes, and on whom they were committed, gradations of punishments had to be modulated for maximal effect on the deterrence of different categories of person. This is why in the above two cases, different punishments were imposed on the “Burgher” (Bezuidenhout) and the “slave” (Jasmyn) for the crime of stabbing another to death. That is, the juridical approach was different in each instance: Bezuidenhout’s public punishment required him to place his head in a noose, receive a severe lashing, and have a “red hot iron” mark etched onto the surface of his body before banishing him from the colony. This ordeal included elements of sovereignty vengeance and carried a public deterrence message, but it was also explicitly framed as a means of correcting the “delinquent,” before sending him out of the colony. By contrast, Jasmyn’s punishment involved a spectacular display of law and sovereign might with his hanged body “dragged to the place where corpses of criminals are deposited,” with the further humiliation of a post-mortem spectacle that attached his rotting corpse to the gallows, thus providing fodder for birds. Here, the intensity of law’s force was projected beyond his death in attempts to make an enduring public statement about little more than sovereign might. No thought was entertained for

his possible remorse or “correction.” Such differential sentences flowed from the different categories of personhood, respectively, ascribed to each at the outset of the case.

To summarize, our discussion to this point indicates how political technologies of criminal procedure at the Cape created privileged “modalities” for the enunciation of truths about crime, criminals, and punishment to defend a sovereignly sanctioned hierarchical order. Its legal techniques required subjects to confess recollections of events to sovereign agents in specified inquisitorial forums; licensed sovereign representatives to enquire about and transcribe criminal events through legal idioms that framed the fiscal’s claim and conclusion; developed gatekeeping mechanisms via the accusation of specific individuals and categories of persons; and enabled unequal forms of depersonalization for those convicted of committing crimes. In turn, these technologies authorized truths about criminality, projected through a judicial prism that filtered stratified “distinctions of person” into an imagined hierarchy of Cape inhabitants. Focused on the “atrocities” of a criminal act, the court of justice weaved its understandings of crime, criminals, and punishment around such hierarchical distinctions. Together, juridical procedures and knowledge frameworks (the power-knowledge in context—Foucault, 1980) implied different, but connected, political logics that allowed considerable juridical discretion in defining and punishing criminals unequally for challenging the status quo.

Reflecting on the Political Logics of Cape Criminal Law

Considered as indissolubly connected with one another (Foucault, 1980, 2000), Cape power-knowledge formations framed official crime-focused law. They also implied a broader colonial political logic that aimed at extending British sovereignty over the colony, asserting its exclusive claims to law and justice in context. This discourse was situated within a confluence of three influential political logics (Foucault, 2000) that were combined in various ways in concerted efforts to rule the Cape colony.

First, most plainly, one detects the logic of spectacular, morally framed, and vengeance-based notions of punishment inflicted on bodies and designed to avenge the sovereign (Foucault, 1979) through inquiry-based legal forms (Foucault, 2000). Embracing medieval, even Roman, political rationalities where law appeared as a mechanism to preserve a *de facto* social hierarchy in the name of a ruler, Cape judges pronounced criminals as moral malefactors who had through their offenses affronted a sovereign. Executing justice secretly through detailed investigations, its contrasting public ordeals offered stark and brutal retribution in spectacular demonstrations of a sovereign’s might. Law’s claim to a monopoly on sovereign violence indicated a foundational role in colonial versions of sovereignty politics that claimed an exclusive right to the death of its subjects from

whom it demanded absolute obedience. As seen above, judges representing the sovereign convened investigations that relied on confession to provide raw material for transcriptions of legal evidence—the latter narrated crimes as an attack on the sovereign body by accused criminal persons, variously positioned on an imagined social hierarchy. Using law to defend that social hierarchy, judges dispensed its force with different degrees of intensity, mostly through spectacular public punishments designed to mirror the “atrociousness” of specific crimes. Part of a sovereignty-orientated political logic, crime-focused law narrated itself as a way of exacting sovereign revenge and sending deterrence messages to a broader populace as warnings not to transgress the Cape’s unequal social arrangements. In this role, as argued elsewhere (Pavlich, 2011), the law was not so much a creature of the sovereign as the latter’s creator—through legal power-knowledge relations that recursively claimed to operate in the name of the sovereign, Cape criminal law, in part, authorized and authored the sovereign in context. To be sure, this was not the only way the sovereign was so authored, but it was an important mechanism in context (Comaroff, 1998).

Second, interspersed in the case narratives discussed above, one may identify traces of an emerging disciplinary approach. Soon after the occupation, local British rulers recognized the value of molding individual intentions and actions away from inhabitants’ previous allegiances to the Dutch East India Company’s rule and toward British authority. Hence, one of the early proclamations issued by the commandant Craig (Theal, 1897, Vol. 1, p. 193), and repeated by the first civilian governor Macartney, required “inhabitants” to swear allegiance to the new British sovereign (Naude, 1950, p. 4). Through rituals of individual oath taking among settlers, attempts were made to shape individual commitments of mind and action. As such, via measures to remove trade restrictions, concerns about currency, taxation burdens, and so on, the incoming rulers tried to shape the thoughts and comportment of inhabitants through disciplinary carrots and sticks. Craig also tried to convince inhabitants not to accept the agitation of “evil minded persons” intent of sowing rebellion and discontent by issuing a proclamation warning that farms would be confiscated from dissenters, but rewards given to those who assisted in stamping out dissent (Theal, 1897, Vol. 1, pp. 341-344).

Disciplinary technologies were also present in military and nascent police functions at the Cape (Giliomee & Mbenga, 2007), as well as the implementation of tighter regulations for fire wardens (Theal, 1897, vol 1, p. 147). The broader disciplinary intent of Craig’s approach was reflected in a letter to Dundas (to whom he reported in Imperial Britain) on March 6, 1796. Craig realistically pointed out that “we have very few friends in the Settlement,” but he also hoped “in time we may bring them to a more favourable way of thinking with respect to His Majesty’s government” (Theal, 1897, Vol. 1, p. 336). Furthermore, in a quest to nurture favorable “thinking,” he observed, “I am persuaded that

we owe their obedience solely to their inability to resist the force here,” adding that disobedience could be expected if a “greater force” emerged. As a result, Craig offered this candid assessment: “I feel it my duty Sir . . . to exert my best endeavours to conciliate individuals, and to direct the concerns of the Civil Government in the manner most likely to give general satisfaction to the community” (Theal, 1897, vol 1, p. 336).

His attempts to “conciliate” the local elite by shaping their individual attitudes and behavior in favor of the new sovereign included various disciplinary techniques, ranging from local threats, fines, and coercion to economic, civil, and social enticements.

If Craig’s approach implied the importance he attached to encouraging individual settlers to support British sovereignty, political technologies of discipline (Foucault, 1979, 2000) were not yet widely institutionalized—especially in criminal justice arenas. But, traces of disciplinary punishment were evident in the way juridical discourse did at times seek to correct individual criminals (delinquents). The court also attached importance to punishments calculated in direct proportion to the “atrociousness” that they ascribed to particular criminal acts. But, its definitions of atrociousness incorporated visions of a sovereign hierarchy, thus yielding a particular, colonial inflection to Cape discipline—it reserved modicums of disciplinary punishments for subjects deemed capable of moral education, usually located at the upper ends of their imagined hierarchy. Those considered not yet capable of such education and correction continued to face the might of vengeance-based punishment. Thus, disciplinary techniques in the Cape criminal justice field were largely reserved for settlers and “Europeans”; far less so for strata designated as “Hottentots” and “slaves,” and so on, for whom spectacularly violent sovereign approaches prevailed (Ross, 1999).

This difference is evident from the Bezuidenhout’s case that referenced the accused’s intention (not to kill, for example, but only to “cut”), an individual “delinquent’s” acceptance of responsibility and remorse for the criminal act, and a call for “rigorous punishment” as a way of “correcting the prisoners themselves and deterring others.” Jasmyn’s intentions, or indeed his capacity for moral feelings of remorse, are by contrast entirely omitted from the record. This omission reflected the judges’ presumption that “slaves” had “inured” or hardened bodies that were not yet at a stage of development amenable to disciplinary correction. Quite extraordinarily, given the vastly different contexts, they unequivocally endorsed the idea that Roman law’s conceptions of slaves should be applied to the Cape:

Slaves were considered by the Romans to be Creatures, and from their enured bodies and their rude and uncultivated habits of thinking are much more difficult to correct and deter from doing evil, than others, who from better education and better habits measure the degree of punishment by the internal feelings rather than bodily pain . . . (Theal, 1897, Vol. 1, p. 304)

From such prejudiced preconceptions, the judges disqualified “slaves” from disciplinary models of power, which they reserved for those who (they imagined) might recognize punishment through “internal feelings” and who could be corrected because of their “civilized” habits. Revenge-based legal violence directed to hurting bodies was regarded as an indispensable punishment for those with “rude and uncultivated habits” with “inured” bodies. At best, the judges advocated a paternal approach to slavery that encouraged owners to act more as “fathers” than “judges” when dealing with slaves—suggesting a potential site for “humane” disciplinary techniques, but they felt the time was not yet right for such basic reforms (Theal, 1897, Vol. 1, p. 309).

So, Cape law’s sovereign vengeance directed itself most harshly to “slave” bodies (Ross, 1993) and reserved nascent disciplinary powers mainly for settlers (especially at the pinnacle of its imagined hierarchies). Its overall knowledge of crime and punishment was premised on categories of person ascribed to strata within an imagined social hierarchy. And here, Cape law embraced another political model implied by the judges’ emphasis on “distinctions of persons” (rather than morally wayward malefactors or delinquent individuals) to calculations of criminal atrocity and punishment; namely, the political logic of “an apparatus of governmentality” or a “biopolitics” that sought to regulate living “inhabitants” or populations (Foucault, 2008, pp. 22, 70). Although beyond the scope of the present article, to detail key debates on biopolitics (Foucault, 1978; but see Esposito, 2008; Lemke, 2011), one may at least point to a series of technologies used to manage and govern groups of persons as populations—or as more frequently referenced in Cape discourses, “inhabitants.” Ruling in this fashion signaled a shift away from death-orientated sovereignty politics:

Biopolitics is not the expression of a sovereign will but aims at the administration and regulation of life processes on the level of populations. It focuses on living beings rather than on legal subjects – or, to be more precise, it deals with legal subjects that are at the same time living beings. (Lemke, 2011, p. 4)

Lemke’s qualification is important as it allows one to conceptualize a politics of Cape law that targeted different categories of person for differential forms of regulation, including the management of living beings categorized as existing at various stages of development and framed through legal “distinctions of person.”

Cape categorizations of persons were no doubt akin to versions of apartheid’s later reliance on distinctive “nations” with particular “cultures” (Louw, 2004, pp. 27-30), or its class generated biological or racial inflections; but it did not explicitly reference race or biology. Perhaps, this is not surprising given that biology and race were less than stable concepts in 18th century legal and political parlance (see Bindman, 2002). European debates around race, for instance, had appeared—especially in response to Kant’s discussion

on the topic—only after 1775 where commentators agreed that there was one human species, but within that umbrella, different “nations” had emerged because of historical contingencies of geography, climate, habit, and so on (Johnson, 2012; Patterson, 1997). Even so, traces of managing through “groups” were enunciated clearly enough through Cape law with its judges’ attempts to calibrate the amount of legal force to apply to different categories of person. The lives of different kinds of person were understood in relation to their purported “civilized,” or “rude” background in “nations” that fostered specific habits (Bindman, 2002; Elphick, 2012). Here, one sees how Cape law at the turn of the 19th century opened to different ways of governing variously conceived categories of person, and thereby laid foundations for the group-based governance that inflected apartheid and post-colonial states.

The nascent formation of biopolitics signaled by Cape law’s emphasis on distinctions of person was part of a wider discursive shift that increasingly managed the affairs of the colony’s inhabitants in new ways. Craig had insisted that “it has been my most assiduous care by everything in my power to promote the Welfare and Prosperity of the Inhabitants” (Theal, 1897, Vol. 1, p. 193) and showed the importance of managing the supply of grain for that purpose. Governor Macartney’s, Francis Dundas, issued a proclamation on January 8, 1799, noting that

Whereas the increased Population of the Cape Town appears to require a more extended police for the purpose of more effectually maintaining that degree of good order and tranquility which constitute the general security and happiness of the peaceable and industrious members of the community, I have judged it expedient to . . . re-establish the division of the Town into 25 wards . . . (Theal, 1897, Vol. 2, p. 336)

Echoing this concern with governing populations, a subsequent governor, George Yonge, addressed a proclamation to the “encreasing population of this colony” that sought to manage and regulate the supply of butcher’s meat for local consumption (Theal, 1987, Vol. 3, p. 194). Colonial rule through such governance did not reduce criminal law’s importance; rather, that law was at times required to target living beings in populations and to work with living subjects whose behavior was contoured by limits imposed on the “types” (categories) of persons they were understood to have represented in the population. One might say such law increasingly recognized “life everywhere it exceeds the juridical constraint used to trap it” and so turned from “the transcendental level of codes and sanctions that is essentially have to do with subjects of will” to a realm that increasingly targeted “men as living bodies” (Esposito, 2008, p. 28).

In this scheme, judges placed emphasis on how to distinguish the lives of persons to target law’s processes variably and adjust its force through measures deemed appropriate to degrees of “civilization” or “savageness.” Thus, George

Yonge reported that the “rude uncultivated state of the Caffres, Hottentots, Boschiesmen, and other Wild Tribes” had been contained by British governance “measures” yielding “very Considerable Effects on the civilization of these people,” such that they now looked to the government for “protection” and justice for “Security” (Theal, 1897, Vol. 3, p. 368). He continued,

Justice Is the only true bond of Society . . . There is no Doubt that the Idea of Firmness and Power of Government, and at the same time Its Justice and Moderation have been the chief means of effecting the present Tranquility. (Theal, 1897, p. 368)

At this confluence in Cape Colonial history, one senses then that vestiges of a medieval sovereign, together with emerging disciplinary models of power, persisted; but both were increasingly drawn into political horizons concerned with governing and managing stratified lives. Others have alluded to the effects of sovereignty-biopolitics alliances in Europe and elsewhere (e.g., Esposito, 2008), but the Cape instance adds elements to the discussion. Not only was its law crucially involved—through technologies, rituals, and knowledge—in authoring and authorizing emerging images of the colonial sovereign, it also helped to create and sustain hierarchies of persons anchored to differences attributed to specific populations within an existing social order. One might here note resonances of apartheid law’s later attempts to define an order through racial categories in the *Population Registration Act of 1950*, continuing the pivotal role that law, and especially criminal law, has played in entrenching biopolitical forms of sovereignty.

In short, the varied alignments and disarticulations between the models of power-knowledge within Cape criminal law and justice played a decisive role in ongoing attempts to extend British sovereignty over the occupied colony. By upholding attachments to such political rationalities, British rule still relied on coercive powers of the spectacle—especially directed at “slaves” (Ross, 1993)—but simultaneously deployed disciplinary powers directed at correcting settler delinquents and developed a biopolitics that managed the inhabitant population according to locally imagined distinctions of person. The combined and hybrid effects of these logics framed Cape criminal law’s discourses on crime, criminals, and punishment, and placed law as a pivot in the defense of a social order in the name of a Britannic sovereign. In my view, such political logics continue to shape and influence the vastly expanded criminal justice arenas of the post-colony, but this contention is not without its detractors.

Conclusion: A Post-Foucauldian Post-Colony?

By way of a conclusion, one might speculate on how, or if, hybrid and changing colonial amalgams of these political logics have contoured expanded post-colonial criminal justice

empires. Various analysts point out that current (post-colonial) criminal justice processes reflect elements of these colonial logics more or less explicitly by contouring new social orders within dispersed sovereignty politics formed around crime (Simon, 2007); working out very different ways of rendering subjects available to surveillance and discipline in “cultures of control” (Garland, 2002); and disproportionately targeting groups of persons for unequal measures of law’s force (Simon & Sparks, 2013), or indeed for the biopolitically framed images of “criminal animals” (Pandian, 2008). Others argue, by contrast, that post-colonial power has all but transcended Foucaultian schemes, as Comaroff and Comaroff (2006) claim in respect of contemporary South Africa. They argue that state “mediated representations” of crime’s horrors, and stories of law and order, are omniscient in post-colonial culture—in rumor, crime (detective) fiction, crime documentaries, TV dramas, “Hollywood horror or high drama,” museums, and so on. These representations are so pervasive as to have effected radically novel “post-colonial” and “post-Foucauldian” forms of sovereignty; post-colonial states and sovereigns are imagined through altered representations—and ways of representing—centered on an obsession with crime and stories of criminal justice (2006, p. 279).

Against Foucault, who, for them, held the “panopticon, rather than the theatre” as the key to modern power, Comaroff and Comaroff argue that novel, fantastic spectacles have appeared in new ways to provide theaters of crime and justice through which post-colonial state sovereignty is conceived beyond Foucault’s carceral horizons (2006, p. 274); “theatre and fantasy” are now central to state forms and “integral to the workday routines of policing itself” (2006, p. 274). As such, they argue, Foucault’s claims about modern power moving from the spectacle to ramified disciplinary powers no longer hold because in “post-Foucauldian,” post-colonial states, an incipient “disorder” exceeds,

the capacity of the state to discipline or punish. It is a predicament in which both those who would wield power and their putative subjects find it necessary to resort to drama and fantasy to conjure up visible means of governance. (2006, p. 292)

Does this mean that the previously described political logics contouring crime-focused law at the Cape circa 1795 have been radically overshadowed by post-colonial states?

Of course, one might well agree with Comaroff and Comaroff’s (2006) findings that post-colonial discourses on crime, criminals, and punishment play drastically different roles in post-colonial sovereignty formations. Equally, Mbembe (2005) indicates how the post-colony has brought about “a decisive change in the paradigms and imaginaries of power, politics and conflict” (p. 166). He also refers to the notion that political developments have not developed along a linear path, but rather that “political transformation in Africa has proceeded along various trajectories” (2005, p. 166). To be sure, the post-colony certainly references

different power-knowledge techniques to imagine relations between sovereignty and crime, criminals, or punishment (2006); even so, I do not see how these decisively eclipse the legacy of underlying settler-colonial political logics of sovereignty, discipline, and biopolitics (governmentality)—specific techniques and knowledge yes; but the underlying logics of sovereignty, discipline, and governmental biopolitics remain tenaciously influential. The latter continue, for example, to shape the “criminal obsessions” that frame the post-colonial state with its deathly criminalizing forces and use of discretionary criminal justice to legitimize dispersed sovereignty claims in the post-colony (Mbembe, 2006); the “ethos of a liberalizing state,” to which Comaroff and Comaroff refer, that deploys capillary-like cultural venues to “normalize” and discipline the thoughts and actions of individual subjects within post-colonial “cultures of control” (Garland, 2002); and indeed, the new ways by which corrective institutions “govern through crime” (Simon, 2007), including a biopoliticization of post-colonial theatrics in which “crime becomes racialized and race criminalized” (Comaroff & Comaroff, 2006, p. 276), and where “animalistic” groupings of criminals are unequally punished (Pandian, 2008). The shifting confluence between these logics—multiple forms of their hybridity—now appears decisive in shaping post-colonial politics; their complete transcendence may be for unknown futures.

My concluding brief then is decidedly not to mount a static defense of Foucault but rather to suggest that Comaroff and Comaroff’s (and to a lesser extent Mbembe’s, 2006) reading of the political logics at hand may be too chronological or sequential; they – in part at least - envisage modern disciplinary politics as breaking with sovereign theaters of spectacle and post-colonial political forms affecting a similar break from carceral power with a renewal of pre-modern theaters of spectacle—seemingly the basis of their “post-Foucauldian” reading. Despite some ambiguity, however, Foucault (2000) mostly alludes to concurrent, triangular arrangements of sovereignty-discipline-governmentality (see Golder & Fitzpatrick, 2009; Esposito, 2008). In so doing, he provides a schema with which to name, and distinguish between, colonial political logics that remain embedded in the shadows of post-colonial sovereignty-based political horizons. Those horizons, in bare form, continue to reflect specular displays of sovereign power, even if dispersed, while valuing supercharged surveillance and biometric technologies of governmentality to observe and correct individuals, while disproportionately targeting persons ascribed to biopolitical groups in efforts to defend new sovereigns and orders. From this vantage, the crime-focused sovereignty politics of post-colonies do not surface by overturning colonial power-knowledge formations; rather, they appear precisely through new combinations of colonial political logics alongside the rise of novel political technologies and knowledge forms. Even if singular discourses beyond crime, criminals, and punishment might eventually contour post-colonial horizons, it would be a

weighty omission to underestimate the tenacious legacy of colonial political rationalities within criminal justice arenas. Such rationalities incarnate a stubborn inheritance that crime-focused ventures in post-colonies routinely renounce but, so far, seem unable entirely to evade.

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2. The author wishes to acknowledge the helpful assistance of the Western Cape Archives and Records Service (WCARS) in securing access to these cases, to the Social Sciences and Humanities Research Council of Canada for providing supportive funding, and to Patrick McLane for his helpful research assistance.

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