

A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire

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The history of the legal profession has been dominated by Richard Abel's monopolization thesis, and by Terence C. Halliday and Lucien Karpik's political model of lawyers as maintainers of liberal politics. By contrast, Assaf Likhovski's legal history of mandate Palestine treats lawyers and judges as cultural intermediaries who shaped the legal identity of Jewish and Arab communities. This article situates Likhovski's book within a growing body of scholarship on non-European lawyering in the British Empire. It links Likhovski's case studies to legal figures from colonial India, West Africa, and Malaya, all of whom acted as cultural translators and ethnographic intermediaries in the formation of colonial identities.

INTRODUCTION

Until recently, the history of the legal profession fell more under the spell of the sociology of the professions than under the influence of historians. Led by Richard Abel, the sociological literature focused almost exclusively

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upon one theme: how professionalization in many times and places was characterized by the marginalization of underprivileged groups (by gender, race, or class) of *de facto* practitioners. The point of professionalization, according to this literature, was to concentrate status, income, and control in the hands of elite practitioners (see Reid 1981; Duman 1983b; Abel 1988; Paul 1991; Lemmings 2000). Pedigreed cultures and exclusionary systems of socialization accompanied the project (Cocks 1983; Pue 1991, 1995a, 1995b; Gross 2000, 22–46; Backhouse 2003). Above all, lawyers were businessmen.

A group of scholars led by Terence C. Halliday and Lucien Karpik have offered an alternative to the market-driven model of lawyering (Halliday and Karpik 1997). Proposing a political model, they highlight the role of lawyers as essential players in the rise of liberal, democratic values, and regimes (Ziadeh 1968, 77–98; Halliday and Karpik 1997; Karpik 1999a, 1999b; Scheingold 1999). The darker side of the story gets less attention. In the face of notable illiberal regimes, legal professionals wedded to procedural liberalism found their principles impotent (Ledford 1996). Other lawyers and judges were indispensable to the construction of legalistic ideologies for many such regimes (see Müller 1991, 68–81). Germany's run-up to the Third Reich receives some treatment in the Halliday and Karpik collection (see Ledford 1997), but the colonial context does not. Yet colonial settings like British India provide countless similar examples of lawyers and judges using legalism to prop up despotic rule (see Beaman 1890; Piggott 1930; Strangman 1931; Hayward Papers; Macleod Papers).¹

Another narrative with a political focus is one that prevails among nationalist historians writing on colonial settings. This tradition takes an exclusive interest in lawyers who went on to become anticolonial freedom fighters and leaders of the independent states that followed. The Indo-Pakistani nationalist schools of history provide a plethora of political biographies of South Asian lawyers in the context of their later political roles (see, e.g., Pershad and Suri c.1961; Srinivasan 1962; Nanda 1964; Allana 1967; Kamath 1989; Krishna 1996). Gandhi, Nehru, Ambedkar, and Jinnah were all London-trained barristers. This literature rushes through the lawyerly careers of these figures with a teleologist's impatience, often plunging into unabashed hagiography (see Pannoun 1976; Ahmad 1984, 21–32; Muhammad 1991, 60–88). The question of whether Gandhi or Jinnah was the better lawyer, for instance, matters to some authors not because they care about the history of lawyers *per se*. They are invested in the postcolonial competition between India and Pakistan, a battle that can take place in the pages of historical studies as much as along the Kashmiri border (see Ahmad 1987, 3).

1. The private papers of British judges in colonial India are notably rare. Two collections that do exist are the papers of Sir Maurice Hawyard (Bombay High Court judge, 1918–21) and Sir Norman Macleod (Chief Justice of Bombay, 1919–36). An ideological commitment to uphold the larger illiberal colonial regime pervades both collections in personal and professional contexts.

A new history of colonial lawyering takes issue with these approaches. First, it turns to colonial lawyers and judges who were not white, Anglo-Saxon, and Protestant (see, e.g., Oguamanam and Pue 2006). In the context of the British colonial world, histories that have not focused upon lawyers leading independence movements have generally been accounts of lawyers of Anglo stock abroad (Duman 1983a, 1983b; Chanock 1999; Kercher 1999, McQueen 1999; Pue 1999, 2001; Pue and Sugarman 2003, 293–399; Lemmings 2000, 203–47). Second, it adopts a particular focus within the “cultural turn” in the history of the legal professions (Pue and Sugarman 2003, 13–15). These mainly non-European figures are portrayed not as businessmen, bureaucrats, or freedom fighters but as intellectuals acting as cultural translators and ethnographic intermediaries.²

Legal professionals from colonized populations were intellectual middlemen who reconfigured colonized cultures for common-law use. Predictably, these recordings—whether forbidding conversion to a particular religion or defining the conditions of married life in contexts where the issue was undecided within a community—had to do with optimizing outcomes in specific disputes. But the legal ethnographic enterprise, by which I mean the judicially recognized account of the history and religio-cultural practices of colonized communities, was also a project of identity formation. The process moved through courtrooms, libraries, classrooms, and the offices of law firms, journals, and publishing houses from Accra on the West African coast to the Malayan port city of Penang.

Scholars are now rediscovering the thousands of colonial law reports and reviews, case papers, practitioners’ manuals, legal memoirs, and private papers across the British colonial world, and using them to explore the merging points between colonial law and the colonized legal figures who contributed to their creation. What may be described as the law-and-identity approach is gaining popularity among scholars of colonial societies (see Anderson 1996; Merry and Brenneis 2003). An alternate line of work has emphasized the more contingent and instrumental aspects of law. For scholars of forum-shopping, for example, law is a tool, and its use is more strategic, individual, and immediate than collective, long-term, or culturally meaningful (see, e.g., Benton 2002). By contrast, an identity-based approach has implicitly stressed the symbolic function of law. Law is a semiotic system that, among other things, reflects and reformulates ethnocultural identity (see Geertz 1983, 230–31; Rosen 2006). The new history of colonial lawyering brings the same lens to the legal profession.

Riding the crest of this wave is Assaf Likhovski’s *Law and Identity in Mandate Palestine* (2006), winner of the 2006 Shapiro Prize for the best book

2. Irish lawyers are an example of a European population under British colonial rule. For a non-academic history, see Quinn (2006).

on Israeli Studies. The work spends equal time on Muslim, Christian, and Jewish “Palestinian” legal players (adopting the author’s historically appropriate use of the term) as on their British WASP counterparts.³ Not far behind comes a chapter of Mary Jane Mossman’s *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (2006) on Cornelia Sorabji, one of the earliest South Asian female lawyers in the British colonial world (Mossman 2006, 191–237). These recent studies are framed by a cluster of works that contain flashes of an identity-based approach to the history of the legal profession (see Adewoye 1971, 1977; Strickland 1975; Kozłowski 1985; Price 1989; Anderson 1996; Merry 2000; Shamir 2000, 2001; Kugle 2001; Chatterjee 2002, 138–42; Brun 2003; Oguamanam and Pue 2006).

This article uses Likhovski’s book as a lookout point from which to assess this new terrain. The surge of law-and-identity work appearing in 2006 contains the latent formulation of a research agenda of great promise across the common-law world. I begin by considering how the new history may engage with existing literatures on lawyers, judges, and colonialism, proceeding to pair case studies from mandate Palestine with a series of studies of legal professionals from other British colonies in Asia and Africa. Together, these individuals and their work illuminate the range of legal identities being negotiated in the late colonial period. Through them, I want to see lawyers and judges from colonized populations as intellectuals engaged in the formation of legal portraits of communities to which they could claim—or try to claim as cultural “cousins” hailing from related communities—a closer relationship than could British lawyers and judges. Property, power, and privilege flowed from these portrayals, exerting continuing influence in many postcolonial jurisdictions today (see, e.g., Fyze 2005). I end by considering methodological challenges for law-and-identity work of this type and by identifying areas ripe for future research. A focus on South Asia will be apparent, not simply reflecting personal research interests, but also because, as multiethnic, multireligious Asian territories under British control, mandate Palestine and colonial India had much in common.⁴ The comparison is a favorite one among sociolegal scholars (see Krishnan and Galanter 2001; Likhovski 2006b, 27, 30–31; Barak-Erez 2007, 10–11).

3. Between 1917 and 1948, the territory that is now Israel was under British rule as part of the League of Nations’ mandate system. The area, which was formerly part of the Ottoman Empire, was called “mandate Palestine” during the period. Likhovski’s use of the term “Jewish Palestinian” is historically accurate, applying as it does to Jews living in mandate Palestine during the period.

4. The “Indianization” of statutory and Islamic law throughout British-run territories outside of South Asia (Sarbah 1909, viii; Salman 1981, 232; Strawson 1993, 13) is one factor linking the two territories, as is the potential prior South Asian experience of British legal officials stationed in mandate Palestine (see Likhovski 2006a, 56).

WHERE THE NEW HISTORY FITS IN

By focusing on law and identity, the new history distinguishes itself from monopolization, liberal, political, and nationalist schools of historiography. The story of increasing monopolization and exclusion by European lawyers does not hold for many colonial settings, particularly in the later colonial period in nonwhite settler colonies. In colonial India, the story was one of “the fall and rise” of South Asian legal professionals, at least at the level of the upper courts in urban centers (see Schmitthener 1968).⁵ “Native law officers” were officially abolished in 1864, by which time European legal Orientalists had translated and compiled a corpus of South Asian religious texts that allowed judges and lawyers to end their reliance on the officers, a group they distrusted (see Anderson 1996, 12–14; Ibbetson 1998, 17–42; Cohn 1996; Jain 2001, 581–83; Benton 2002, 39). From the 1870s on, South Asians began to appear in significant numbers as lawyers trained in the British tradition (as advocates, barristers, and solicitors) (see *Mistry c.* 1911, 73–76; Macgeagh and Sturgess 1949, 539–783; Gandhi 1982, 30–31). As already noted, lawyers in colonial settings more often than not bolstered despotic regimes through their day-to-day work. Gandhi’s plea to lawyers and judges to boycott the Indian courts suggests as much (Gandhi 2004, 205–07; Setalvad 1971, 41–43; Nariman 1978).⁶

The new history does not take an interest in colonial non-European lawyers because they would go on to become political leaders. The interest in lawyers *qua* lawyers uses an entirely different filter—one that takes an interest in the legal colonial universe quite apart from the independence-related narrative. Rather than filling the role of native informant (a position arguably occupied by the native law officers and authorities in South Asian religion and languages who assisted the legal Orientalists), these later legal professionals took on a role closer to the “native” anthropologists of the present day, a comparison I explore below.

This approach to colonial lawyering dovetails nicely with several bodies of work by anthropologists and historians of colonial settings. The first is the scholarship initiated by Bernard Cohn on colonial forms of knowledge in South Asia. Cohn and his followers have looked at the census and various types of governmental reports as works of colonial ethnography, in which state-sanctioned descriptions of colonized communities were developed by quantitative and qualitative means (Cohn 1987; Metcalf 1995, 113–59). But

5. In provincial courts and at the lower levels of urban legal circles, South Asians acted as legal intermediaries throughout the colonial period. See Schmitthener (1968, 349–55); and Jain (1990, 670–74).

6. On Sir Norman’s opposition to the movement, see *In re Jivanlal Varajray Desai and others* (1919); and letter from Norman Macleod to Torquil Macleod (Bombay, January 26, 1921) in “Letters from India” (third packet), 4A of Macleod Papers.

few have acknowledged that thousands of ethnographic studies were produced by colonial lawyers and judges in legal judgments, law review commentary, and textbook publications (for a rare exception, see Anderson 1996).

Another obvious engagement is between the new history of colonial lawyering and the history of colonial intermediaries (see, e.g., Lawrance, Osborn and Roberts 2006). In South Asian studies, this literature has focused upon trade and political alliances between Europeans and South Asians. From the late 1960s on, the Cambridge School took the view that in working with Europeans, Indian merchants, financiers, and functionaries were collaborators, emphasizing Indian culpability in the colonial enterprise (Seal 1968; Marshall 1976; Guha 1989, 290–305; Lal 2003, 196–98). What was teleologically implied was that this made Indians partly responsible for colonialism. The field became highly charged politically, provoking the formation of the Subaltern Studies collective (Guha 1982, vii–viii). The subalternists were mainly South Asian scholars in India and the United States who adopted a “from the ground up” approach and read sources produced by elites—both European and South Asian—“against the grain” to extract the subaltern story, restoring agency to subaltern players in South Asian history (Guha 1997).

The dichotomy between villainous collaborators or agency-wielding heroes is a recurring historiographical pattern across colonial contexts and one that has made it hard to draw nuanced conclusions about groups that fit into either category (see, e.g., Adewoye 1971; Gregory 1981). South Asian lawyers and judges could fall under either heading (see Guha 1982, 8), but both readings are problematic. The collaboration view ignores the complexities of South Asian communal identities and histories on an ethnoreligious, regional, caste, and linguistic basis. As in Afro-Atlantic slavery studies (see Koger 1985, 80–101; Thornton 1998, 72–73; Gomez 1998), it assumes that the racial binary between white and nonwhite overshadowed ethnoreligious and class differences from the outset. It also reads the alleged collaborator as driven purely by self-interest and the retrospectively imposed foreknowledge that full-blown colonialism was on its way.⁷

Subaltern studies, on the other hand, have offered a powerful and productive methodology—to look for primary sources, including oral ones, that offer a subaltern perspective (see Pandey 1984; Arnold 1994, 155–59; Amin 1995, 117–19) while undertaking against-the-grain readings of elite sources (see Guha 1983). Over the last few decades of the twentieth century, the broader turn toward resistance studies often fell into the trap of mistaking the restoration of the *perspective* of the oppressed, a methodological aim, for the restoration of agency itself—as a predetermined substantive one. In so doing, many scholars of resistance denied themselves the option of

7. Consider the fact that for territories that fell only temporarily under European control, there is no scholarly debate over collaboration. On European rule in the Persian Gulf island of Hormuz, for example, see Sykes (1915, 184–57) and Floor (2004, 473–74).

acknowledging powerlessness on the part of their subjects, focusing their efforts on finding inventive and at times bizarre new ways in which to argue that the oppressed did exercise power (see, e.g., Bush 1996; Moitt 1996). Fortunately, subalternists have generally guarded against the slide from the restoration of perspective to agency, stressing a continuum of power and powerlessness (see Sarkar 1984, 274; Chakrabarty 1985, 374, 376).

Ideally, the new history will steer clear of reading colonial lawyers as either collaborators with colonial rule or as heroes resisting from the inside. The *who-was-really-in-control* research agenda certainly produced some rich theoretical work (see Bhabha 1994, 85–92), but much was sacrificed for this obsession with power. The story was always the same—in some ways, the colonizer won, in others, the colonized did. The new history of colonial lawyering will hopefully turn away from the politicized project of vilifying or vindicating non-European elites.

Lastly, the new history of colonial lawyering should aim for the production of integrated legal histories. The cleavage between works on the history of the legal profession and of the history of substantive law has become deep and has lasted for too long (compare Duman 1983a, 1983b; Paul 1991 with Anderson and Guha 1998 and Hay and Craven 2004). Part of the explanation may lie in the unconscious penetration of rule-of-law ideology into the outlook of legal scholars themselves. If law is a science, then it should not matter who the lawyers or judges were in any particular case. But if law is socially embedded, the identity of the lawyers and judges involved—political, cultural, ethnic, religious, and gender-based—matters very much. The history of the legal profession is as essential to understanding colonial legalism as is the historian's engagement with substantive areas of law and rule-of-law ideologies treated as intellectual history (for an example of the latter, see Mehta 1999). Likhovksi has managed to interweave the substantive content of these lawyers' legal work with their individual stories and cultural matrices. It is to his work that I now turn.

LAW AND IDENTITY IN MANDATE PALESTINE

Likhovksi's book (2006) will undoubtedly become the leading work on the legal history of mandate Palestine. Its predecessor is Ronen Shamir's *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* (2000). Shamir's chapter on the legal profession looks at Jewish lawyers exclusively. Likhovksi's (2006a) study provides a more complete study of mandate Palestine, including one section on Arab Palestinian legal professionals, a group for whom painfully few primary sources exist (173–210); and another on British legal figures (21–123), in addition to a third section on Jewish lawyers (127–70). Unlike Shamir (2000), who adopts a variant of the monopolization thesis (115–18), Likhovski (2006a) investigates how law shaped

identity, a theme he claims has not yet been the focus of a single major work of legal history (2). Likhovski may be overstating the originality of his approach, overlooking as he does a number of recent contributions to the legal history of colonial Fiji and Hawaii (see Merry and Brenneis 2003). Nonetheless, his book is certainly a pioneer in applying an identity-based focus to the history of the legal profession specifically. Two other aspects of his book deserve special note: first, the book's attention to audience; second, its unusual use of a range of types of legal sources and fora.

Likhovski stresses the audience-specificity of particular legal forms and its consequences for identity formation. The debate over whether law for Jews should be explicitly "Hebrew law" or simply "law in Hebrew" was a discussion with a Jewish audience (Likhovski 2006a, 127–70; Likhovski 1998). An ethnographic guide to the customary law of Bedouin tribesmen ultimately found itself addressing an Australian military audience that was stationed in Bedouin territory in both World Wars (Likhovski 2006a, 207–09). Most insightful is Likhovski's point that legislation in mandate Palestine had the League of Nations as an audience, which was of critical importance given that Britain's mandate powers were derived from the League. Equally, legislation was intended to make British mandatory rule look legitimate to the British public back home at a time when colonial rule was coming under fire in the Euro-American metropolitan world generally.⁸ This point is at the heart of Likhovski's chapter on children's rights legislation, a chapter that reveals the practical impotence of Palestine's child protection laws. The Acts had no real impact upon the condition of children's lives in mandate Palestine; Likhovski suggests that their true purpose was to improve public relations with outside audiences (97–105, 212). The observation is an important one, particularly for gap studies on the disjuncture between legislative message and judicial implementation. The judicial gutting of legislative provisions begins to look less like a lack of central control over renegade judges and more like a coordinated state effort if one considers the different audiences for legislation and case law and the differences in visibility between the two fora.⁹

8. A degree of mutual Anglo-American sniping over the treatment of nonwhite populations seems to have existed circa 1900. American critiques of British racism in the empire were answered by British reports of atrocities committed against African Americans. Compare, for example, the two *Advocate of India* articles, "American Views of Anglo-India. 'Curious Hybrid Civilization'" (1913) with "Burned at the Stake. Crowd Cheer Dying Negro's Agony. Funeral Pyre 20 Feet High" (1911).

9. For an example of what looks like the judicial sabotage of colonial legislation, compare the prohibition of excess dower (*mehr*) in Chapter 1, s. 5 of Part III of the Oudh Laws Act (XVIII of 1876), with the upholding of excess dower through the "family custom" reasonableness standard developed in *Sugra Bibi v. Masuma Bibi* (1879) and *Zakeri Begum v. Sakina Begum* (1892). For further discussion, see Sharafi (2002). A similar example is the colonial Ceylonese Supreme Court's unraveling of colonial administrators' attempts to criminalize gambling among the poor. See Rogers (1991, 195–201).

Likhovski is also to be congratulated for using an expanded range of legal source types. Chapter four addresses children's rights legislation (84–105). Chapter three examines the most important exit clause in mandate law, a vaguely framed device that allowed colonial judges not to apply common-law or equitable doctrines in a particular case. It revolves around the case law of negligence causing personal injury (61–83).¹⁰ Chapter five looks at legal texts relating to legal education (106–23). The two chapters comprising the section on Jewish law and lawyers (chapters six and seven) showcase writings about law in debates over the proper role of Jewish religious law in Palestine's legal system (127–70). Chapter eight (the first in the Arab section) puts a rich and oddly neglected type of legal source—the law review—to work, focusing upon the Arabic-language law journal *al-Huquq* and its Ottoman-educated editor Fahmi al-Husayni (173–91).¹¹ Chapter nine, on Arif al-'Arif, makes this lawyer's legal ethnographic work its centerpiece (192–210).

Likhovski's book is a collection of chapters that make the tour through the various types of legal historical sources and venues. It serves as an excellent model for students of the legal history of any common-law jurisdiction. The colonial legal history of South Asia, for instance, is generously populated with studies of legislation that make only timid forays into case law (see Fisch 1983; Nair 1996; Singha 1998; Chatterjee 1999). Legal sources other than statutes and case law are rarely used by legal historians of any time or place.¹²

10. According to Article 46 of the Palestine Order in Council 1922, the courts were to apply Ottoman laws and legislation enacted by the government of Palestine. However, where Ottoman and mandate legislation did not apply, the courts were instructed to turn to “the substance of the common law and the doctrines of equity” provided that these two sources of law would be in force “so far only as the circumstances of Palestine and its inhabitants . . . permit” and subject to whatever qualification local circumstances made necessary (60).

11. Colonial South Asia offers a galaxy of law journals for the legal historian, among them the Calcutta-based *Indian Jurist* (1862–1867), *The Legal Remembrancer*, NWP (1879–1982), *Madras Law Journal* (1891–1999), *Calcutta Weekly Notes* (1896–1986), *Bombay Law Journal* (1899–1946), *Bombay Law Reporter (journal section)* (1900–1946), *Allahabad Law Journal* (1904–1946), *Calcutta Law Journal* (1905–1931), *Burma Law Times* (1907–1920), the Coimbatore-based *Hindu Law Journal* (1918), *Lahore Law Journal* (1919–1930), *Allahabad Law Times* (1923–1933), *Mysore Law Journal* (1923–1973), *Travancore Law Times* (1926–1947), *The Lucknow Cases, a fortnightly journal* (1927), and the *Hindu Law Quarterly* (1930–1936) (end dates indicate current holdings of Indian, British, and American libraries, not necessarily the date when publication ceased). Colonial law reviews generally consisted of one section of case reports and another of articles both by local lawyers and jurists and reprinted from overseas sources (typically Anglo-American). Some, like the *Patna Law Journal* (1916–1921), contained solely law reports. Another surprisingly neglected primary source is the colonial legal textbook. Presumably, it was a particularly important source type in the colonial context, given the logistical challenge of stocking law libraries in many locales. A study of the leading colonial textbook publisher, Calcutta-based Thacker Spink and Co., and its presence in colonial legal life, is sorely needed. For a list of the legal textbooks in a Bombay firm's law library circa 1911, see Mistry (92–111). On textbooks of Anglo-Islamic law, see Anderson (1996, 14).

12. Some work based on lecture notes does exist in the English context. See Hoffheimer (1994); Curley (1986, 1–19; 1998, 84–127).

The consequence of Likhovski's methodological resourcefulness and linguistic range is that the chapters may lack a certain unity. They are a series of episodes involving law and identity in roughly the same time and place, but no single narrative thread binds them tightly together. Nonetheless, a slight patchwork effect is an unavoidable price to pay and one that is justified by the impressive scope of Likhovski's end product.

Representing One's Own

How did non-WASP lawyers and judges shape their own community's identity through colonial law? Likhovski opens with the intriguing Anglo-Jewish figure of Norman Bentwich. Both Bentwich and al-'Arif blur the colonizer-colonized binary—Bentwich, by being simultaneously a member of the white British colonizing elite and of a “colonized” (or in this case, “mandated”) community.¹³ Likhovski characterizes al-'Arif as a “native colonizer” because of his pan-Arabist appropriation of Bedouin customary law (Likhovski 2006a, 203–7), a theme explored below. Bentwich was the Anglo-Jewish Attorney-General of mandate Palestine from 1922–31. He was deeply committed to Zionism (see Bentwich 1919, 1932, 1934b, 1944) and had family members who had settled in Palestine in the 1910s (Likhovski 2006a, ix). He oversaw the passage of commercial legislation aimed at promoting economic development in order to encourage Jewish immigration to Palestine (57). Under Bentwich's supervision, statutes provided for trade by limited liability companies and cooperative societies; the regulation of trademarks, patents, and copyright; the regulation of mining and electrical enterprises along with the professions; and adherence to international conventions on firearms and dangerous drugs, travel, and transport by sea, air, and road, and quarantine requirements (Bentwich 1934b, 136–37).

Bentwich was also a key figure in the establishment of the Jerusalem Law Classes, the first institution for the legal education of lawyers in Palestine. Arab Christians and Muslims complained that he was Anglicizing and Judaizing the Franco-Ottoman law of Palestine (Likhovski 2006a, 185–88). They referred specifically to Bentwich's aim of institutionalizing the “Hebrew law” project within the legal system of mandate Palestine (117). Bentwich was one of many adherents to a larger movement that sought to tie the law of Palestine to Judaic legal traditions. By the 1940s, the movement had failed (Likhovski 1998; 2006a, 127–70; 2006b). If there is any weakness in Likhovski's treatment of Bentwich, it is that it is too brief. Bentwich's sea of published works on his life (Bentwich 1941, 1962, 1965), his vision of Zionist

13. On a similar set of split affiliations that surfaced in interactions between Anglo-Jewish colonizers and Indo-Jewish colonized subjects in British India, see Roland (1998, 61).

socialism and the twentieth-century Jewish experience (Bentwich 1934a, 1960a, 1960b), and imperial law (Bentwich 1912) could have filled a chapter rather than the dozen-odd pages Likhovski grants them.

Likhovski's example of Bentwich provides a model that travels well—to British India and West Africa, among other places. Two Bombay High Court judges and the Gold Coast's first London-trained barrister used law in a range of identity-related ways that mirror elements of the Bentwich case study. The remainder of this section likens Bentwich's identity-related agenda in the fields of legislation and legal education to the efforts made by three legal figures from West Africa and India to craft their own communities' identities through legal writings and case law.

John Mensah Sarbah, a mixed-race lawyer from the Gold Coast region (now Ghana), returned from Lincoln's Inn in 1887 and took on the question of whether indigenous West African law existed. British judges in the territory had declared that "owing to the absence of any authentic records of native law," customary law had to be treated with great caution and deserved to be put on the same footing as foreign law (Hayes Redwar quoted in Crabbe 1971, 57). Judges were instructed to use English law by analogy before they looked to custom. Sarbah's response was to publish work that did for the Fanti communities of the Gold Coast what al-'Arif's legal ethnography would do for the Bedouin, a topic elaborated upon below. He gave the unwritten, customary traditions of a colonized society currency within the colonial common-law system.

Sarbah forged Fanti identity at two levels through his *Fanti Customary Laws* (1897) and *Fanti Law Reports* (1904). At the level of substantive law, he communicated to the courts the existence and centrality to Fanti life of institutions like matrilinearity and joint family ownership. More generally, he was making the important claim that the Fanti *had law* at all. With this recognition came a dignity and authority denied to Fanti institutions and norms by the narrow British definition of law as written and state-enforced (see Sarbah 1968, vii; Hutchison, 172; Edsman 1979, 54–58). Sarbah's later book, *Fanti National Constitution* (1906), aimed to show that there was also a Fanti concept of the state (Sarbah 1968; Edsman 1979, 54–58). His work inspired other West African lawyers like Joseph Buaki Danquah and Nee Amaa Ollennu to publish similar ethnographic accounts of their own communities (Danquah 1928a, 1928b; Ollennu 1962; Sinitsina 1994). The work of these early African lawyers gave West African communities a basic identity in and *through* law, claiming respect by means of a set of legal traditions that predated colonialism and persisted in spite of it.

For West African lawyers like Sarbah, having law was a critical part of community identity. For two South Asian judges in the Bombay High Court in the same period, using law was a way of settling debates over reform within their own communities. South Asians began to have a major presence in the upper echelons of the legal system from the late nineteenth century

on. By the early twentieth, a number had risen to the ranks of the presidency High Courts, and in 1909 Syed Ameer Ali became the first South Asian judge to be appointed to the Judicial Committee of the Privy Council (see Abbasi 1989; Muhammad 1991). Through their positions in the Bombay High Court, the Parsi judge Dinshaw Dhanjibhai Davar and the Hindu judge Narayan G. Chandavarkar reformulated Parsi and Hindu law in the image of their ideal communal visions. Davar was orthodox in his views of Parsi life; Chandavarkar was a Brahmin with reformist values. Davar's orthodox interpretation of a Parsi temple trust deed prohibited conversion to his religion, Zoroastrianism. Chandavarkar's reformist reading of the text of a Hindu will relaxed the social norms applied to Hindu widows. Just as Bentwich left his stamp upon the legal shape of Jewish identity, so the idiosyncratic religious and political views of these two Bombay judges became etched upon their communities as these cases passed through their courtrooms.

As a Zoroastrian, Dinshaw Davar was a follower of the pre-Islamic religion of ancient Persia and a member of a small community that migrated to India after the seventh-century conquest of Persia by Arab Muslims. Under British rule, the Parsis became an elite of intermediary traders and professionals. In the early twentieth century, a series of lawsuits erupted on the admission of ethnic outsiders into the Parsi community through intermarriage, conversion, and adoption. The most publicized of these was the case of *Petit v. Jijibhai* (1909) (see Sharafi forthcoming). It came before the Bombay High Court in the year that Davar was made the first Parsi judge in the High Court, and it was he who delivered the leading judgment.

In 1903, a young French woman named Suzanne Brière married into the Tata family, the Parsi "royalty" of mercantile-industrial Bombay. She was married in a Zoroastrian wedding ceremony following a purported initiation ceremony into the religion. Whether conversion to Zoroastrianism was permitted was in dispute. For orthodox Parsis, one had to be born into the community to be eligible for initiation; for reformists, anyone could convert. Davar ruled against Mrs. Tata. Rather than declaring conversion itself impermissible, he held that non-Parsis were excluded from enjoying the benefit of Parsi trusts, the legal instrument governing Zoroastrian fire temples, charitable funds, and Towers of Silence, where the bodies of the deceased were exposed to vultures.

Davar's ruling turned upon a semantic distinction in the construction of the trust terms. The trust deeds governing the Bombay fire temples and Towers of Silence were for the benefit of *Parsis* only. According to Davar, the terms *Parsi* and *Zoroastrian* were not synonymous: *Parsi* was an ethnic term; *Zoroastrian*, a religious one—before *Petit*, the terms were generally used synonymously. Davar's ruling ethnicized the term *Parsi*.

Outside the courtroom, Davar's orthodoxy was well known. He was a steadfast opponent of proselytism. Some described him as "a saviour of the community from extinction" through racial dilution (Masani 1917, ix;

Darukhanawala 1939, 150). On his way home from the *Petit* hearings, he was said to take his carriage the long way home so that he could drive through an orthodox Parsi neighborhood; orthodox Parsis would line the street and cheer for him as he drove past, waving.¹⁴

Davar's separation of the terms *Parsi* and *Zoroastrian* had the far-reaching effect that trust deeds that may have referred to *Parsi* in the older religious sense came to be reinterpreted in the new ethnic sense. In a community for which the colonial courts had social as well as legal authority, Davar's decision had huge cultural influence. For the past century, the *Parsi* versus *Zoroastrian* distinction has been attributed to Davar and has been adopted in everyday speech by Parsis, and—following their lead—by non-Parsis, too (see Tankariwala 2006). The methodological challenges of showing cultural reception are major, a point to which I return below. The Davar ruling is an unusually easy case.

Chandavarkar provides an inverse case study—a reformist judge whose rulings were tinged by his crusade for the rights of Hindu widows. Chandavarkar was a member of the upper-caste Saraswat Brahmin community and was a leading advocate of reform in Hindu communities. Most judges restricted themselves from speaking or writing extrajudicially, another methodological challenge I explore below. Fortunately, Chandavarkar left copious amounts of writings and speech texts. From Madras to Lahore, Chandavarkar toured the lecture circuit advocating reforms from female education to the lifting of the *kala pani* (black water) taboo on long-distance sea travel (see Kaikini 1911). Improving the treatment of Hindu widows was particularly high on his agenda. Chandavarkar worked to normalize widow remarriage, a practice prohibited among orthodox Hindus, and to have the social conditions of widows' lives improved, particularly for child-widows.¹⁵

One traditional expectation of Hindu widows was that they remain faithful to their dead husbands. In many circles, the widow's right to be supported by the joint family of her dead husband was contingent upon her continuing chastity. A Bombay-based case law reinforced this expectation.¹⁶ In 1910, however, a case on this exact point came before the Bombay High Court, and Chandavarkar was the senior judge to hear the case. In the case of *Parammi kom Ramayya v. Mahadevi kom Shankrappa* (1910), a Hindu widow tried to claim an annual sum of Rs 24 (almost \$8 U.S.), a sum stipulated in her late husband's will as maintenance. The widow had had a relationship with another man after her husband's death and had borne a child from that relationship. After the birth, though, she had returned to celibacy. She also repented and underwent ritual purification.

14. Many thanks to Fali Nariman for this account (Delhi, March 8, 2004).

15. For a fictional account of traditional taboos imposed upon Hindu widows in Chandavarkar's period, see Deepa Mehta's film, *Water* (2005) and Bapsi Sidhwa's (2006) novel by the same name.

16. See *Valu v. Ganga* (1882) and *Vishnu Sha'mbhog v. Manjamma* (1884).

In her husband's will, there was no explicit requirement that she remain celibate in order to claim the Rs 24 per year. However, the case law of Bombay and Madras presidencies made it a requirement. These rulings were based upon interpretations of Sanskritic texts, particularly one which read: "Let [the husband's family] allow a maintenance to his women for life, *provided they keep unsullied the bed of their lord*" (emphasis added). In his construction of the terms of the will, Chandavarkar reinterpreted the notion of abandonment. He argued that Hindu law prohibited the absolute abandonment of a wife by a husband (or his joint family)—unless the wife had committed one of the sins considered deadly or had had sexual relations with a man of lower caste. In these situations, she was not even entitled to a "bare" or "starving maintenance," a sum that would have been just enough to sustain life. In the case before Chandavarkar, the widow had done neither of these things, and had furthermore repented. Chandavarkar emphasized the importance of purification and awarded the widow the sum stipulated in her husband's will. *Parammi* fit tidily into Chandavarkar's larger reformist agenda, reversing precedents to which he himself had ironically contributed as a young lawyer, a point that raises methodological issues to which I return below.

Bentwich, Davar, Chandavarkar, and Sarbah used legislation, legal education, case law, and legal treatises to give state approval to their personal visions of communal identity. Their views of reform lay at the core of most of these constructions. Both Bentwich's and Chandavarkar's legal work reflected ambitious plans for the radical transformation of their own communities. Bentwich's target was the creation of a socialist Zionist state in the ancient Jewish homeland. Chandavarkar's was a radical restructuring of Hindu society, an erasure of the inequalities of traditional caste and gender roles in Hindu society. Davar, by contrast, looked on Parsi reform efforts with apprehension. His outlook reflected the anxieties of an affluent but tiny trading minority that feared ethnocultural extinction by dilution if it accepted converts. Taking one step back, Sarbah's mission was to have the actual existence of his community's legal culture acknowledged in the first place. These four figures brought very different aspirations for their own communities to the bench or drafting table. Their examples stress the relevance of legal professionals' ethnoreligious perspective to a full understanding of developments in substantive law.

Representing Neighbors

Another set of legal professionals represented "neighboring" communities. Whether through pan-Arabism, a pan-Islamic sensibility, or a gendered South Asian identity, the cultural neighbor formula tied non-European lawyers across the British colonial world to colonized communities that were not quite their own. Arif al-'Arif, the Muslim Palestinian lawyer to whom

Likhovski devotes a chapter, wrote the definitive legal ethnography of the Bedouin of his day. His unspoken claim to authority rested upon the claim that although he was not Bedouin, both he and his subject population were Arab. In the Straits Settlements (now Singapore), the Muslim legal figure Bashir Ahmed Mallal testified in a highly publicized libel case (1926) between conservative Sunni Muslims and the unorthodox Ahmaddiya sect. He then published an account of the trial with commentary. “I may not be Ahmaddiya, but we are all Muslims” was the essence of his claim to authority. Cornelia Sorabji, the daughter of a Parsi father and Hindu mother who had both converted to Christianity, could have summed up her legal work on behalf of elite Indian women living in *purdah* (seclusion) with a similar line: “I am neither a Hindu nor Muslim wife living in seclusion, but we are all South Asian women.” These early creators of “ethno-jurisprudence” (see Vanderlinden 1993) prefigured the “native” anthropologists of our own day. The same issues are at play in debates over whether scholars of Otherness—whether through race, ethnicity, gender, or sexual orientation—can claim superior authority over their research areas on the basis of their own parallel identities (see, e.g., Matsuda et al. 1993, 2; Roof and Wiegman 1995; Matsuda 1996, 13–20; Asher 2001).

Likhovski devotes his final chapter to the Muslim Palestinian lawyer Arif al-ʿArif, who published a book on Bedouin custom, construing it as the “original” Arab legal culture. By Likhovski’s account, al-ʿArif repackaged a neighboring—and in fact very different—legal culture in order to harness it in the service of a pan-Arab identity. This identity was as new and unsettled for Muslim and Christian Palestinians as was the Jewish identity Bentwich was forging. And yet nationalists “often find the source of nationalist culture in traditions preserved by marginal subgroups such as monks or nomads” (Likhovski 2006a, 199). Al-ʿArif and his nationalist pan-Arabism turned to the Bedouin of the Negev Desert as specimens of a pure, unadulterated past, representing the living origins of Arab legal sensibilities (199). The Palestinian Muslim lawyer and adventurer conducted a census of the Bedouin in 1931 and published his legal ethnography, *Law among the Bedouin*, in Arabic in 1933.

Al-ʿArif tried to construct a racial link between Arabic-speaking peoples, particularly those in Palestine and the Bedouin (201). But being “Arab” would have had no resonance with the Bedouin at the time al-ʿArif arrived, argues Likhovski, unlike their strong sense of being nomadic and Muslim: “The Bedouin of the Beersheba District during the mandate did not view themselves as part of the Arab ‘nation,’ a modern concept created in the late nineteenth and early twentieth centuries” (200). In the same way that Euro-American anthropologists and colonialists regarded many colonized peoples as answering questions about the observers’ own origins, Likhovski sees al-ʿArif as a “native colonizer” himself (203–07), a terminology that overlooks the critical role of racial difference, whether actual or perceived,

in most colonial settings (see Ballhatchet 1980; Kolsky 2005). Likhovski suggests that al-ʿArif’s depiction of Bedouin life as “pure” and “authentic” was equally fraught; what al-ʿArif portrayed as tribal customs untouched by colonial influence were in fact the products of an involved history of Anglo-Bedouin interaction (Likhovski 2006a, 200).

Al-ʿArif’s adoption of Bedouin law was in fact secularism-tinged, privileging an Arab identity over a Muslim one (200–01). Across the Indian Ocean, another legal interpreter worked in the opposite direction. Bashir Ahmad Mallal strengthened the category of being Muslim and contributed to the legal ethnography of an identity that stretched a good distance beyond the Arab and Middle Eastern world. Mallal was a Sunni Muslim of South Asian descent living in colonial Malaya. He began his legal career as a managing clerk in a British law firm in the Straits Settlements and, although never gaining a lawyer’s formal credentials, became a towering figure in the legal history of the territory in its colonial and postcolonial periods (see Bartholomew 1975). Mallal was founding editor of the *Malayan Law Review*, a textbook author, and legal academic who later in life received an honorary doctorate in law (see Mallal 1928, 1940, 1958, 1961; Mallal and Mallal 1931, 1936, 1937, 1939). He was also deeply involved in the affairs of his religious community. Mallal was the first elected head of the community organization known as the Anjuman-i-Islam (the Islamic Society) and editor of the Islamic society’s newspaper, *The Muslim*.

In 1926, a libel case arose between Muslim denominations in the Straits Settlements over the question of whether members of the Ahmadiyya sect, an unorthodox missionary movement, could be called Muslim at all (see Ahmadi 1970). Orthodox Tamil Sunnis visiting the colony had accused the Ahmadiyyas of being *kafirs* (nonbelievers). Under Islamic law, this label deprived a person of the right to inherit property and to be married to a Muslim woman. A *kafir* was looked upon as an “inveterate enemy and traitor” (Mallal 1928, 163).¹⁷ Mallal was not Ahmadiyya himself, but he appeared as a witness in his capacity as a community leader who, through his friendship with the Ahmadiyyas, had made himself a target of the *kafir* slur. He also edited a volume presenting the trial to the English-speaking public in the style of so many celebrated trial accounts of the period (Mallal 1928). Like al-ʿArif, Mallal saw himself as coming from a community that was much closer to the one in question than were the British authorities. His commentary

17. According to the plaintiffs, the alleged libel intended to represent them as “disseminators of false doctrines, deceivers, misguided illiterate fools, hypocrites, liars and unbelievers behind whom it is unlawful in Mohamedan law for any Muslim to pray, to whom no Muslim woman should be joined in marriage, from whom any Muslim woman married to them is *de facto* divorced and whose bodies should not be interred in any Muslim burial ground” (Mallal 1928, 154.)

made the British trial judge's ignorance clear.¹⁸ A Sunni Muslim fluent in Urdu and Persian, Mallal assumed the role of unofficial spokesman for the Ahmadiyyas. As al-'Arif was forging pan-Arabism through treatise writing, so Mallal was bolstering pan-Islamism through his testimony and commentary (*ibid.*). Mallal argued for an inclusive and tolerant understanding of Islam that would minimize in-fighting, lending credibility and unity to Muslims as a whole. He was also intent upon correcting misconceptions about Islam, a tradition that "has for many centuries been misunderstood and misinterpreted by those outside this faith" (v). Mallal succeeded. The British judge George Campbell Deane ruled that the fact that there were "73 sects of Mohammedans within the pale of Islam" pointed to a comprehensive and tolerant spirit of inclusion within Islam. He went on to set the bar high for what constituted a *kafir*, endorsing the arguments of the Ahmadiyyas' lawyer, another presumably Muslim South Asian named Sarwar. The Ahmadiyyas could indeed be called Muslim, according to Deane, believing as they did in the core beliefs of the religion (170). The result was that "justification," the assertion that the libel was true, could not be proven by the defendants (171). The fact that Mallal's inclusive Islamic vision reached an imperial readership not only furthered Mallal's own project of unifying Muslims, but also—intriguingly—did unspoken work for the Ahmadiyya sect itself. The movement had established a mosque in Woking, England, and was gaining British converts, including a member of the House of Lords (156–57). The group also published *The Islamic Review* in England, a glossy magazine that often featured photos of attractive young British converts to the movement.¹⁹

A third example of neighborly representation appears in Mary Jane Mossman's new book (2006) on the first women lawyers in the Anglo-American world at the turn of the twentieth century. Mossman's work does not forefront an explicitly identity-related approach, but her chapter on Cornelia Sorabji, one of the earliest female lawyers from colonial South Asia, contains a number of relevant threads. Mossman highlights Sorabji's role as cultural intermediary, not just in representing Indians to the British colonial system, but in representing Indian *women* to that system.

Sorabji's own attitude toward a gendered identity was complicated. Mossman documents Sorabji's failed attempts to gain entry to the legal profession, despite having been the first woman to study for an Oxford BCL degree (Bachelor of Civil Law). Ultimately, the position of Lady Assistant to the Court of Wards for Bengal, Bihar, Orissa, and Assam was created to

18. "I believe that His Lordship, who was quite unfamiliar with the peculiarities of this religion, appeared at the initial stage of the proceedings to be confused by the foreign terms used in the libellous document" (Mallal 1928, v).

19. British converts included Marmaduke Pickthall, Al-Haj Lord Headley al-Farooq, and William H. Quilliam. See Friedmann (1989, 183) and *The Islamic Review* for the early twentieth-century period. Many thanks to Will Hanley for his guidance on this topic.

allow Sorabji to offer legal advice to elite Hindu and Muslim women living in *purdah* (Mossman 2006, 230). Obviously, her role as a champion of wives and widows was entirely gender-dependent. But reading Sorabji as a feminist is problematic; Mossman takes issue with historian Antoinette Burton's attempt to construe Sorabji as an "unsung feminist hero" (237). Sorabji had no time for "women's rights women" of her own period. She found it a great "bother" to be a woman, describing female legal counsel for *purdahnashins* (women living in seclusion) as "men of business" (233, 237).

Mossman's portrait of Sorabji portrays a stern figure who clearly identified with the imperial center and was a stalwart supporter of British rule generally. Sorabji was a vocal critic of Gandhi and the independence movement, she studied and retired in England, and yet she occupied an intermediate and intermediary position, being "Indian by birth, Persian by descent, and English by culture" (200, note 46). When it came to Indian women living behind the veil, Sorabji was critical of a Western cultural outlook. In one 1897 letter, Sorabji told a friend that she felt a sense of "mission" to interpret the culture of India for the British public (233). In her many works on the *purdahnashin*, she communicated the same message to British administrators as Mallal did in his comments on Muslims. As self-appointed cultural "cousins" of the Ahmaddiyas and *purdahnashin*, both took it upon themselves to correct a number of misconceptions that prevailed amongst the British public about the two communities. Mallal aimed to dispel the association of intolerance and fanaticism with Muslims. Sorabji took great pains to present the complexities and subtleties of life in *purdah*.

Particularly when it came to acting as witnesses and litigants, *purdahnashin* as a group were a constant source of confusion and complication for the colonial legal system.²⁰ The colonial state sponsored *purdah* parties and other strategies aimed at drawing these women out of the *zenana*, or inner part of the home.²¹ But rather than trying to drag the *purdahnashin* out of her seclusion through forced "civilization," Sorabji urged a more practical, intermediate solution of sending female legal advisors *in* to the *zenana* (74). She urged British women galloping into the *zenana* not to ritually defile parts of the house by demanding a tour (with the best of intentions). As consumers of beef, British women were advised that they would only pollute Hindu women by touching them in greeting (Sorabji 1917, 50). Her many writings on *purdahnashin* investigated property, succession, and maintenance disputes

20. See, for example, letters of February 22–28, 1900 between Messrs. Bicknell Merwanji and Motilal (solicitors for respondents) and P. W. Pleader for Messrs. Thakurdas Dharamsi Cama and Hormasjee (solicitors for appellants), Defendants' Exhibits, No. 47, Exhibit No.1, 107–11 in *Haji Saboo Sidick and other v. Ayeshabai and another* 1903: vol. 5, judgment no. 24 (Privy Council Office Records). See generally s. 132 (1) of the Code of Civil Procedure.

21. On *purdah* parties organized by British women, see *Times of India* (1905); *The Parsi* (1888); *Deccan Herald and Daily Telegraph* (1914); and Norman Macleod, "Letters from India" (December 17, 1921), 33A, HRA/D63/A1 in Macleod Papers.

involving widows and wives (see Sorabji 1908, 1917, 1936, 2001, 2003; Mossman 2006, 229, note 188). In the same way as al-'Arif's ethnography of the Bedouin purported to offer an inside glimpse of the customary norms of a normally closed society, Sorabji's writings on the *pardahnashin* detailed the codes of purity and pollution that operated within a world generally hidden from British view.

Representing cultural neighbors entails a web of issues surrounding the relationship between spokesperson, audience, and subject population. For deliberately exclusive communities, being presented to an outside public may have been problematic, particularly where the representative had an agenda that diverged from the community's—whether political, economic, or status-driven. According to Likhovski, the pan-Arab project played no part in Bedouin identity prior to Al-'Arif's publications (Likhovski 2006a, 200). Sorabji had economic reasons for presenting *pardahnashin* identity to the imperial public. Her job at the Court of Wards was one of the few ways in which she could earn a living as a single woman in law. She certainly tried everything else first (Mossman 2006; 207–25). Neither Likhovski nor Mossman address the question of how these subject populations responded to being reconfigured for colonial intelligibility by a cultural “neighbor”; regrettably, the necessary sources may not exist.

Anthropological discussions of “native” anthropologists provide a ready conceptual starting point (see Messerschmidt 1981; Fahim 1982; Limón 1991; Medicine 2001; Kuwayama 2004). “Insider” legal ethnographers like Bentwich, Sarbah, and Chandavarkar were invested in the production of a particular version of their communities' identities as members of the communities they were describing. By contrast, “neighborly” legal ethnographers' agendas were not always so transparent, often diverging from that of their subject population, a point Likhovski makes repeatedly about al-'Arif's pan-Arabism. In a version of the triangulation of anthropologist, subject population, and readership, a geometry developed between a legal ethnographer like al-'Arif, his subject Bedouin population, and an ultimately British imperial (and in this case, specifically Australian) public. Scholars like John Aguilar (1981) overlook the complexities of the “neighborly” ethnographer's position when they speak of insider and outsider anthropologists alone.

It is this constellation of influence and representation that Likhovski might have explored in his final chapter, sources permitting. Did the subject populations of al-'Arif, Mallal, and Sorabji view these legal interpreters, at least initially, with a distaste or mistrust often reserved for rival next-door-neighbor communities? Were certain types of questions and topics deemed inappropriate given these ethnographers' prior cultural knowledge, not allowing them to “play dumb” or ask directly about basic tenets? Were the larger agendas of the ethnographers resented or deemed incomprehensible by the target community? Most of all, was there any sense of betrayal when these ethnographers “cashed in,” presenting their findings to the outside imperial

public for their own benefit and occasionally to the detriment of the subject population?

One wonders if Al-'Arif's lurid passages on Bedouin women, polygamy, and divorce were seen in this light (see Al-'Arif 1944, 53–84). The English edition of *Bedouin Love, Law and Legend* included one photo of a Bedouin mother nursing her child with bare breast exposed and another of a sheikh featured because he married twenty-six wives (47, 73). Even the English title reflects the voyeuristic edge to al-'Arif's ethnography—the 1933 Arabic *Kitab al-qada' bayn al-badu* (*Law among the Bedouin*) became *Bedouin Love, Law and Legend* in its 1944 English incarnation, and sections on the more sensational and exotic aspects of Bedouin life were moved to the front of the book (207–08). The assumption that a legal ethnographer would make the subject population look good may have been stronger for a cultural neighbor than it would have been for a European interloper. These issues are as applicable to neighborly ethnojurisprudence as to “native” anthropology and would be fertile conceptual ground for scholars of the new history.

Al-'Arif, Mallal, and Sorabji claimed closer links to the communities they were representing than what lay within Britons' reach. But simultaneously, they maintained links of education, language, religion, and residence to the imperial node to which they spoke. This delicate balance was a common trait of successful intermediary populations (see Slezkine 2004, 4–39). Bentwich of course was British in a way none of the others were, having been born and raised in Britain, and being white. But unlike Bentwich, Cornelia Sorabji, and presumably Sarbah, was Christian. Sorabji's mixed background (Hindu and Parsi) may have watered down any presumption of allegiance to a single “Other” ethnic affiliation. Straddling Britain and India, Sorabji was described as warming “her hands at two fires, without being scorched” (Mossman 2006, 233). For figures like al-'Arif and Mallal, European affinities were limited to a degree of fluency in English and years in the service of the colonial government (193–94).²²

Lawyers' training in Britain often played a formative role in the cultural affinities of colonial lawyers, whether inducing a deep Anglophilia as it did for Sorabji, or sowing the seeds of anticolonialism, as in cases like the revolutionary Indian law student Vinayak Damodar Savarkar (Visram 2002, 150–56) or future Nigerian independence movement leader Obafemi Awolowo (Adeniyi 1993, 38). The new history of colonial lawyering ought to regard non-European barristers as one type of “service nomads” (Slezkine 2004), ethnojuridical translators with an often peripetatic phase of life that would prove formative not just professionally, but also in their awareness of emerging national, religious, and racial identities (see, e.g., Wacha 1920, 246;

22. However, al-'Arif's “double life” as an anticolonial agent should not go unmentioned (see Likhovski 2006a, 192–96).

Setalvad 1971, 38; Abbasi 1989, 9–13; Batalvi 1991, 2; Adeniyi 1993, 38; Gandhi 2004, 3–16).

METHODOLOGICAL CHALLENGES

Scholars contributing to the new history face a number of source-related problems. The first two concern gaining access to information about legal figures from particular types of colonized populations, namely indigenous populations in white settler colonies (where a sizeable white population settled permanently, as in Canada, South Africa, Australia, and New Zealand), highly Anglicized mixed-race populations like Creole Mauritians of mixed background, and certain intermixed indigenous-white Canadians.

For indigenous figures, the problem is an absence of indigenous lawyers in history generally. It was in white settler colonies that the most extreme and explicit racial barriers to entry into the legal profession were erected. Martin Chanock's work on the Cape colony (now South Africa) documents the Transvaal Law Society's successful moves to keep nonwhite lawyers out of the profession in the first two decades of the twentieth century (Chanock 2001, 226–27). Aboriginal Canadians and Australians were effectively denied the right to vote during the late nineteenth and early twentieth centuries, precluding bar membership in most jurisdictions (see Backhouse 2003, 10, note 28).²³ A few unusual exceptions like Maori legal figure Apirana Turupa Ngata and British Columbian Coast Salish advocate Andrew Paull did exist (Ramsden 1948; Sorrenson 2006; Backhouse 2003, 8–9), in some cases because they bore the heavy cost of relinquishing "Indian" status for the right to become lawyers (Backhouse 2003, 9). Looking to the U.S. colonial context, aboriginal communities like the Cherokee adopted Western legalism and operated a system of autonomous courts during the nineteenth century (Strickland 1975). Generally, though, almost every potential candidate for law-and-identity research will hail from colonized populations in nonwhite settler colonies, the only colonial societies where non-European legal professions were allowed to develop circa 1900.²⁴

23. The first fully aboriginal Canadian lawyer is believed to be the Seneca graduate of the University of Western Ontario, Norman Lickers (Backhouse 2003, 10; *Regina Leader Post* 1938). Aboriginal Australians did not effectively gain the right to vote until the 1960s. Most aboriginal Australians did not have access to legal services, let alone aboriginal lawyers, until the 1970s (Faine 1993). The first aboriginal barrister in Australia was Patricia O'Shane, admitted to the profession in 1976 (Sykes 1993, 68–73).

24. As a result, calls for further historical research on North American aboriginal identities (see Harmon 2002) cannot be answered by scholars of the legal profession—at least, not as part of the research agenda envisioned here. It should be said, however, that research on non-Anglo European immigrant lawyers in white settler colonies should be possible. On the Canadian prairie west, see Pue (1991, 258, 271, note 114).

The methodological challenge with interracial lawyers and judges is just the opposite. There were hardly too few: a disproportionately high number of the first non-European legal figures in the common-law world fell into this category (see Merry 2000, 174–75; Strickland 1975, 121, 180). The problem lies in identifying them from written sources—given the typical emphasis upon the European names, heritage, and Christian affiliations of most people of mixed background.

Individuals of mixed ethnicity were particularly well suited to acting as intermediaries in many fields, trade and law among them. Having ties to the two worlds they were trying to bridge made them less “strange” to European and non-European audiences alike (see Miller 1988, 245–51, 289–95; Mehta 1999; Slezkine 2004). On paper, however, it is virtually impossible to distinguish most mixed-race individuals from their counterparts of entirely European heritage. This is a general occupational hazard for historians of communities like the mixed-race Anglo-Indians of colonial South Asia (see Gist and Wright 1973; Abel 1988; Hawes 1996; Caplan 2001), the Euro-Afro-Asian Creole populations of Mauritius (see Carter c. 1998, Christopher 1992), and occasionally the Euro-aboriginal *Métis* of Canada (Brown and Schenck 2002, 335).²⁵ Sometimes photos appeared alongside biographical write-ups on leading colonial lawyers, some of which may provide hints about ethnic affiliations (see, e.g., Hutchison c. 1930). These sources, however, are unusual. Moreover, photos and physiognomies can be deceiving (see Sasidharan 2006, 48–52; Johnston 2002, 200–01; Harris 1993).

A third challenge for the new history relates to problem of lawyers’ “sincerity” and the use of lawyers’ courtroom argument as a source. Reconstructing the “real views” of lawyers from the claims they make in court is bedeviled by the problem that these arguments say nothing about the lawyers’ personal views. As hired guns trying to influence judicial behavior, lawyers try any argument that may succeed. The fact that one lawyer’s arguments in the same or different cases often contradict each other reinforces the image of lawyers as “intellectual prostitutes.”²⁶

The new history must be cognizant of this hazard in trying to connect views inside and outside the courtroom. The lawyerly career of the Hindu reformist Chandavarkar provides a ready illustration. As a young lawyer in 1884, Chandavarkar argued successfully that an unchaste widow’s maintenance ought to be cut off by her dead husband’s family (*Vishnu Sha’mbhog*

25. Although the Euro-aboriginal *Métis* of Canada fused European and aboriginal naming practices (Devine 2004, 223–35) and adopted largely aboriginal identities (Brown and Schenck 2002, 324–6), those who were able to “pass” for white did so, particularly after the 1885 execution of the insurrectionary *Métis* leader, Louis Riel (335).

26. For instance, in 1872–73, American lawyer Matthew Hale Carpenter made opposing arguments on the ambit of the Fourteenth Amendment in two cases heard over the same period by the U.S. Supreme Court. Compare his arguments in the *Slaughterhouse Cases* (1873) and *Bradwell v. State* (1872).

v. Manjamma (1885)). As a Bombay High Court judge in the 1910 *Parammi* case, he either changed his mind, or was more able to reveal his true pro-widow position, being released from the rules of advocacy. “Cause lawyers” could provide more stable ground for legal historians (see Sarat and Scheingold 1998; Halliday 1999a), although mixed motives in such cases are not unknown. Regardless, one suspects that London barristers’ “cab rank” rule (whereby an advocate was obliged to accept any brief with a reasonable case) would also reign in the British colonial world.

The problems associated with using courtroom argument as an uncorroborated source makes judges and jurists somewhat more appealing as objects of study than lawyers. Their legal texts carry another set of methodological worries, albeit ones that apply equally to lawyers’ courtroom argument. How can one distinguish a political commitment to a particular vision of cultural identity from a professional investment in the formal principles of legal interpretation and adjudication, whether a view of textual construction or on the proper role of judges? The simple answer is that most legal discussions as they appear in the case law cannot *by themselves* be taken to reflect larger views outside the courtroom. There are exceptions, such as discussions by judges that veer from legal doctrine into ethnography (for instance, see *Jan Mahomed Abdulla Datu v. Datu Jaffer* (1914); *Rachel Benjamin v. Benjamin Solomon Benjamin* (1926); Shodhan 2001). Generally, though, the legal historian needs to couple courtroom claims with texts from outside the strictly professional context—whether memoirs, private papers, letters to editors, or even prefaces to textbooks—where authors permitted their personal commitments to shine through. For figures like Bentwich and Chandavarkar, such texts exist in vast quantities. But they are exceptional, and even in such cases, the writers may have been deliberately constructing a public persona that differed from their privately held views.

Historians attempting to use case law to connect the history of doctrine, lawyers, and culture, three surprisingly discrete historiographical genres, need to be alert to the methodological challenges of using case law and to focus their efforts upon individuals who have a sufficiently thick foliage of extrajudicial texts, which even then must be handled with care. Likhovski and Mossman chose their subjects as well as they could have: both al-‘Arif and Sorabji produced a wealth of publications on law, the culture of their focal population, and their own lives (see Likhovski 2006a, 267–68; Mossman 2006, 306).

Finally, there is the question of reception. Lawyers and judges cannot simply be assumed to have shaped their communities’ identities through their legal activity, particularly in the courtroom. How can one know their communities *knew* what they were saying in court, or cared? Proving that colonial courts had *cultural* authority within particular colonized communities is a daunting task. Some communities seem to have had a heightened awareness of law as well as a fluency within the legal system. The Parsis of colonial

Bombay and the Indo-Fijians of British Fiji are prime examples (see Merry 2003, 150; Sharafi 2006). But others—indigenous Fijians and Australians, among others—seem to have been indifferent or even law-averse (Faine 1993; Kaplan 2003, 167). Again, in the absence of extralegal texts connecting legal events to the larger community's world, the historian must be wary of assuming cultural acceptance where there may have been unawareness, indifference, or even hostility toward the legal portrayal of a community. Widening the range of acceptable source types may be one way of responding to the reception problem. Where community memory and openness permit, oral history may provide answers as to why a particular community did *not* look to law, particularly in law-averse communities with low literacy rates (see Vansina 1985; Perks and Thomson 1998).

FUTURE DIRECTIONS

The new history of lawyering offers several entry points into non-European colonial legal sensibilities. Following Likhovski (on Bentwich and al-'Arif) and Mossman (on Sorabji), one formula is to track particular individuals. For example, lawyers like Mohammad Ali Jinnah and judges like Syed Ameer Ali and Dinshaw Mulla played critical roles in creating “legal India” through the Judicial Committee of the Privy Council, the final court of appeal for the British Empire. Both Muslim, Jinnah and Ameer Ali were involved in many cases on Hindu family law and identity (see generally Pannoun 1976; Ahmad 1987; Abbasi 1989; Muhammad 1991). Mulla, who was Parsi, wrote leading textbooks on Islamic and Hindu law for colonial India, and as a Privy Councillor decided cases on personal law from many South Asian communities besides his own (see Mulla 1907, 1912; Darukhanawalla 1939, 148). In West Africa, J. B. Danquah and his writings on Akan customary law deserve study (see Danquah 1928a, 1928b; Ollennu 1962), as does the intriguing figure of Thomas Morris Chester, the African American London-trained barrister who resettled in Liberia after a career as a U.S. Civil War correspondent (see Blackett 1989, 3–91; Macgeagh and Sturgess, 557).

Another approach would be to examine patterns among groups of lawyers, as Likhovski does in chapters on Jewish and Arab lawyers (Likhovski 2006a, 127–91). Likhovski takes a more qualitative, narrative approach than the quantitative mode adopted by Duman (1983a) in his work on lawyers in the British Empire. Likhovski's chapter on legal education in Palestine serves as a ready model for research on colonial students at the Inns of Courts in London (Likhovski 2006a, 106–23). The Inns' admissions registers reveal patterns of chain migration between the Inns and the colonies (see Foster 1889; *Records of . . . Lincoln's Inn* 1896; Macgeagh and Sturgess 1949; Sturgess 1958; *Register of Admissions to . . . Middle Temple* c. 1977). At Middle Temple, surprisingly large numbers of Mauritians appeared, some of whom may have

been of mixed background, as did students from officially independent South Asian princely states like Hyderabad and Baroda. Muslims from South Asia appear to have flocked to the same Inn, an unexpected phenomenon given the cultural stereotype of the period that characterized Muslims as “backward” and resistant to Anglicized forms of education (see Hunter 1872, 151–216; Hardy 1872, 92–115; Strangman 1931, 201; Nehru 1946, 390).

In London, South Asian bar students tended to lodge together in neighborhoods, like Paddington and Bloomsbury, and to study at the University of London and Inns concurrently, with only a comparatively small number coming to the Inns from study at Oxbridge (see Macgeagh and Sturgess 1949). Work on these groups would contribute to the growing body of literature on South Asians in Britain (see Visram 2002; Shukla 2003, 25–78; Fischer 2004; Singh and Singh Tatla 2006, 43–54; Ali, Kalra, and Sayyid 2006, 143–314). Also needed would be a study tracing notable clusters of West Africans at the Inns and in colonies like the Gold Coast, Sierra Leone, and Nigeria (Elias 1954, 351–59; Adewoye 1971, 48–53).²⁷ The same should be said about the multiethnic non-European community of lawyers in the Straits Settlements (now Singapore), a group of individuals of Malayan, Chinese, Burmese, and Indian descent (see Mallal and Mallal 1937, viii–xix).

Histories of lawyers from doubly colonized jurisdictions like Quebec, Mauritius, the Cape Colony, and Ceylon could shed light on the complexities of identity in regions shuffled across a succession of European legal systems and sensibilities.²⁸ Some work on the history of substantive law of these regions has been done, but—as elsewhere—to the exclusion of legal professionals (see, e.g., Tetley 2000). Research on lawyers and judges from diasporic trading communities should also be put on the scholarly agenda. The history of lawyers amongst the Jews, Parsis, and Armenians of the Indian Ocean, the Lebanese of West Africa and the Caribbean, and the Chinese of Southeast Asia, among others, would undoubtedly be fertile ground. Because such communities were often intermediaries in many sectors besides law, their lawyers may have had access to preexisting channels of trust and trade that would create special types of linkages between law and commerce, and between lawyers and litigants from within the same community.

27. For short biographies and photos of West African lawyers, see Hutchison (1930, 29, 61, 99, 108, 113, 115–6, 120, 136, 153, 158, 164, 171–73, 194). On West Africans at Middle Temple during the 1890–1905 period, see Macgeagh and Sturgess (1949, 681, 725, 745). It is unclear whether another group of Middle Temple students were of part-African descent, given their entirely European names. See Macgeagh and Sturgess (1949, 687, 735). Kobina Sekyi, the first African to graduate with a British degree in philosophy, was another West African who qualified as a barrister in 1918. For a list of judicial and legal officials in southern Nigeria (1931–54), see Adewoye (1977, 298–302).

28. A large number of Mauritians with French names appear in the admissions registers of Middle Temple. Their ethnic identity is not given. For examples, see Macgeagh and Sturgess (1949, 555–56, 558, 560, 570–71, 623, 627, 636, 640, 655, 691, 693, 696, 712, 721, 741).

Finally, there are communities to follow, particularly those that bought into the myths of colonial legalism and used the legal arena as a favored space for the resolution of “internal” community disputes. Lawyers and litigants from communities such as the Nayars of India’s Malabar Coast, Tamil Brahmins of Madras Presidency, Parsis of Bombay, and Indo-Fijians of British Fiji used the colonial legal system as a tool for sharpening their own communal identities (see Price 1989; Arunima 2003; Merry and Brenneis 2003; Sharafi 2006). One wonders if the plethora of source material on and by Jewish lawyers and the dearth on and by their Arab counterparts may reflect larger community attitudes toward colonial law generally, namely a Jewish embrace of the colonial legal system and an Arab indifference or even resistance to it. In the broader Anglo-American world, Strickland’s book (1975) is an invitation for further work on Cherokee legal history, given the unusual phenomenon of the independent Cherokee courts that operated during the nineteenth century.²⁹ In South Pacific colonies, non-European and mixed-race lawyers and judges are similarly intriguing communities to investigate. Work led by Sally Merry on the colonial South Pacific lays the groundwork for further investigations of another set of colonial communities that made Anglo-American law “their own” (Merry 2000, 155, 162, 174–75, 188–89; Merry 2003, 150).

The new history of colonial lawyering that Likhovski and others are working to create interprets colonial legal professionals neither in relation to a professionalization project nor to their future roles in anticolonial movements or independent polities, whether liberal democratic or otherwise. Rather than reading non-European colonial lawyers as villainous collaborators or as heroes exercising agency, the new approach sees them as intellectual middlemen molding colonial forms of ethnographic knowledge and collective self-image. In this way, the history of the legal profession connects with the themes of legal pluralism and communalism, reflecting the inseparability of legal interpretation and the ethnocultural (and gendered) worlds of law’s interpreters.

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29. As Strickland’s footnotes suggest, the Oklahoma Historical Society is a treasure trove of Cherokee legal history sources. See, for example, Foreman (n.d.).

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