Introduction

> We deeply lament the evils and misery which have been brought upon India by the acts of ambitious Men, who have deceived their Countrymen, by false reports, and led them into open Rebellion. Our Power has been shewn by the Suppression of that Rebellion in the field; We desire to shew Our Mercy, by pardoning the Offences of those who have been thus misled, but who desire to return to the path of Duty.
>
> *Proclamation, by the Queen in Council, to the Princes, Chiefs and People of India*, 1858

> The talk of clemency comes with ill grace, and comes upon a public that asks for no clemency, no mercy, but asks for simple justice. If there has been a plot really to wage war against the King or to overthrow the Government, let those who are found guilty by a properly constituted court be hanged.
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> Mohandas Karamchand Gandhi, "The Viceroy's Speech: Inquiry Committee," *Young India*, 10 September 1919

Between January and February 1858, Bahadur Shah Zafar II, the last Mughal emperor, was placed on trial for his role as the leader of the most consequential uprising in the British Empire since the American Revolution. Importantly, he was not charged for these crimes as a Mughal sovereign, but instead was accused of mutiny and treason as a subject and pensioner of the East India Company. In an act of pointed humiliation, the courtroom was set up in his former palace, the seat from where the Uprising was said to have been directed. Described by the legal scholar A.G. Noorani as "the first victor's trial in modern

history," the event would see an elderly man in waning health face a court of questionable legitimacy, and in a language in which he was not fluent.[1] Though the emperor maintained his innocence, the European Military Commission found him guilty on all counts. As his surrender to British authorities had been contingent on the guarantee of his life, the court banished him to Rangoon to live out the rest of his days in exile.

Within months of this trial, the British parliament in London had formally recognized India as a crown colony. The transfer of power was publicly announced by Queen Victoria through a royal proclamation, delivered to the people from cities and towns across the subcontinent. The charter laid out the new terms governing the relationship between sovereign and subject under colonial rule. Among the promises of economic prosperity, equality under the law, and the protection of local customs and traditions, the proclamation contained an offer. An amnesty was presented to rebels on the condition of their surrender. Forgiveness would be available to all but a small group of rebel leaders. After a display of power "in the field," this new configuration of imperial sovereignty would be established through an act of mercy.[2]

Over sixty years later, Mohandas Karamchand Gandhi led the Noncooperation Movement (NCM). This began in September 1920 and quickly became India's largest organized mass political effort to bring about *swaraj* or self-rule. In echoes of the Uprising of 1857, the movement started with a call for Indian soldiers to withdraw from the British army. What followed was a strictly nonviolent program of boycotts which targeted schools, lawcourts, legislatures, and finally taxes. Here Gandhi was building on a reading of colonial power that he first articulated in *Hind Swaraj* in 1909. One of the most novel aspects of this thesis revolved around the question of consent. Unlike both liberal and revolutionary nationalists, who to different degrees critiqued the colonial state for its refusal to ground its authority in the popular will, Gandhi suggested that Indians had in fact already consented to colonialism. This was not a consent performed via the

[1] A.G. Noorani, *Indian Political Trials, 1775–1947* (New Delhi: Oxford University Press, 2005), 77.

[2] "Queen Victoria's Proclamation," in *Indian Constitutional Documents, 1773–1915*, ed. Panchanandas Mukherji (Calcutta: Thacker Spink and Co., 1915), 355–358.

vote, but through everyday practices. Whether it be in commerce, law, politics, or education, Gandhi argued that, while Indians continued to be the patrons of colonial institutions in their daily lives, they conferred colonial rule legitimacy.[3] In a somewhat counter-intuitive move, by making colonial subjects complicit in their own subjugation, Gandhi's reading of colonial authority proved incredibly empowering. The implication was that Indians need no longer petition the colonial government for constitutional reform. Nor should they target the institutions of colonial power through acts of revolutionary violence. The agency to end empire was reimagined as a resource already available from within, something that could be activated through personal sacrifices and a disciplined program of nonviolent withdrawal. As the argument ran, the British remained in India only because Indians kept them there, and with full nonparticipation, colonial rule would collapse in a year.

Gandhi's call to arms electrified anticolonial sentiment across India and inspired noncooperators to flood colonial prisons. For many, the act of jail-going became a moment of original liberation. As the future deputy prime minister C. Rajagopalachari would write from his prison cell in 1921, "Have I really become so free that Government has to lock me up if they wish to keep me? For the first time in my life I felt I was free, and had thrown off the foreign yoke."[4] While the movement ultimately failed, this period is generally recognized by historians as a turning point in the history of popular anticolonial nationalism, and a blow to the authority of the colonial state that the British Empire would never fully recover from.[5]

Myriad factors had led Gandhi to the conclusion that reform from within the existing constitutional order was no longer plausible. A major issue had been the infamous declaration of martial law in Punjab in 1919, passed in response to the outbreak of anticolonial protests across the province. In a coauthored report sent to the Indian National Congress examining the violence that ensued, Gandhi decried

[3] M.K. Gandhi, *Hind Swaraj and Other Writings*, ed. Anthony J. Parel (Cambridge: University of Cambridge Press, 2009).

[4] Chakravarti Rajagopalachari, *Jail Diary: Being Notes Made by Him in Vellore Jail from December 1921 to March 1922* (Madras: Swarajya, 1922), 3.

[5] David Hardiman, *Noncooperation in India: Nonviolent Strategy and Protest, 1920–22* (Oxford: Oxford University Press, 2021).

the indiscriminate use of flogging, the humiliating crawling orders, and the large number of severe sentences passed in hastily established martial law courts. The most grievous sin though had been the terrible violence of the Jallianwala Bagh massacre which had left almost 400 unarmed protestors dead and around 1,200 more injured.[6] In the report's words, this was a "calculated piece of inhumanity ... unparalleled for its ferocity in the history of modern British administration."[7]

Gandhi recognized better than most the role played by violence in sustaining empire. And yet during this period he had also begun to consistently warn his followers about another dangerous instrument of colonial power: the ensnaring promise of mercy. In a series of political cases connected to arrests in 1919, colonial judges had tempered their sentences as a gesture of goodwill to the accused. Gandhi understood these measures as strategies to restore amicable relations between the government and the people, and throatily denounced them. Whether in his private correspondence or in his public writings, he advised those accused of crimes to demand justice but refuse mercy.[8] When he wrote about the judges involved in these cases, he compared them to plunderers who first stole property and then decided to return a portion of it as an act of kindness.[9] Gandhi argued that Indians needed to recognize that colonial violence did not always take the shape of a sword.[10]

In March 1922, with the movement stuttering, Gandhi would find himself in a criminal court facing multiple charges of sedition. The experience of trial had been a demeaning one for the last Mughal emperor. The leader of the NCM, by contrast, positively welcomed the criminal charges brought against him. The accused explained that as an Indian citizen he had been duty-bound to commit these crimes, and was similarly compelled to plead guilty and accept his punishment.

[6] Kim A. Wagner, *Amritsar 1919: An Empire of Fear and the Making of a Massacre* (New Haven: Yale University Press, 2019).
[7] "Congress Report on the Punjab Disorders," 25 March 1920–June 1920, vol. 20, *Collected Works of Mahatma Gandhi* (hereafter *CWMG*) (Ahmedabad: Navajivan Trust, 1958–1984).
[8] See, for instance, "Durgadas Adwani," *Young India*, 3 December 1919, vol. 19, *CWMG*.
[9] "Unhappy Punjab," *Navajivan*, 7 September 1919, vol. 18, *CWMG*.
[10] "Dr Satyapal's Case," *Young India*, 3 September, 1919, vol. 18, *CWMG*.

If colonial rule attempted to coerce colonial subjects into promising their political allegiance to the Crown, bound through laws like the Indian Penal Code (IPC), this was summarily dismissed in his now famous denunciation of the concept of sedition. As Gandhi stated, "Affection cannot be manufactured or regulated by law."[11] For Gandhi, the citizen's prime obligation lay not in obeying the sovereign commands of the modern colonial state and its assembly of positive laws, but "in obedience to the higher law of our being, the voice of conscience." As he faced the colonial judge he declared, "I do not ask for mercy. I do not plead any extenuating act."[12] He pled guilty and asked, instead, for the strictest possible punishment. He was sentenced to six years imprisonment.

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In a colonial context marked by tremendous violence, it is easy to dismiss the promise of imperial mercy as hollow. However, the place of amnesty in the Queen's Proclamation had been no accident. Neither was its rejection by Gandhi an afterthought. The offer of mercy to rebels had rather been consciously organized to enfold a new class of subjects within an expanding imperial order in the aftermath of 1857, each individual bound to the sovereign through a tie of allegiance. It was only when colonial mercy was rejected that Indian nationalism began to express itself as fully unbound from the political and legal constraints of imperial subjecthood. However, if mercy proved pivotal to both the founding of the modern colonial state and the emergence of a new iteration of anticolonial nationalism, its significance has received scant attention from historians of colonial law and violence in South Asia. This book by contrast takes mercy much more seriously. While colonial rule was at all times dependent on extreme force to maintain its authority and punish those that transgressed its laws, it remained equally reliant on calculated exercises of mercy and leniency to preserve its thin but vital claims to legitimacy as a paternalist force. As this book argues, to understand the complex nature of colonial violence, we need to examine its constitutive relationship to discretion and colonial mercy.

[11] M.K Gandhi, "The Great Trial," in *The Law and the Lawyers*, ed. S.B. Kher (Ahmedabad: Navajivan Publishing House, 1962), 118.
[12] Francis Watson, *The Trial of Mr. Gandhi* (London: Macmillan and Co., 1969), 68.

By returning to the question of colonial power through the lens of mercy, I make two larger interventions in the legal histories of South Asia and the British Empire. First, *Trials of Sovereignty* studies colonial terror and mercy as related expressions of colonial sovereign power. In recent years, new histories of imperialism have effectively disturbed an earlier historiographical complacency regarding the role of violence in empire, while simultaneously challenging the still present imperial nostalgia that echoes through contemporary British public discourse. These studies of colonial law have largely focused on either exceptional episodes or practices of violence, or very clear examples in which white subjects were afforded racial privilege.[13] This has, I suggest, produced an overly straightforward reading of how "the rule of colonial difference" governed the majority of the law's violence in colonial India.[14] While the central role played by race has been underscored across this work, how law managed and deepened a secondary set of markers of difference has been comparatively obscured. Whether it be along lines of class, status, caste, religion, or gender, colonial officials and judges thought carefully about these social hierarchies, and developed a legal apparatus to ensure the violence of the state would be applied unevenly accordingly.[15] As this book argues, the decision to punish some colonial subjects with violence relied on the same logic

[13] There is now a large body of work on these questions, see Mark Condos, "License to Kill: The Murderous Outrages Act and the Rule of Law in Colonial India, 1867–1925," *Modern Asian Studies*, 50:2 (2015), 1–39; Elizabeth Kolsky, "The Colonial Rule of Law and the Legal Regime of Exception: Frontier 'Fanaticism' and State Violence in British India," *American Historical Review*, 120:4 (2015), 1218–1246; Kim A. Wagner, "'Calculated to Strike Terror': The Amritsar Massacre and the Spectacle Violence," *Past and Present*, 233 (2016), 185–225; Nasser Hussain, *A Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003). For examples of everyday violence, see Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010); Jordanna Bailkin, "The Boot and the Spleen: When was Murder Possible in British India?" *Comparative Studies in Society and History*, 48 (2006), 462–493; Martin Wiener, *An Empire on Trial: Race, Murder and Justice under British Rule, 1870–1935* (Cambridge: Cambridge University Press, 2008); Deana Heath, *Colonial Terror; Torture and State Violence in Colonial India* (Oxford: Oxford University Press, 2021).

[14] Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 14–34.

[15] Scholars of gender and personal law have been more attentive to these processes, demonstrating how colonial codification acted to enshrine conservative and elite interpretations of religious authority at the expense of more plural customary

which allowed others to be treated with greater degrees of leniency. When colonial violence is read in these terms, the complexities of politics of colonial difference appear with greater clarity. Violence did not simply separate the colonized from the colonizer, but also allowed lawmakers and judges to reproduce and police differences between communities in an effort to co-opt and placate social and political elites. At all stages, these decisions attempted to deepen the authority and bolster the legitimacy of this broader colonial political order. These complex calculations took place during periods of both crisis and emergency and through the administration of everyday justice, and help us better chart the complicated and often circumscribed nature of colonial state power.

Second, *Trials of Sovereignty* moves beyond approaches to violence and sovereignty that have exclusively focused on the ideas and practices of the colonial state. Instead this book studies the right to punish as a contested and unstable expression of sovereign power. As new intellectual histories of Indian political thought are demonstrating, the ideas of liberal imperialists were not uncritically consumed as they traveled to the colony. They were rather heavily debated, critiqued, and remade under the conditions of colonial rule. Over time, as the legitimacy of the state waned in the eyes of the governed, anticolonial thinkers offered coherent and compelling alternate political imaginaries. These political projects not only sought to displace the colonial government but also attempted to rethink the place of rights and justice, as well as the nature of sovereignty itself.[16] Rather than treating the history of state violence and the history of anticolonial political thought as separate fields of inquiry, this history of colonial punishment affords us an opportunity to productively bring this scholarship together. As this book shows, when representative institutions did not exist in meaningful ways, the criminal trial emerged as the most important political debating chamber in colonial

traditions. See, for instance, Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999).

[16] For important recent histories of South Asian political thought most relevant to this study, see C.A. Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge: Cambridge University Press, 2012); Faisal Devji, *The Impossible Indian: Gandhi and the Temptation of Violence* (Cambridge, MA: Harvard University Press, 2012); Shruti Kapila, *Violent Fraternity: Indian Political Thought in the Global Age* (Princeton: Princeton University Press, 2021).

India. In these moments, as the state attempted to enforce its right to punish criminal wrongdoing, colonial subjects responded by effectively probing, testing, and over time rejecting the ideological foundations of colonial rule. This book therefore studies the decision to punish or pardon not only as key "strategies of rule" but also as a site of very serious colonial resistance.[17]

In studying the contested and unsettled nature of colonial sovereignty through the right to punish across this history, *Trials of Sovereignty* also offers the first legal history to explore how the early development of India's modern criminal justice system would be shaped by both the violence of 1857 and the subsequent emergence of an anticolonial political nation. This period represents a highly significant chapter in the history of colonial justice and provides important context for the postcolonial present. Though justice in India is now done in the name of a sovereign Indian people, the courts and codes assembled during this period continued to play a formative role in postcolonial criminal law long after British colonialism ended. They remain powerful reminders of the enduring legacies of colonial rule which continue to mark our contemporary world. This introduction will begin by describing this book's approach to terror, mercy, and sovereignty, before offering an overview of the book's chapters.

The Politics of Terror

The relationship between terror, mercy, and criminal law was first thoroughly explored in Douglas Hay's classic study of England's eighteenth-century "Bloody Code." Hay argued that this system of criminal justice was interesting neither for the very large number of capital statutes on the books (over 200 at its peak) nor for the number of death sentences passed in courts.[18] The riddle was rather to understand why an ever-growing number of capitally punishable

[17] K.J. Kesselring, *Mercy and Authority in the Tudor State* (Cambridge: Cambridge University Press, 2003), 2.

[18] Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, and Cal Winslow (London: Verso, 2011), 17–64.

offenses, mostly relating to property crime, produced a fairly unchanging number of hangings. If the criminal law looked bloody, Hay explained that the criminal trial had remained shot through with discretion. It was the tactful deployment of these pockets of discretion that enabled private networks composed of the propertied classes to save most offenders from the gallows. In building a legal order around terror, the point was thus not to kill more convicts, but to increase the occasions in which subjects might stand fearfully at the foot of judges and jurors, only to be saved through the benevolent act of pardon. The drama of the trial and executive clemency therefore became an opportunity to reinforce "vertical chains of loyalty" between those who held power and those who did not.[19] The criminal law, ordered around the death sentence, helped to uphold the rule of property in an era in which the state lacked an established police force.

Though discretion would remain an important feature of English criminal law, by the early nineteenth century this legal order would collapse, to be replaced by the type of modern disciplinary carceral institutions that have been the focus of so much scholarly attention.[20] Following a wave of legal reforms in the 1830s which dramatically reduced the number of capital statutes, the figure of the condemned was now almost always a murderer.[21] As the "Bloody Code" was dismantled, the number of executions in turn drastically decreased.[22] This trend was found across Western Europe, as well as in other parts of the empire. Australia's proclivity for hangings, for instance, peaked in the 1830s before also beginning to steadily decline.[23]

The declining scale of state violence and its increasingly private performance was bound up in processes of state formation and much

[19] Ibid.

[20] Though the "golden age of discretion" has been recently shown to have lived on beyond the end of the bloody code in England, the decision-making authority of the judge remained substantively broader in colonial India. Phil Handler, "Judges and the Criminal Law in England, 1808–61," in *Judges and Judging in the History of the Common Law and Civil Law*, ed. Paul Brand and Joshua Getzler (Cambridge: Cambridge University Press, 2012).

[21] Phil Handler, "Forgery and the End of the 'Bloody Code' in Early Nineteenth-Century England," *The Historical Journal*, 48:3 (2005), 683–702.

[22] V.A.C. Gatrell, *The Hanging Tree: Execution and the English People, 1770–1868* (Oxford: Oxford University Press, 1994), 617.

[23] Steven Anderson, *A History of Capital Punishment in the Australian Colonies, 1788 to 1900* (Cham: Palgrave Macmillan, 2020), 53.

wider concurrent transformations relating to political authority during this period.[24] The widening access to the ballot box for instance developed hand in hand with the changing nature of state violence. The "Great Reform Act" of 1832 increased the franchise to more than 650,000 property-owning men.[25] Within two years, gibbeting, the practice of hanging bodies in chains after execution, was scratched from the statute books. The more generous Second Reform Act of 1867 almost doubled the electorate, and in Robert Saunders' words ushered "in the age of mass politics" in Britain.[26] The next year capital punishment was made a completely private affair.[27] As the law increasingly derived its authority from the notion of popular consent and representative institutions, it demonstrated a diminished appetite for public violence.

In colonial India, the relationship between an expanding electorate and a diminishing level of state violence was fully inverted. In the colony, the restricted nature of the franchise developed alongside a sustained recourse to violence. While liberal imperialists of the early nineteenth century had been committed to rapidly transforming Indian society through a series of interventionist projects, the violence of 1857 instigated a shift toward "indirect rule." As Karuna Mantena has lucidly detailed, this ideological turn was embodied by a more conservative approach to reform and a more authoritarian mode of governance.[28] Under these conditions, the principle of elected representation was first introduced at the local level in 1882 through a highly restricted franchise which voted for rural district boards and municipal councils only. From this point, progress moved at a glacial pace. By the time of the final political reform during our period of

[24] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Macmillan, 1978); Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin, 1977).

[25] John A. Phillips and Charles Wetherell, "The Great Reform Act of 1832 and the Political Modernization of England," *The American Historical Review*, 100:2 (1995), 411–436.

[26] Albeit still remaining an all-male mass politics. See Robert Saunders, "The Politics of Reform and the Making of the Second Reform Act, 1848–1867," *The Historical Journal*, 50:3 (2007), 571.

[27] Gatrell, *The Hanging Tree*, 23.

[28] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Imperial Liberalism* (Princeton: Princeton University Press, 2010).

study, the Montagu-Chelmsford reforms of 1919, the franchise would stand at under three percent of the population.[29] As the colonial government was still headed by a powerful unelected executive, India remained a "despotism of law" well after Company rule ended.[30]

Shorn of the restraints and oversight that representative institutions offered in Europe, the colonial state would continue to heavily rely on terror as a means of administering colonial justice. Though gibbetting and *tashir* (punishment through public humiliation) fell out of the penal machinery between 1800 and 1860, colonial subjects in India continued to be hanged and flogged in both private and public settings well into the twentieth century. Whipping as a judicial punishment retained a particularly significant place in the provision of justice long after it had become a rarity in the metropole.[31] Between 1896 and 1905 alone, 293,277 colonial subjects were whipped for a range of crimes.[32] Execution numbers grew consistently during this period. In simple terms, the colonial judiciary were more comfortable passing death sentences, and the condemned were less likely to receive commutation or mercy.[33] By the final years of colonial rule, single-year statistics in India commonly recorded more hangings than the total for the first fifty years of twentieth-century Britain.[34]

[29] James Chiriyankandath, "'Democracy' under the Raj: Elections and Separate Representation in British India," *Journal of Commonwealth and Comparative Politics*, 30:1 (1992), 41–43.

[30] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998).

[31] By the late nineteenth century this included garrotting, and later crimes particularly associated with male sexual deviance and perversion, including male prostitution, acts of indecent exposure, transvestites or pimps, see Jennifer Davis, "The London Garrotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in mid-Victorian England," in *Crime and The Law: The Social History of Crime in Europe Since 1500*, ed. V.A.C. B. Herman and G. Parker (London: Europa, 1980), 208; Angus McLaren, *The Trials of Masculinity: Policing Sexual Boundaries, 1870–1930* (Chicago: University of Chicago Press, 1997), 14–36.

[32] National Archives of India (hereafter NAI), Home (A)/Judicial/March 1907/Nos. 167–183, p. 42.

[33] Alastair McClure, "Killing in the Name of? Capital Punishment in Colonial and Postcolonial India," *Law and History Review*, 43 (2023), 365–385.

[34] In every year between 1940 and 1944 India recorded more than 700 executions, see NAI/Home/File No. 1/22/46/Public 1946; by contrast, Britain recorded 632 executions across the whole of 1900 and 1949, Victor Bailey, "The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945–51," *Law and History Review*, 18:2 (2000), 306.

What political work did this violence seek to achieve, and what might it tell us about the nature of colonial power? Recent scholarship has explained this tremendous scale of violence as a particularly striking manifestation of what Partha Chatterjee described as "the rule of colonial difference."[35] Unlike the rule of property, the rule of colonial difference rested on the presumption of a fundamental racial and civilizational distance between ruler and ruled. The shelves of texts produced by colonial anthropologists and historians in the aftermath of the Uprising argued that India did not constitute a modern political nation. Indian communities were instead conceived as a collection of communities divided and fractured along various markers of internal difference.[36] These ideas were powerful legitimating tools for colonial officials, who would justify colonial rule in India as a necessary mediating authority preventing society from collapsing into Hobbesian civil war.[37]

While historians have focused on different forms of violence in an effort to shine greater light on this question, all scholars have stressed the significance of isolating physical violence as a discrete and valuable site of historical analysis. Given the earlier complacency around the violent nature of empire in imperial historiography, this has been important corrective work. However, by focusing exclusively on terror and corporeal violence, historians risk obscuring the highly dynamic and contested nature of the relationship between colonial violence and colonial difference that developed across this period of study. This study departs from existing literature on colonial violence in two significant ways.

As aforementioned, first, it suggests that colonial difference was far less stable than is commonly supposed. By focusing on violence in its most spectacular or bloody form, histories of colonial violence have

[35] Chatterjee, *The Nation and its Fragments*.

[36] The sentiment is captured by the colonial official and anthropologist H.H. Risley in his work, *The People of India*, "We have seen that the factors which in other countries are regarded as essential to the growth of national sentiment either do not exist at all in India, or tend to produce separation rather than cohesion." Herbert Risley, *The People of India* (Calcutta: Thacker, Spink and Co., 1915), 293.

[37] James Fitzjames Stephen, for instance, described the simple provision of peace and law in India as a "social revolution . . . in a country, which has for centuries been the theatre of disorder and war," cited in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (London: G.P. Putnam and Sons, 1895), 287.

tended to read colonial difference singularly as a racial boundary separating colonizer from colonized.[38] Whereas the management of differences within colonial society, whether that along lines of caste, class, gender, or religion, have largely remained outside of what these histories study as *colonial* violence.[39] One of the contentions of this book is that we must pay much greater attention to the uneven application of colonial violence across the Indian social. The history of capital punishment following convictions for murder, the most common means by which the colonial state would take life under the law, helps us quickly underscore the importance of this point. A significant proportion of murder trials in India were the results of fairly mundane disputes between Indian subjects, often involving disputes over land or acts of domestic violence. While race always provided the overarching framework for how this legal order would be organized, on these occasions, colonial judges and officials were required to consider how other markers of difference might affect

[38] Kolsky rightly points out that race, contra David Cannadine's argument, played a more important part than rank or status in empire. However, by focusing primarily on white violence, less attention is afforded to the ongoing and developing relationship between the two, Kolsky, *Colonial Justice*, 10. For an example of colonial difference as a means to understand other forms of state violence, see Kim A. Wagner, "Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency," *History Workshop Journal*, 85 (2018), 217–237.

[39] Some early steps have been made to correct this, in reference to caste and police torture, see Mark Brown, *Penal Power and Colonial Rule* (Oxon: Routledge, 2014); Radha Kumar, "Witnessing Violence, Witnessing as Violence: Police Torture and Power in Twentieth-Century India", 47:3 (2022), 946–970; Heath, *Colonial Terror*. Meanwhile a rich older body of literature has examined how colonial knowledge production hardened communal and caste sentiment and contributed to conflict between communities. For a classic, see Gyan Pandey, *The Construction of Communalism in Colonial North India* (New Delhi: Oxford University Press, 1990). Other scholars have examined how various colonial categories were forged through criminal law, most infamously in the case of the Criminal Tribes Act of 1871. See Sanjay Nigam, "Disciplining and Policing the 'Criminals by Birth', Part 1: The Making of a Colonial Stereotype – The Criminal Tribes and Castes of North India," *The Indian Economic and Social History Review*, 27:2 (1990), 131–164; Sanjay Nigam, "Disciplining and Policing the 'Criminals by Birth', Part 2: The Development of a Disciplinary System, 1871–1900," *The Indian Economic and Social History Review*, 27:3 (1990), 257–287. For an overview of the more recent literature on this law, see Sarah Gandee and William Gould, "Introduction: Margins and the State – Caste, 'Tribe' and Criminality in South Asia," *Studies in History*, 36:1 (2020), 7–19. For a recent study of the experience of the *Hijra* under this legislation, see Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c. 1850–1900* (Cambridge: Cambridge University Press, 2019).

their decision to punish. How, for instance, might a judge incorporate ideas around Indian patriarchy or caste or religious sentiment into colonial death penalty jurisprudence? When should colonial subjects be executed in public or private?

When we compare alike cases that ended with different results, we learn that colonial ideas of difference did not always result in the decision to resort to more violence. While many more Indians were sent to the gallows than in England during this period, small and conditional rewards could be available for those who helped confirm the basic terms of the colonial encounter by conforming to cultural stereotypes. A bloody colonial state continued to preserve pockets of leniency and mercy in an attempt to accommodate colonial ideas of Indian cultural difference within its legal order, remaking internal social hierarchies and customs in the process. To track this process, we cannot simply examine acts of violence alone. We must instead ask why some colonial subjects were killed and others were spared.[40]

As this book argues, the politics of punishment in India constantly referred back to the ongoing and highly strained search for legitimacy under colonial rule. An autocratic state which did not derive its authority through a popular mandate could ill-afford to demonstrate complete disinterest in how the public viewed the legitimacy of its claim to define crime and punish subjects with violence. The colonial state responded to this challenge by fostering an uneven economy of violence and mercy to establish what Radhika Singha has described as "circuits of communication" between the ruler and the ruled.[41] In doing so, the criminal law was organized to achieve a fundamentally contradictory task – to reassert the logic of racial difference upon which colonial rule itself was predicated on one hand, while simultaneously and strategically privileging particular sections of Indian society to cultivate support for a fundamentally asymmetrical political order on the other. This proved a precarious balancing act that grew increasingly unstable over time.

[40] For how the perpetuation of difference formed the basis of indirect rule, see Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge, MA: Harvard University Press, 2012); see also Nicholas Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University press, 2001).

[41] Singha, *Despotism of Law*, xi.

Second, this book highlights the fraught entanglements between the continued growth of state violence and the subsequent criminalization of nationalist politics under colonial rule. During the nineteenth and twentieth centuries, Indian thinkers and political organizers effectively questioned the legitimacy of the state's violence, while contesting the notion that the Indian people did not represent a mature political nation. As Durba Ghosh, Joseph McQuade, Ujjwal Kumar Singh, and Taylor Sherman have shown, the emergence of an anticolonial nationalist movement brought substantial changes to India's legal and constitutional architecture in India.[42]

From the first decade of the twentieth century, the government began to widen its arsenal of exceptional powers to tackle the problem of political crime. Whether it be the decision to expand powers of preventive detention or enable deportation without trial, these measures were all justified on the grounds that political unrest in India had reached a state of almost perpetual crisis. This was a form of legality which borrowed penal strategies from existing extraordinary powers in British India, while also drawing on methods of intelligence gathering and policing from other parts of empire. What had previously been the Thagi and Dakaita Department was abolished and remade into the Department of Criminal Intelligence in 1903.[43] Changes to the sedition law in 1898 allowed local government to demand security for good behavior from publishers, a punishment that had previously been introduced to monitor vagrants and "*badmaashes*."[44] Emergency ordinances during World War One that

[42] Durba Ghosh, *Gentlemanly Terrorists: Political Violence and the Colonial State in India* (Cambridge: Cambridge University Press, 2017); Joseph McQuade, *A Genealogy of Terrorism: Colonial Law and the Origins of an Idea* (Cambridge: Cambridge University Press, 2020); Ujjwal Kumar Singh, *Political Prisoners in India* (New Delhi: Oxford University Press, 1998); Taylor Sherman, *State Violence and Punishment in India* (London: Routledge, 2009).

[43] Michael Silvestri, *Policing 'Bengali Terrorism' in India and the World* (Cham: Palgrave Macmillan, 2019), 39.

[44] This amendment also extended the law which allowed magistrates to bind over suspected offenders. Previously defined by those "or to do any wrongful act that may probably occasion a breach of peace" reframed to add "that is likely to disturb the public tranquillity," British Library (hereafter BL)/India Office Records (hereafter IOR)/L/PJ/6/479. Singha discusses the extension of the law to sedition, Radhika Singha, "Punished by Surveillance: Policing 'dangerousness' in colonial India, 1872–1918," *Modern Asian Studies*, 49:2 (2015), 264.

passed in Punjab to target political crimes "borrowed" sections from the Frontier Tribes Regulations.[45] The power to punish by association was widened by the Criminal Law Amendment Act XIV of 1908, which allowed whole associations to be proscribed and guilt to be ascribed to members on the basis of signatures or presence in a gathering. On many occasions, suspects were detained for months in jail under these powers, often in torturous conditions, only to be released without charge.[46] The steadily expanding franchise in Britain and white settler colonies would develop alongside a growing number of political prisoners housed in British jails in colonies across Africa and Asia.[47]

That nationalists sought to undermine the terms of colonial rule and were criminalized for their political efforts is not a novel insight. What is significant though is the serious calculations and concerns that would inform how the state responded to subjects of empire who framed their crimes as sacrifices made in the name of the nation. In cases in which the colonial state could define the criminal as "backward," "fanatic," or "savage," it continued to punish through ritualistic, brutal, and often highly public expressions of violence throughout this period of study. However, when popular political criminals were to be punished, and at times executed, the performance of colonial justice was to become an almost exclusively private and secretive affair. Though scholars have rightly drawn attention to the role of anxiety as a catalyst for more violence in empire, on some occasions, violence itself became the source of anxiety.[48]

Whether in the greater role played by terror within the everyday colonial penal economy, or the expansive category of political

[45] *Sedition Committee Report 1918* (Calcutta: Superintendent Government Printing, 1918), 150.

[46] BL, IOR/Mss EUR/573/36.

[47] Michael Lobban, *Imperial Incarceration: Detention without Trial in the Making of British Colonial Africa* (Cambridge: Cambridge University Press, 2021).

[48] For colonial governance and anxiety, see the important earlier article by Ranajit Guha, "Not at Home in Empire," *Critical Inquiry*, 23:3 (1997), 482–493; for more recent studies, see Mark Condos, *The Insecurity State: Punjab and the Making of Colonial Power in British India* (Cambridge: Cambridge University Press, 2017); Kim A. Wagner, "'Treading upon Fires': The 'Mutiny' – Motif and Colonial Anxieties in British India," *Past and Present*, 218:1 (2013), 1–39; Jon Wilson, *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835* (New York: Palgrave Macmillan, 2010).

criminality in India, these features of the colonial criminal law represented major departures from its counterpart in the metropole. In both cases, these features of the law were rooted in the founding colonial belief that representative institutions were not yet feasible in India. As colonial officials and lawmakers would argue in various forums, the state needed to be more violent to police a people defined as unable to fulfill the terms of modern political subjecthood and the social contract. And yet, in cases of both ordinary and political offenses, violence was also recognized as too blunt an instrument to singularly manage the unstable and contested nature of this colonial order. In many instances, terror would need to be balanced with strategic acts of restraint, leniency and mercy.

Mercy and Empire

If the bloody legacies of colonial violence remain a site of heated debate in postimperial Britain, in postcolonial India it is the history of colonial mercy that continues to court controversy. Feverish debate around which leaders accepted mercy, and why, continues to appear across newspaper columns, primetime TV debates, and during election campaigns. And yet while the provision of colonial mercy has remained a salient and politically charged contemporary issue, we lack a serious conceptual or historical understanding of the precise role played by mercy in colonial India.

Legal historians of other regions have been more attentive to the power and significance of mercy. This has ranged from studies on the restorative role of mercy during large-scale amnesties following civil wars and revolutions through to examinations of the discretionary powers wielded by judges to modify and mitigate everyday acts of punishment.[49] Across this work, scholars largely agree that mercy was never simply about doing justice better. The ability to both punish and then pardon were instead important governing strategies

[49] For recent literature that captures the breadth of historical interest in mercy and discretionary justice, see Edwin Carawan, *The Athenian Amnesty and Reconstructing the Law* (Oxford: Oxford University Press, 2013); Peter King, *Crime, Justice and Discretion in England, 1740–1820* (Oxford: Oxford University Press, 2000); Carolyn Strange, *Discretionary Justice: Pardon and Parole in New York from Revolution to the Depression* (New York: New York University Press, 2016).

used to uphold uneven social orders. As Carolyn Strange has explained, acts of mercy were always double-edged and conditional, as "those who appeal for mercy are necessarily *at* the mercy of power-holders."[50] If terror instilled fear, mercy bound the subject to the sovereign and cultivated habits of deference and obedience.

Imperial historians have stressed the important roles assigned to mercy as a tool of empire. As K.J. Kesselring's research demonstrates, pardons were key to imperial expansion in Ireland from as early as the sixteenth century. In Ireland, pardons were not only made available in the everyday administration of justice but also commonly offered to rebels who contested crown authority. Unlike in England where pardons could only be delivered personally by the Crown, the Irish deputy had been vested with the power to pardon subjects on behalf of the king himself. This departure was a recognition of the particular difficulties of governing in the peripheries of early modern empire, where the legitimacy and strength of English authority remained uncertain and fragile. As Kesselring notes, if these calculated exercises of mercy helped to extend crown authority across Ireland, they also implicitly revealed the limits of state power. Mercy necessarily appeared with the sword and represented opportunities for representatives of the Crown to more tactfully negotiate with local structures of power.[51]

Mercy's fingerprints can be found throughout the history of the British Empire. Between the seventeenth and nineteenth centuries, hundreds of thousands of men and women were transported as convicts across the imperial world.[52] The origins of transportation were partly rooted in efforts to address growing imperial labor demands. But this development was also conceived as an alternate punishment to the gallows during a time in which the efficacy of public executions was under question and jails overcrowded. Transportation offered a partial solution to both these concerns, and

[50] Carolyn Strange, "Introduction," in *Qualities of Mercy: Justice, Punishment, and Discretion*, ed. Carolyn Strange (Vancouver: University of British Columbia Press, 1996). 5.

[51] Kesselring, *Mercy and Authority*, 192–197.

[52] Clare Anderson, "Transnational Histories of Penal Transportation: Punishment, Labour and Governance in the British Imperial World, 1788–1939," *Australian Historical Studies*, 47:3 (2016), 381–397.

from the early seventeenth century the Crown began to present conditional pardons to the condemned who were then sent to the colonies.[53]

As convicts were transported around the globe, officials tasked with administering these newly acquired territories turned to the pardon to develop new societies. For instance, in the early colonial history of New South Wales, governors prioritized pardons for men who possessed useful labor skills. While ongoing efforts to promote the ideal of a settled family unit resulted in convicts often being rewarded with pardons or tickets-of-leave after marriage.[54] Modern state bureaucracies developed across the nineteenth and twentieth centuries, and historians of Australia, Canada, South Africa, and Ireland have demonstrated the manifold ways colonial officials continued to carefully balance exemplary acts of terror with pointed demonstrations of mercy as they attempted to shore up colonial authority.[55] Examples here ranged from the use of mercy as a way to manage fraught relations with communities in colonial frontiers, as a means to declare peace after periods of rebellion and revolt, and as a feature of day-to-day justice.[56]

[53] This system was regulated and heavily expanded with the 1718 Transportation Act which allowed the courts to directly sentence a convict to transportation, Cynthia Herrup, "Punishing Pardon: Some Thoughts on the Origins of Penal Transportation," in *Penal Practice and Culture, 1500–1900 Punishing the English*, ed. Simon Deveraux and Paul Griffiths (London: Palgrave Macmillan, 2004); J. M. Beattie, *Policing and Punishment in London 1660–1750: Urban Crime and the Limits of Terror* (Oxford: Oxford University Press, 2001): 424–431; Bruce Kercher, "Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850," *Law and History Review*, 21:3 (2003), 527–584; Simon Devereaux, "Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789," *Law and History Review*, 25:1 (2007), 101–138.

[54] This discretion to pardon was whittled down over the years, but remained an important feature of colonial justice, J.B. Hirst, *Convict Society and its Enemies: A History of Early South Wales* (London: George Allen and Unwin, 1983), 79–80, 85–86.

[55] Rob Turrell, "'It's a Mystery': The Royal Prerogative of Mercy in England, Canada and South Africa," *Crime, History and Societies*, 4:1 (2000), 83–101.

[56] Rob Turrell, *White Mercy: A Study of the Death Penalty in South Africa* (Westport: Praeger, 2004); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010), 169–170; Caitlin Adams, "Thinking the Empire Poor: Plebian Petitions for Clemency in Britain and New South Wales," *History Australia*, 19:3 (2022), 430–449; James Gregory, *Mercy and British Culture, 1760–1960* (London: Bloomsbury, 2021).

If pardons in their various guises helped satisfy the immediate demands placed on a fast-growing empire, on other occasions, merciful acts could perform more nuanced ideological work. For example, Tina Loo's study of late nineteenth-century British Columbia examined how colonial judges were at times willing to recommend executive mercy during capital cases involving First Nations people. These recommendations, however, rested not on an ideal of universal justice, but on the notion that Indigenous subjects should not be held to the same legal standard as white Canadians when it came to ideas of modern criminal responsibility. Cultural differences could therefore be accommodated into colonial law, but only through what she describes as acts of "savage mercy."[57] Stacey Hynd has found similar politics governing the mitigation of death sentences for African defendants in twentieth-century Nyasaland and Kenya in which she describes the mitigation of sentences as being "shaped by shifting landscapes of power and racialized stereotype of African behaviour."[58] In both cases, mercy helped embed the racial logic of colonial difference ever deeper into colonial legal cultures, while simultaneously consolidating the basic political ideas that justified imperial rule.

Colonial rule in India would rely on many of these forms of imperial mercy, while also emerging as a site in which innovative experiments in mercy and discretionary justice would be undertaken.[59] However, unlike the history of colonial violence, these issues have not received sustained scholarly interest. In the only work to previously study this question at length, Durba Ghosh has examined the royal amnesty which was organized to coincide with the Montagu-Chelmsford reforms of 1919. As Ghosh shows, the two events were deeply

[57] Tina Loo, "Savage Mercy: Native Culture and the Modification of Capital Punishment in Nineteenth-Century British Columbia," in Qualities of Mercy, ed. Strange.

[58] Stacey Hynd, "'The Extreme Penalty of the Law': Mercy and the Death Penalty as Aspects of State Power in Colonial Nyasaland, c. 1903–47," *Journal of Eastern African Studies*, 4:3 (2010), 542–559; Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909–1956," *International Journal of African Historical Studies*, 45:1 (2012), 81.

[59] Mithi Mukherjee has importantly stressed the significant discursive role played by the idea of mercy and benevolence in the remaking of the imperial constitution post-1858, this book seeks to examine how this played out in practice. See Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History (1774–1950)* (New Delhi: Oxford University Press, 2010).

intertwined. The 1919 reforms had been understood by colonial officials as a symbolically significant step toward "responsible government." The Act promised to both expand the electorate and empower provincial governments over select policy areas. However, these reforms were planned during a highly febrile political climate. The concurrent growth of militant and revolutionary nationalism, largely organized by a class of upper caste and educated Indians, had produced a growing population of political prisoners housed in colonial jails. This brought about a very immediate problem. How could a state hoping to prove its commitments to liberal reform do so while also using emergency powers to imprison so many subjects for political offenses? The amnesty was therefore conceived as a means to bring these more militant but influential individuals back within the fold, while also garnering broader support for the state's proposed constitutional reforms.[60]

Ghosh's analysis demonstrates how seriously officials took mercy as an instrument that might resolve very thorny political problems in India. But there is far more to be said. From the middle of the eighteenth century, the political authority of the East India Company grew rapidly in the subcontinent. In the course of roughly a hundred years, the Company transformed itself from a relatively small coastal trading company to the major territorial power in South Asia. Historians of this period have demonstrated the crucial role played by the Company's military in this story.[61] While coercive force was always key, mercy represents an understudied aspect of this history. References to negotiated surrenders and amnesties appear across the records of the mutinies, revolts, rebellions, and wars fought between the Company and regional powers. Offers of mercy helped compel local figures of authority to accede to company authority and accept British paramountcy. In return, colonial rulers promised that their lengthy histories of violence, crime, or resistance would be forgotten and their lands and villages protected.[62] In these instances, amnesties

[60] Ghosh, *Gentlemanly Terrorists*, 51–56.

[61] For the role of the military in the extension of company rule, see, Kaushik Roy, "The Hybrid Military Establishment of the East India Company in South Asia: 1750–1849," *Journal of Global History*, 6 (2011), 195–218.

[62] How effectively individuals were able to win mercy and amnesty varied. In 1807 when Luchmon Sing, a "petty raja" from Bengal, asked for mercy for himself and his

and mercy not only helped avoid protracted and expensive military campaigns but also build crucial networks of patronage with leaders and figures of authority across the Indian subcontinent.[63]

While mercy was crucial to the rise of the company raj, for reasons discussed later, this book focuses specifically on the function and politics of mercy as a tool of imperial governance following the Uprising of 1857 and the transfer of full sovereignty to the Crown. From this point, the notion of a merciful sovereign would emerge as a critical resource from which colonial rule drew its ideological legitimacy. Before the colonial government considered deploying amnesties to solidify support for ongoing constitutional reforms in the twentieth century, large-scale amnesties were deployed to bolster the authority of the imperial Crown. After the amnesty offered during the Queen's Proclamation in 1858, multiple more exercises of mass pardons were undertaken to coincide with royal celebrations. During the Delhi Durbar in 1877, organized to inaugurate Queen Victoria's assumption of the title of Empress of India, ten percent of colonial prisoners were released as a gesture of goodwill.[64] Though the nationalist political movement was not yet a cause of concern for the colonial state, these releases had been motivated by fears that loyalty amongst the Indian public had been

followers and resumption of all his private property, he was only promised mercy and protection, "Sunnud granted to Luchmon Sing, 1807," in *A Collection of Treaties and Engagements with the Native Princes and States of Asia* (London: United East-India Company 1812), 339. By contrast, others were able to win notable concessions. As the first Rohilla War in 1773–1774 drew to a close, Faizullah Khan retreated into a nearby mountainous area with the remaining troops. While the company forces enacted brutal violence on those left behind, difficulties reaching Khan and his followers led to the offer of an amnesty. In the subsequent Treaty of Lal Dang, Khan was both forgiven and given the right to choose his own area for the establishment of a new Rohilla state. See Alok Prasad, "Rohilla Resistance against Colonial Intervention under Nawab Faizullah Khan of Rampur (1774–1794)", *Proceedings of the Indian History Congress*, 73 (2012), 563–572.

[63] Amnesties, promises of indemnity, and pardons were made available during periods of conflicts that include but are not restricted to the Cooch-Behar "disturbances" in 1788, the deposing of the Rajah of Benares in 1791, the Third Anglo-Maratha War in 1818, the Paika Rebellion of 1817–1819, the Kol Uprising of 1831–1832, and the Santhal Rebellion in 1855.

[64] Alastair McClure, "Sovereignty, Law and the Politics of Forgiveness in Colonial India, 1858–1903," *Comparative Studies of South Asia, Africa and the Middle East*, 38:3 (2018), 385–401

weakening. This practice would then be repeated during future jubilees and coronations in 1887, 1897, and 1903.

The strategy of using amnesties to ease nationalist political unrest would first be openly discussed in 1908 after the controversial partition of Bengal. As emergency laws were passed to respond to ongoing discontent and protest, Viceroy Lord Minto pressed Secretary for State Lord Morley to organize another amnesty to coincide with the fifty-year anniversary of the Queen's Proclamation. In his letters, he stressed how serious he believed the emergence of political criminality had become and suggested that amnesty for these crimes "would be a good answer to those who accuse us of vindictive ferocity toward political offenders."[65] By the early twentieth century, the routinized nature of these pardons had become highly anticipated dates in the jail calendar for the incarcerated. As the Hindu nationalist V.D. Savarkar explained in his prison diaries from the Andaman Islands, when the jubilee and other important events were approaching, the possibility of amnesty would become the "talk of the whole prison."[66] As the colonial government assembled an extensive modern administrative state and codified its criminal law, the practice of mass spectacles of mercy remained prominent and carefully cultivated features of colonial justice and colonial power.

Though moments of mass pardoning have received some attention, the regularity of these spectacles poses further questions. For one, given the elaborate and extremely public lengths the post-1858 colonial state went to promote its merciful and forgiving character, how far did colonial mercy extend beyond these curated states of legal exception? And what bureaucratic and administrative procedures governed the processing of petitions for mercy in ordinary cases? As this book shows, efforts to manage mercy beyond these organized spectacles would prove a regular source of trouble for colonial officials, exposing real uncertainties about the precise rights owed to Indian subjects within the imperial political order.

[65] Morley to Minto, 7 October 1908, BL, IOR/Mss Eur D573/3 f298. Another pardon was also organized to coincide with the signing of the Treaty of the Peace and the end of hostilities at the end of World War One, which resulted in the release of ten percent of male prisoners and made all female prisoners eligible for release on the discretion of the local government. BL, IOR, L/PJ/6/1558, File 5768.

[66] V.D. Savarkar, *The Story of My Transportation: A Biography of Black Days of Andamans* (Bombay: Sadbhakti Publications, 1950), 187.

Moving beyond the prerogative power to pardon, discretion would also flow through India's codified legal order in very significant ways. For reasons explored in greater detail across this book, colonial judges were invested with very wide discretionary powers under the IPC, while the authority of the criminal jury would be circumscribed. Notably, discretion played an especially important function in relation to corporal violence and punishment. From its reintroduction in 1864, whipping for instance was a summary punishment and was left to the discretion of the magistrate. Meanwhile the punishment for murder, the most common capitally punished offense, was defined by an unusual degree of discretion. Across most of the British common law world, murder carried a mandatory death sentence.[67] Once the accused was found guilty, the authority of the judge in England, Canada, or Australia extended to writing a recommendation for mercy. The decision to save the murderer from the gallows was thus reserved for executive authorities. Under the IPC, by contrast, the judge was invested with the authority to find the accused guilty of murder, but then decide to punish the convict with death *or* transportation for life. These wide powers of discretion had been carved very purposefully into a law organized to administer justice for a people deemed unable to be fully trusted as modern legal subjects. As India's criminal law was codified, colonial judges became the most powerful figures managing the political economy of colonial violence. They decided which subjects could be whipped or condemned, and which might be punished with fines, imprisonment, or transported to the Andaman Islands.

In an attempt to track the dynamic and contested relationship between the right to punish and the right rule in colonial India, this book therefore traverses the wide range of discretionary powers woven into the colonial legal and political order. It engages carefully with a very basic set questions: How precisely was the criminal law assembled in colonial India, and in what ways did this legal apparatus develop in

[67] Mandatory death sentence for murder was the norm throughout most of the British imperial world. In some colonies which had incorporated the IPC, the mandatory death sentences for murder was, however, only added at a later date, including Kenya and Singapore. See Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya ca. 1909–1956," *International Journal of African Historical Studies*, 45:1 (2012), 84–85; Michael Hor, "The Death Penalty in Singapore and International Law," *Singapore Year Book of International Law*, 8 (2004), 105–117.

relation to the changing political and social context of this politically tumultuous period? What factors informed the degree of severity applied to different colonial subjects, and when and why were different methods of punishment deemed appropriate? And finally, how did those subjected to this legal order respond to the threat of colonial terror and the promise of mercy? In following these questions across a key period of state formation, this book tracks how the ideologies of empire were translated into legal practice as the foundations of India's modern criminal justice system were being built.

Trials of Sovereignty

Unlike other studies of colonial sovereignty and violence, this book does not study the colony as a state of exception.[68] Instead, I examine the right to punish as both the most significant expression of colonial sovereign power and an ongoing problem for a state that never grounded its authority in popular support. Insights from approaches to the history of imperial territoriality, jurisdiction, and geography are useful here.[69] As various scholars have shown, the sheer breadth and diversity of imperial geographies relied on plural legal orders and a flexible approach to law and authority. In British India, this unevenness was most strikingly the case in relation to princely states. Dotted across the subcontinent, these almost 600 semi-autonomous territories existed under the paramountcy of British rule, but retained degrees of political sovereignty. If this was very often an uncertain arrangement, issues provoked from unsettled boundaries, disputes over the extradition of criminals, and cross-border policing could often quickly spiral into serious debates about the limits and nature of sovereignty.[70] As histories of these territories have shown, following the establishment of crown rule, this was no predictable story in which

[68] Heath, *Colonial Terror*, see also Achille Mbembe, *Necropolitics* (Durham: Duke University Press, 2019).

[69] See, particularly, Lauren Benton's warning that "representing empires as zones of exception oversimplifies imperial sovereignty," Lauren Benton, *Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2009), 286.

[70] Eric Lewis Beverley, "Frontier as Resource: Law, Crime, and Sovereignty on the Margins of Empire," *Comparative Studies in Society and History*, 55:2 (2014), 241–272; For the problems of residual enclaves of French territory in India, see

colonial law could be used by the British Empire to gradually encroach into princely territory. Whether in the case of a small coastal states like Cochin, or the larger and more powerful Travancore, legal savviness enabled princely states to exploit the ambiguity of their status under imperial and international law, consolidating, and on occasion even extending, their sovereignty at the expense of the British colonial state.[71] With this in mind, Priyasha Saksena has suggested that the idea of sovereignty is best examined by historians as a "terrain of legal and political struggle."[72]

This book considers how our understanding of the relationship between the right to punish or pardon might change if we examine these sovereign expressions of power in these terms. When we look back at the historical record, struggles over the precise boundaries determining the legitimate right to define crime and punish appear with tremendous frequency. Intermittent scandals, whether from incidents of brutal police torture or the prevalence of poorly punished nonofficial white violence were persistent themes in newspapers and repeated lines of attack from nationalists.[73] As the state held tightly to the right to resort to punitive and often spectacular forms of violence in the name of colonial justice, Indian social reformers wrote passionately about the need to reform the criminal justice system to better incorporate modern criminological principles, contrasting the promises of British commitments to liberalism to the painful application of colonial law.[74] Who could participate in the

Mark Condos, "The Indian 'Alsatia': Sovereignty, Extradition and the Limits of Franco-British Colonial Policing," *Journal of Imperial and Commonwealth History*, 48:1 (2020): 101–126. Reeju Ray has demonstrated how civilizational arguments were deployed to extend sovereignty into frontier zones in the north east frontier, and relevantly, how these attempts were constantly mediated through and "interrupted" by various forms of resistance, Reeju Ray, "Interrupted Sovereignties in the North East Frontier of British India, 1787–1870," *Modern Asian Studies*, 53:2 (2019): 606–632.

[71] Priyasha Saksena, "Jousting over Jurisdiction: Sovereignty and International Law in Late Nineteenth-Century South Asia," *Law and History Review*, 38:2 (2020), 409–457; Devika Shankar, "A Slippery Sovereignty: International Law and the Development of British Cochin," *Comparative Studies in Society and History*, 64:3 (2022), 820–844.

[72] Saksena, "Jousting over Jurisdiction," 415.

[73] Heath, *Colonial Terror;* Kolsky, *Colonial Justice*.

[74] See, for instance, Hiralal Chakravarti, *Whipping in India: A Plea for Its Abolition* (Calcutta: Majumdar Library 1908)

process of punishing was also contentious. When the colonial state restricted the role played by the criminal jury, petitions flooded colonial government claiming that access to trial by jury represented a fundamental right owed to British subjects.

The state faced similarly strong criticism from its reliance on criminal law to restrict political and civil liberties. Some of the first large-scale protests in opposition to the colonial measures would be organized against legislative attempts to restrict press freedoms in the 1870s.[75] By the time national leaders were being placed on trial for political offenses in the 1890s, these moments would emerge as key episodes of nation-making. During these trials massive crowds gathered outside courtrooms and across cities to offer their support for the accused and protest for their release. These courtroom dramas were widely reported in local newspapers, while publishing houses printed cheap copies of trial transcripts accompanied by extensive legal commentary for the benefit of the Indian public. As local governments anxiously collected information collated from police surveillance reports, they often learnt that support for imprisoned political leaders had grown since they were found guilty.

These contestations mattered, and in many instances forced the colonial state into a series of "tactical retreats."[76] Entrance to criminal trials were restricted and at times made completely private, while verdicts were made public in the dead of the night. In the face of growing pressure on the law, emergency ordinances were passed, amendments were frantically made to the IPC, and the role played by juries in criminal cases were restricted. Punishment too became a compromised spectacle. Popular revolutionaries were hanged and buried in secret, while large gatherings to mourn the deaths of national martyrs heavily policed. If law was the "cutting edge of colonialism," by the twentieth century, the wheels of colonial justice turned rather creakily.

Like the ever-shifting jurisdictional boundaries marked on maps, the discretionary authority to determine when and how to punish remained unevenly and fluidly spread across an ever-evolving

[75] Uma Das Gupta, "The Indian Press 1870–1880: A Small World of Journalism," *Modern Asian Studies*, 11:2 (1977), 213–235.

[76] This phrase is borrowed from Simon Deveraux, "Recasting the Theatre of Execution: The Abolition of the Tyburn Ritual," *Past and Present*, 202:1 (2009), 174.

criminal legal order that encompassed judges, juries, local government officials, the Government of India, the secretary of state, and in times of emergency military officers. The swelling and deflating of decision-making powers across these figures of official authority offer windows into the constantly reconstituting nature of sovereign power and the responsiveness of the state to the changing political and cultural currents of Indian society. In this sense, how officials delegated and exercised the authority to kill or let live were as much a "strategy of governance" as it was a pure distilled expression of power.[77]

Working through a series of connected case studies, this book therefore follows the various tactics, experiments, and negotiations undertaken by a colonial state which attempted to reassert its legitimacy while managing a highly unequal political order. Amnesties and mass pardons were tacit concessions made by a state which could not singularly rely on violence to restore peace and win loyalty from its subjects. Petitions for mercy were both last pleas from desperate subjects and tests for a colonial state that heavily promoted its merciful character. While the broad discretion afforded to colonial judges was an acknowledgment that colonial judges would require room for maneuver when punishing different subjects to retain legitimacy and credibility. As later chapters will show, these exercises of power were at all times governed by the changing political and social conditions around which colonial sovereign authority would develop in India.

In examining the right to punish and pardon as a fraught and politically charged marker of sovereignty, we are in turn better able to bring the strategies of resistance into our histories of colonial sovereignty. The crisis of legitimacy that the colonial state faced in the aftermath of World War One had not been brought about singularly by the interventions of a charismatic leader like Gandhi. Nor were the liberal promises of progress, justice, and paternalism suddenly exposed by the horrors of the Amritsar massacre. As this book argues, even under a very repressive colonial order, colonial subjects had ensured British claims to sovereign power remained persistently, and sometimes quite literally, on trial. The turn away

[77] Ray, "Interrupted Sovereignties," 612.

from empire and the rejection of its mercy had been the product of decades of contestations with colonial law and the political ideas of empire. These are legal histories of dissent and defiance that deserve greater attention.

Temporal Scope

This book confines its analysis to a very particular historical juncture, bookended by the Uprising in 1857–1858 and the NCM in 1920–1922. In studying the question of mercy and sovereignty between these two inflection points in the history of South Asia and the British Empire, I do not suggest that either should be regarded as clean historical ruptures. Nonetheless, I do suggest that mercy performed very specific legal and ideological work during the period in question that deserves study on its own terms. Put most simply, I argue the following two points: the imposition of imperial mercy was integral to the political and constitutional reordering that ushered in the era of the crown raj, and would prove vital to the consolidation of its legitimacy. Second, and connected to this, the rejection of imperial mercy later emerged as a crucial assertion of Indian sovereignty in opposition to British rule. The direct connection tying mercy to the nation and a noncolonial imaginary of citizenship and sovereignty was first fully articulated during the NCM.

In tracking this rise and fall of imperial mercy across this period, the book begins by examining the construction of a new political order between 1857 and 1860 following the abolition of the East India Company and the full transfer of political sovereignty from the Mughal state to the British Crown. Chapter 1 focuses on the Uprising of 1857 and is arranged around two questions: How did the colonial state attempt to erase the memory of Mughal sovereignty and the popular character of the violence enacted in its name, and what role did mercy play in this story? The chapter positions the arrest and punishment of Bahadur Shah Zafar II as a founding trial of colonial sovereignty which exposed both the extraordinary violence and the absolute limits of colonial sovereign power. A former sovereign would be transformed into a criminal and brought within the British imperial order, but for the sake of the future legitimacy of this political project, he could not be killed.

Following the ousting of the last Mughal emperor, Chapter 2 explores the declaration of colonial peace through the amnesty offered to rebels in the Queen's Proclamation of 1858. While earlier scholarship has tended to study this proclamation as an ideological charter, I turn to this document as an instrument of postconflict resolution. In comparing and contrasting the variety of strategies used to pardon or punish rebels, I argue that every pardon operated as a founding political bargain presented to the defeated. The offer of mercy would be contingent on the full surrender of Indian political agency.

Chapter 3 concludes the study of this political and constitutional transition by exploring the most important legal reform of this time, the IPC (1860). Codification represented a highly political exercise that helped set the terms of the relationship between the subject and sovereign in India, while also entrenching ideas of colonial difference further into the everyday administration of criminal justice. By paying close attention to the figure of the judge and the institution of the jury, I demonstrate how ideas of caste, culture, race, and gender informed the distribution of discretionary authority across the code.

The book then moves from the founding violence of crown rule to the role of criminal law in preserving and extending colonial authority in the late nineteenth and early twentieth century. Chapter 4 focuses on how the colonial judiciary and the local government wielded the discretion available in the IPC to determine the outcomes of capital trials. I argue that the decision to save some subjects from the gallows helped the law build vital but ultimately fragile alliances between local elites as colonial authorities sought access to the most intimate and politicized areas of Indian life. Chapter 5 charts the assembly of standardized and uniform bureaucracies managing pardons and scaffolds, and the broader struggles of colonial terror and mercy to cultivate fearful and obedient subjects. As I argue, the colonial state only enforced clear rules governing the processing of petitions and the management of executing convicts after the condemned and their supporters targeted these poorly organized procedures.

The final chapters examine the emergence of mercy as a critical issue within the nationalist political imaginary. Chapter 6 offers a careful reading of the first two sedition trials of Bal Gangadhar Tilak (1898 and 1908). While existing scholarship has studied Tilak's subversive

performances within the courtroom, I extend this analysis to incorporate his efforts at winning executive mercy and commutation from prison. More than any other political leader, Tilak spent his imprisonment exhausting every avenue to petition and appeal against his sentence. This included multiple approaches to the Privy Council and serious plans to petition the House of Lords. In an important and original breakthrough in anticolonial political thought, it was when Tilak failed to win freedom on the basis of justice alone that he connected the availability of mercy to the curtailment of political rights in India.

Chapter 7 concludes with the full rejection of colonial mercy and the return of the discourse of war in India. Here I focus on the importance of mercy in Gandhi's political thought between the massacre at Amritsar in 1919 and his subsequent emergence as the most important political leader in India during the NCM. As the NCM helped establish the grounds for a truly national mass movement, Gandhi's steadfast rejection of any overtures of mercy threatened to explode the political conditions upon which imperial sovereignty had been founded.