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*Licence to Kill: The Murderous Outrages Act and the rule of law in colonial India, 1867–1925**

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Abstract

In 1867, the Government of India passed one of the most brutal-minded and draconian laws ever created in colonial India. Known as the 'Murderous Outrages Act', this law gave colonial officials along the North-West Frontier wide powers to transgress India's legal codes in order to summarily execute and dispose of individuals identified as 'fanatics'. Arguments for the creation and preservation of this law invariably centred around claims about the purportedly 'exceptional' character of frontier governance, particularly the idea that this was a region that existed in a perpetual state of war and crisis. Far from being peripheral in its impact, this article explores how this law both drew upon and enabled a wider legal culture that pervaded India in the wake of 1857. It argues that this law was a signal example of British attempts to mask the brute power of executive authority through legalistic terms, and was also evocative of a distinctly 'warlike' logic of colonial legality.

Introduction

At around 8am on 18 February 1870, while heading to the post office in Dera Ismail Khan to collect letters, Private Felix Desnap was grabbed by the neck from behind and stabbed in the back with a dagger, just below the shoulder blade. Desnap's assailant then threw him to the ground, and attempted to stab him again. As the attacker plunged the dagger towards him, Desnap managed to seize it by the blade using both of his hands, cutting his left thumb to the bone and inflicting

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serious cuts to his right hand in the process. A struggle ensued and, with the help of a crowd of onlookers, Desnap was able to subdue his would-be assassin.[1] The individual responsible for the attack was a young Pashtun man named Ikhlas. According to his own testimony, Ikhlas had 'wanted to kill an infidel'. 'I had been looking out the last three days for an Englishman to kill,' Ikhlas stated, and when 'I got alongside the European soldier I drew my dagger and made a stab at him.'[2] Within hours of his arrest, Ikhlas was tried, sentenced, and executed. The lieutenant-governor of Punjab, D. F. McLeod, later wrote to Lieutenant-Colonel S. F. Graham, the commissioner of Derajat, commending him on the swift execution of 'justice' in this matter.[3]

The law that enabled such a swift execution of justice in this case was Act XXIII of 1867, more popularly known as the 'Murderous Outrages Act'.[4] First proposed as a response to a series of murders and attempted murders of British officials and their subordinates along the frontier, the Murderous Outrages Act granted colonial officials wide-ranging powers to prosecute individuals identified as 'fanatics' in Punjab, and later, Baluchistan and the North-West Frontier Province.[5] Under the articles of this law, any fanatic convicted of the murder or attempted murder of a European or those working in their employ was liable to death or transportation for life, with all their property being forfeited to the state.[6] No juries were allowed for these cases. Instead, the accused was tried by a tribunal consisting of a commissioner and two other executive officers with full magisterial powers.[7] Sentences

[1] Letter No. 31 from S. F. Graham to the Punjab Government (hereafter PG), 21 February 1870, India Office Records, London (IOR), P/442/53, p. 114.

[2] Ibid.

[3] Letter no. 273 from the PG to S. F. Graham, 25 February 1870, Ibid., p. 115.

[4] 'Murderous Outrages in the Punjab, Act No. XXIII of 1867', in Theobold, W. (1868). *The Legislative Acts of the Governor General of India in Council, from 1834 to the End of 1867; with an Analytical Abstract Prefixed to each Act*, Vol. 5: 1866–67, Calcutta: Thacker, Spink & Co., Calcutta, IOR, V/8/119.

[5] The Murderous Outrages Act was extended to Baluchistan in 1881 and its provisions were re-enacted at the creation of the North-West Frontier Province (NWFP) under the auspices of the Murderous Outrages Regulation: National Archives of India (NAI), Foreign/Political A/October 1881/nos. 353–355; and NAI, Foreign/Frontier A/August 1901/nos. 63–72.

[6] Prior to this law, the maximum punishment for attempted murder was transportation.

[7] In cases where a commissioner was not available, the deputy commissioner could fill his place, and subordinate officers, including the assistant and extra assistant commissioners, would be called upon to act as the assessors. Executive

were to be carried out immediately, with no need for review, and no appeals whatsoever being granted.[8] Court officers were even allowed to wilfully ignore evidence and witnesses if these were believed to have been 'offered for the purpose of vexation or delay'.[9] Offenders tried under the Murderous Outrages Act were almost invariably executed, usually within a day or two of their arrest and trial (sometimes even on the same day, as in the case of Ikhlas).

In terms of its authoritarian and draconian provisions, the Murderous Outrages Act shares obvious linkages with earlier forms of highly coercive colonial legislation, such as the well-known Thuggee Act of 1836.[10] Another more direct harbinger of the Murderous Outrages Act was the Act for the Suppression of Outrages in the District of Malabar (Act XXIII of 1854), also known as the 'Moplah Act'. Enacted in response to a series of violent attacks against non-Muslims, this law granted the colonial state extensive powers to detain, prosecute, and inflict extremely harsh punishments against members of Malabar's purportedly 'fanatical' Mappila community.[11]

officers, therefore, could include commissioners, deputy commissioners, assistant commissioners, and extra assistant commissioners. An amendment to the Murderous Outrages Act, following its renewal in 1877, extended to sessions judges the same jurisdiction in these matters as had been previously reserved solely for executive officers: 'No. 9 of 1877: A Bill to Revive and Amend Act No. XXIII of 1867', *Gazette of India, 1877: Pt. V*, IOR, V/11/45. The original intention of restricting these powers to executive officers appears to have been aimed at ensuring that only Europeans would be able to sit on these tribunals. Colonial officials, however, seemed to have been somewhat flexible when it came to adhering to this rule, and there were cases where native Indians were able to serve as members: NAI, Foreign/A. Pol. E/June 1884, nos. 704–714.

[8] 'Murderous Outrages in the Punjab, Act No. XXIII of 1867', IOR, V/8/119, paras 2, 7, 10, pp. 460–62.

[9] Ibid., para. 5, p. 461.

[10] See Singha, R. (1998). *A Despotism of Law: Crime and Justice in Early Colonial India*, Oxford University Press, New Delhi; Wagner, K. A. (2007). *Thuggee: Banditry and the British in Early Nineteenth Century India*, Palgrave Macmillan, Basingstoke; and Freitag, S. B. (1991). Crime in the Social Order of Colonial North India, *Modern Asian Studies*, 25:2, pp. 227–61.

[11] The Murderous Outrages Act was actually directly modelled on this law, though with certain modifications that made it specific to the particular exigencies of the North-West Frontier. See Letter no. 141 from the Government of India (GOI) to the PG, 6 June 1866, IOR, P/438/13, no. 1, para. 4; and Letter no. 380–1129 from the PG to the GOI, 1 September 1866, IOR, P/438/15, no. 12, paras 4 & 9. For the Mappila Act itself, as well as an outline of the circumstances that led to its creation, see 'Act No. XXIII of 1854, An Act for the Suppression of Outrages in the District of Malabar', in Williams, W. P. (1856). *The Acts of the Legislative Council of India relating to the Madras Presidency from 1848 to 1855*, The Church of Scotland Mission Press, Madras, IOR, V/4589; and Report from T. L. Strange to T. Pycroft, 25 September

The Thuggee Act and Mappila Act were both remarkable pieces of legislation in that they were created by a British Indian government that claimed to be deeply concerned with the rule of law.[12] What makes the Murderous Outrages Act perhaps even more remarkable in comparison, however, is that it was passed during the height of the codification era, a period when India was gradually being placed under a new set of standardized legal codes. In addition to its renewed and vigorous emphasis on the rule of law, one of the main goals of codification was to ensure that colonial authorities adhered to a uniform procedure when administering the law.[13] The Murderous Outrages Act, however, gave officials sweeping authority to transgress these new judicial codes, based on claims that the exigencies of colonial governance along the North-West Frontier were somehow 'different' from the rest of India.[14] By empowering colonial officers to effectively overturn these laws and exercise such an extraordinary degree of personal authority, the Murderous Outrages Act seemed to fly in the face of these cherished British ideals about due and uniform judicial process—a point that was later readily seized upon by its Indian critics.[15] It is this tension that forms the focus of this article.

1852, *Correspondence on Moplah Outrages in Malabar, for the Years 1849–53* (1863), The United Scottish Press, Madras, IOR, V/3212.

[12] Since the 1780s, the idea of a government that both respected and was bound by the law had been central to British attempts to establish the moral supremacy of their brand of rule over the arbitrary sovereignty and 'personal discretion' of the regime of 'oriental despotism' they were supposed to have replaced: den Otter, S. (2012). 'Law, Authority, and Colonial Rule', in Peers, D. M. and Gooptu, N. *India and the British Empire*, Oxford University Press, Oxford, p. 168; Singha, *A Despotism of Law*; and Kolsky, E. (2005). Codification and the Rule of Colonial Difference: Criminal Procedure in British India, *Law and History Review*, 23:3, p. 652.

[13] den Otter, S. (2007). '"A Legislating Empire": Victorian Political Theorists, Codes of Law, and Empire', in Bell, D. *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*, Cambridge University Press, Cambridge, pp. 89–112.

[14] Difficulties in enforcing a regular judicial system, for example, led to the introduction of a series of special regulations in 1872 known as the 'Frontier Crimes Regulations'. These Regulations represented an attempt to govern Pashtun society according to what the British believed were their own customs and traditions: Letter no. 440S from the PG to the GOI, 17 September 1886, IOR, L/P&J/6/202, file 776, pp. 301–04. See also Beattie, H. (2002). *Imperial Frontier: Tribe and State in Waziristan*, Curzon Press, Richmond, Chapter 6.

[15] V. J. Patel once described it as a 'criminal' law, and S. Satyamurti similarly railed against how such laws were absolutely incompatible with true notions of justice: see, respectively, Legislative Assembly Debates, 19 March 1925, IOR, V/9/68; Legislative Assembly Debates, 20 February 1936, IOR, V/9/131; and Legislative Assembly Debates, 9 April 1936, IOR, V/9/134.

A great deal of recent scholarship has been devoted to the study of how the enaction of zones and moments of legal exclusion and exception across different colonial and imperial spaces enabled the violent operation of sovereign power.[16] Frontiers—as geographically remote, physically inaccessible regions populated by supposedly 'backward', 'jungly', and 'tribal' peoples who historically resisted the encroachment of imperial polities[17]—were especially conducive to the creation of regimes of legal exception. Colonial Bengal's North-East Frontier, for example, was home to a highly exceptional legal-political regime that relied heavily on the use of military force and coercion to subdue its so-called 'tribal' peoples.[18] The legacies of this particular colonial regime have since given rise in post-colonial India to what Sanjib Baruah has described as a deeply authoritarian and militarized political system that operates well beyond the normative ideals of Indian democratic institutions.[19] Frontiers, therefore, are both crucially physical and also abstract: physical in that they become geographically demarcated zones of corporeal violence, but abstract in that they are also the site of conceptual debates over the nature of imperial sovereignty and its attendant legal and political structures. It is through these debates, this article argues, that we can often glimpse the innermost workings of the different 'logics' that informed notions of imperial and colonial sovereignty.

[16] See, for example, Benton, L. (2010). *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*, Cambridge University Press, Cambridge; Stoler, A. L. (2006). On Degrees of Imperial Sovereignty, *Public Culture*, 18:1, pp. 125–46; Mbembe, A. (2003). Necropolitics, *Public Culture*, 15:1, pp. 11–40; and Hussain, N. (2003). *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, University of Michigan Press, Ann Arbor.

[17] See Scott, J. C. (2009). *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, Yale University Press, New Haven; Guha, R. (1989). *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya*, Oxford University Press, New Delhi.

[18] Robb, P. (1997). The Colonial State and Constructions of Indian Identity: An Example of the Northeast Frontier in the 1880s, *Modern Asian Studies*, 31:2, pp. 245–83; Van Schendel, W. (2009). *A History of Bangladesh*, Cambridge University Press, Cambridge; Van Schendel, W., Mey, W. W. and Dewan, A. K. (2001). *The Chittagong Hill Tracts: Living in a Borderland*, The University Press, Dhaka, pp. 54–70. For a recent examination of the use of 'punitive' military expeditions in subduing this region, see Guite, J. (2011). Civilisation and its Malcontents: The Politics of Kuki Raid in Nineteenth Century Northeast India, *The Indian Economic and Social History Review*, 48:3, pp. 339–76.

[19] Baruah, S. (2005). *Durable Disorder: Understanding the Politics of Northeast India*, Oxford University Press, New Delhi, p. 61.

As zones of exception, frontiers were regions where colonial power was stripped bare of its hallowed trappings; here, a much more brute and overt aspect of colonialism asserted itself. Thus, far from being merely anomalous blips that existed only at the peripheries of empire, these regimes of frontier governance can actually tell us a great deal about the priorities that underpinned colonial power at the centre. In the case of the Murderous Outrages Act, this article argues that this law—while shaped in part by the unique exigencies of governance along the North-West Frontier—actually drew upon and enabled a much more pervasive and widespread legal-political culture in British India: one which sought to maintain 'illimitable' forms of sovereignty and executive authority, but under the auspices of a 'universal' rule of law.[20] As we shall see, this was an idea that not even India's most prolific lawmakers and codifiers, including Henry Maine and James Fitzjames Stephen, really ever challenged. For them, the imposition of the rule of law did not necessarily entail the elimination of powerful executive authority. Instead, the first duty of law was to vouchsafe the security of the colonial regime. Rather than being a 'lawless law' inconsistent with British values of justice, many administrators, including Maine, came to view the Murderous Outrages Act as the precise opposite: as a law that was the pre-eminent signifier of the prevailing legalism of British colonial rule and its devotion to the rule of law. However, with its emphasis on the need for British officials to maintain the 'sovereign' authority to punish and kill wayward colonial subjects, this article argues that these conceptions of law and authority also possessed what might be characterized as a deeply 'warlike' quality to them as well. As such, this article also contributes to the wider debate taking place at the moment regarding the ways in which self-proclaimed liberal imperial powers reconciled values of universal rights and civilizational uplift with inequality, force, and violence in order to operate as deeply illiberal, coercive, and, in the case of the Murderous Outrages Act, as an essentially militaristic regime.[21]

[20] Nasser Hussain has explained this as a fundamental 'tension' that existed at the heart of British colonial legality in India, but, as this article argues, the imposition of the rule of law did not necessarily entail the elimination of powerful executive authority. See Hussain, *The Jurisprudence of Emergency*, pp. 5, 7.

[21] See, for example, Mehta, U. S. (1999). *Liberalism and Empire: a Study in Nineteenth-Century British Liberal Thought*, University of Chicago Press, Chicago; and Pitts, J. (2005). *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*, Princeton University Press, Princeton, New Jersey.

Colonialism, law, and 'lawfare'

When the Murderous Outrages Act was enacted in 1867, India was in the midst of a sea change. This was the high tide of the codification movement, a period when British legislators were systematically re-imagining the entire basis of Indian jurisprudence. Although the need for legal codification had initially been accepted under the Charter Act of 1833, and a law commission under T. B. Macaulay had even been convened in 1834 to begin drafting legislation towards this end, codification in India made little headway until after the Indian Uprising of 1857. Between 1859 and 1872 successive law commissions enacted an array of sweeping legislation, including the Code of Civil Procedure (1859), the Indian Penal Code (1860), the Code of Criminal Procedure (1861), and the Evidence Act (1872). Codification was significant because it opened up the possibility of a new form of 'scientific jurisprudence' through the creation of substantive legal codes.[22] It also provided a renewed, and much-needed, moral justification for British imperial rule following the Uprising. This revamped legal project, it was reckoned, would finally liberate India from the tyranny of despotism, custom, and superstition by providing it with standardized, rational legal codes.[23] As Karuna Mantena puts it, by the end of the nineteenth century, 'the rule of law had become ... a de facto byword for the justification of British rule' and was considered to be the 'supreme gift imparted by imperial rule'.[24]

However, while codification may have been widely championed in some circles, it was also viewed with equal suspicion and trepidation in others. Many of India's administrators in the 1860s and 1870s were quite wary of any form of substantive, institutionalized law, and were reluctant to openly embrace what promised to be a profound shift in the way India was governed. As Sandra den Otter has pointed out,

[22] India's legal reform movement even outpaced similar reform efforts back home in Britain. These reforms also took place within a wider global movement and engagement with the idea of legal codification which dated back to the adoption of the French Civil Code, or *Code Napoléon*, in 1804, and the Thibaut-Savigny debates in Prussia in 1814: see Mantena, K. (2010). *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton University Press, Princeton, New Jersey, pp. 91–92. Elizabeth Kolsky has also discussed the important global dimension of the debates surrounding codification: Kolsky, Codification and the Rule of Colonial Difference, pp. 632–33.

[23] den Otter, '"A Legislating Empire"', p. 89.

[24] Mantena, *Alibis of Empire*, pp. 90–91.

these administrators believed that the extension of the rule of law was inimical to vigorous government, since it not only regulated the conduct of its colonial subjects, but also placed limits on the executive authority of colonial officials.[25] This was an especially difficult idea to sell in the wake of the nearly catastrophic Uprising of 1857, when it was widely believed that unrestrained despotism was the best form of rule for India.[26] As James Fitzjames Stephen, the law member for India between 1869 and 1872 and one of the staunchest proponents of codification, once remarked: 'Nothing has struck me more forcibly in India than the almost inveterate prejudice in the minds of many district officers that law ... is a sort of mysterious enemy to them which ... will prevent all vigorous executive action.'[27] Viceroy John Lawrence (1864–69), whose term in office coincided with the drafting and enactment of the Murderous Outrages Act, was certainly sympathetic to the opponents of codification. As one of the architects of the so-called 'Punjab school',[28] Lawrence was one of the strongest advocates of the need for 'patriarchal', authoritarian governance which was not weighed down by regulations or excessive

[25] den Otter, '"A Legislating Empire"', p. 107.

[26] Mantena, *Alibis of Empire*, p. 97.

[27] Stephen, J. F. (1872). *Minute on the Administration of Justice in British India*, Home Secretariat Press, Calcutta, IOR, V/23/28, fiche no. 201–206, index 150, p. 85. As he summed up several years later, 'many persons object not so much to any particular laws, as to the government of the country by law at all': Stephen, J. F. (1875). 'Legislation under Lord Mayo', in Hunter, W. W. *A Life of the Earl of Mayo, Fourth Viceroy of India*, Smith, Elder, and Co., London, p. 152.

[28] Eschewing the ponderous procedural practices and legislative regulations that prevailed elsewhere in India, Governor-General Dalhousie had famously insisted that he had 'no wish that our voluminous laws should be introduced into this new country', and that officers should possesses a much 'larger discretion' than they possessed in the older provinces: Letter from the Governor-General to the Board of Administration, 31 March 1849, IOR, H/760, paras 12, 17. The Punjab government often enjoyed boasting how 'no effort has been spared to render justice cheap, quick, sure, simple and substantial ... every other consideration has been rendered subordinate to these cardinal points': *General Report on the Administration of the Punjab Territories, from 1854–55 to 1855–56 Inclusive* (1858), Chronicle Press, Lahore, para. 5, p. 5. For more on the 'paternalistic' and authoritarian aspects of Punjab governance, see Major, A. J. (1996). *Return to Empire: Punjab under the Sikhs and British in the Mid-nineteenth Century*, Sterling Publishers, New Delhi; Talbot, I. (1988). *The Punjab and the Raj 1849–1947*, Manohar, New Delhi; and Gilmartin, D. (2009). The Strange Career of the Rule of Law in Colonial Punjab, *Pakistan Vision*, 10:2, pp. 1–21, University of the Punjab Pakistan Study Centre, Lahore.

interference from superiors.[29] If the Uprising taught colonial officials one lesson, it was that colonial justice needed to be swift, severe, and exemplary if they were going to be able to keep their subjects in check and prevent a similar catastrophe from occurring again.[30]

The codification debate, therefore, drew battle lines between two seemingly irreconcilable positions: those, like Lawrence, who supported the preservation of exceptional individual powers of discretionary authority, and those, like Stephen, who believed that British authority needed to be rooted in the rule of law. As this article will demonstrate, however, these two positions were never mutually exclusive.[31] Although the rule of law in colonial India after 1857 always involved a fine balancing act between these two positions, it was ultimately weighted more towards the exercise of executive authority. In this sense, then, British conceptions of colonial legality following the Uprising continued to be strongly shaped by the same sorts of debates and tensions that had characterized them during the preceding decades. Laws such as the Murderous Outrages Act or the Criminal Tribes Act of 1871 found their forerunners in earlier legislation like the Thuggee Act and the Moplah Act, and old debates over the relative merits of 'non-regulation' versus 'regulation' governance in India remained very much alive. It is quite telling, for instance, that in his seminal 1872 *Minute on the Administration of Justice in British India*, Stephen actually looked to the 'almost unlimited discretionary power' of Punjab's famous non-regulation system as a sort of 'model' for his own brand of codification.[32] Codification

[29] Johnson, G. (1991). 'India and Henry Maine', in Diamond, A. *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, Cambridge University Press, Cambridge, p. 378.

[30] Wagner, K. A. (2013). '"Calculated to Strike Terror": Colonial Violence and the Spectacle of Power in British India', Paper presented at the ReNewing the Military History of Colonial South Asia conference, University of Greenwich, London, 22 August 2013.

[31] As Kolsky has already pointed out, the processes of codification have historically much more easily taken root in undemocratic, authoritarian, and despotic regimes, such as that which existed in British India: Kolsky, Codification and the Rule of Colonial Difference, p. 634.

[32] Stephen, *Minute on the Administration of Justice*, p. 7. According to Stephen, Punjab had actually provided the first example of a government that operated under codified law anywhere in British India: 'one of the first acts of the Board of Administration was to draw up what were in substance Codes. Lord Lawrence and his colleagues enacted for the Panjáb a Penal Code, Codes of civil and criminal procedure, and a Code in scope not very unlike the French Code Civil, many years before such a Code had the force of law in other parts of India': Stephen, 'Legislation under Lord Mayo', p. 179.

was thus never meant to erode executive power and weaken the position of India's 'ruling race'; it was meant to bolster, strengthen, and reinforce it. This was a point that was made abundantly clear by Stephen himself, who argued that 'the best possible security for executive vigour is to define precisely by express law thrown into the clearest and shortest form the amount of discretionary power to be given to judicial and executive officers'.[33] This article explores how the Murderous Outrages Act was deeply rooted in this idea of using law to actually bolster executive prerogative, rather than limiting it. Keeping in mind that it is problematic to talk about and analyse colonialism and colonial law as singular, monolithic categories,[34] it argues that the Murderous Outrages Act was therefore less a truly 'exceptional' piece of legislation than it was simply a signal example of a particular conception of law and order that pervaded British India both prior to and following 1857.

Recent work by Elizabeth Kolsky has demonstrated how colonial law upheld and excused quotidian forms of violence in India.[35] What this article would like to explore, however, are the ways in which law itself was used as a form of violence against the colonized. Designed as a 'legal' response to what was, in fact, viewed by many as a type of 'frontier warfare'—an idea that will be elaborated upon later—the Murderous Outrages Act was a law that permitted colonial officials to assume the violent power of sovereignty on a regular basis, without recourse to any formal declaration of war, martial law, or any other state of emergency. As such, it was a signal example of what John and Jean Comaroff have referred to as 'lawfare'—the use of legal codes, charters and warrants, administrative regulations, and states of emergency—to 'impose a sense of order upon its subordinates by means of violence rendered legible, legal, and legitimate by its own sovereign word'.[36] The concept of lawfare provides an interesting way

[33] 'Men under those circumstances,' he continued, 'know the limits of their power, and act within it vigorously': Stephen, *Minute on the Administration of Justice*, p. 94.

[34] Lauren Benton's recent work has been particularly useful in thinking about empire as a series of sites for the creation and negotiation of various new, uneven, competing, 'lumpy' forms of legal and political sovereignty: Benton, *A Search for Sovereignty*, pp. 285–90. As such, it is overly simplistic to conclude that empire is merely a zone of exception 'par excellence': Mbembe, Necropolitics, p. 24.

[35] Kolsky, E. (2010). *Colonial Justice in British India: White Violence and the Rule of Law*, Cambridge University Press, Cambridge.

[36] Comaroff, J. L. and Comaroff, J. (2006). 'Law and Disorder in the Postcolony: an Introduction', in Comaroff, J. L. and Comaroff, J. *Law and Disorder in the Postcolony*, University of Chicago Press, Chicago, pp. 29–30.

of approaching questions about the relationship between colonial law and the violence that was so often perpetrated by colonial states[37] by enabling us to think about how, even when at its most violent and 'criminal', colonialism often sought to steep itself in the language of legitimacy and law. It also raises interesting questions about whether we might not be able to usefully invert Clausewitz's famous maxim—that war is a continuation of politics by other means[38]—and to start thinking about law, and the colonial political-legal regimes it buttressed, as the continuation of a type of warfare against the colonized.[39]

In the case of the Murderous Outrages Act, this was a law that relegated those charged under its articles to a space where all legal rights and norms ceased to exist, and where the sovereign power to decide was essentially converted into the power to kill. It is in this guise, I would also like to argue, that sovereignty takes on a distinctly warlike quality, since it is ultimately based on destroying an enemy—either internal or external—who poses a perceived existential threat to society and the very foundations of political-juridical order. In the context of the Murderous Outrages Act and Punjab's North-West Frontier, this was a world in which every colonial official became a sort of front line 'soldier' against an endlessly insurrectionary colonial adversary, and where any means were justifiable in order to preserve the state against this enemy.

[37] See, for example, Elkins, C. (2005). *Britain's Gulag: The Brutal End of Empire in Kenya*, Jonathan Cape, London; Sherman, T. C. (2010). *State Violence and Punishment in India*, Routledge, London; Gott, R. (2011). *Britain's Empire: Resistance, Repression and Revolt*, Verso, London; Thomas, M. (2012). *Violence and the Colonial Order: Police, Workers and Protest in the European Colonial Empires, 1918–1940*, Cambridge University Press, Cambridge; and Kolsky, *Colonial Justice in British India*.

[38] The specific wording of this oft-quoted and paraphrased passage is: 'war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means': Von Clausewitz, C. (trans. Howard, M.) (2008). *On War*, Oxford University Press, Oxford, p. 29. Foucault posed a similar question about the operation of power in modern European society in *The History of Sexuality Vol. 1* as well as his 1975–76 Collège de France lecture series: Foucault, M. (1990). *The History of Sexuality Vol. 1: The Will to Knowledge*, Penguin Books, London, p. 137; Foucault, M. (trans. Macey, D.) (2003). '*Society Must Be Defended': Lectures at the Collège de France, 1975–76*, Penguin, London, p. 15.

[39] John Comaroff has noted, for example, how in nineteenth-century South Africa, Tswana-speaking peoples referred to British overrule via law as 'the English Mode of Warfare': Comaroff, J. L. (2001). Symposium Introduction: Colonialism, Culture, and the Law: A Foreword, *Law and Social Inquiry*, 26:2, p. 306.

Protecting the Europeans of the frontier

Punjab's North-West Frontier was a region that was intimately associated with violence and turbulence throughout the British period. Between 1851 and 1867, a total of 703 murders were reported to have been committed in the Peshawar district alone.[40] This high incidence of violent crime and murder was largely attributed to the 'character' of the Pashtun inhabitants of the region, who were believed by the British to be socialized into violence and murder from birth. Like many other groups who operated at the margins of or within the interstices of the colonial regime,[41] the Pashtuns of the frontier were often portrayed by the British as a hereditary criminalized, 'predatory' community, prone to murder, theft, rapine, and pillaging.[42] *Pashtunwali*, the 'code of honour' that governed various tribal practices and behaviour,[43] was seen by many British observers as little more than 'a code which teaches that an unavenged injury is their deepest shame, a blade,

[40] Between 1849 and 1850, it was 'estimated' that there was approximately one murder per day in the district (though colonial officials admitted that this astounding figure remained 'unconfirmed'): Letter No. 302–3254 from G. R. Elsmie to the Commissioner and Superintendent, Peshawar Division, 11 November 1873, IOR, P/137, para. 4, p. 926.

[41] Radhika Singha, for example, has explored how groups such as the Bhils and Pindaris were branded by the colonial state as inherently 'predatory', criminal communities to justify the use of often brutal and oppressive measures to control them: Singha, *A Despotism of Law*. Kim Wagner has examined how similar practices were also employed in suppressing the Thugs during the nineteenth century: Wagner, *Thuggee*.

[42] Writing in January of 1852, after reviewing a report compiled by John Lawrence on the state of policing the Peshawar Valley, Governor-General Dalhousie concluded that 'the people of these hills are not our subjects, [that] they are poor, lawless, reckless and that they and their fathers before them ... have lived upon plunder and have been accustomed to regard it as a right not as a crime': Minute by the Governor-General, 16 January1852, IOR, P/SEC/IND/173. Mountstuart Elphinstone's highly influential *Account of the Kingdom of Caubul* was one of the earliest British works to portray the Pashtuns as 'predatory': Elphinstone, M. (1815). *An Account of the Kingdom of Caubul, and Its Dependencies in Persia, Tartary, and India; Comprising a View of the Afghaun Nation, and a History of the Dooraunee Monarchy*, Longman, Hurst, Rees, Orme, and Brown, Paternoster-Row, and J. Murray, London.

[43] *Pashtunwali* encompassed an amalgam of different normative traditions and practices, and was adhered to in varying degrees by different Pashtun groups. See Ahmed, A. S. (1980). *Pukhtun Economy and Society: Traditional Structure and Economic Development in Tribal Society*, Routledge and Kegan Paul, London, esp. Chapter 4; Beattie, *Imperial Frontier*, pp. 7–8; and Nichols, R. (2001). *Settling the Frontier: Land, Law and Society in the Peshawar Valley, 1500–1900*, Oxford University Press, Karachi, pp. 6–7, 25–26.

well steeped in blood, their proudest badge'.[44] As G. R. Elsmie, the additional commissioner and sessions judge for Peshawar in 1873, put it, 'there is evidently something in the air of the frontier which rouses brutality in every Mahomedan'.[45]

The earliest British officials to govern this region were certainly no strangers to violence. Many of these individuals were military officers, and were specifically chosen to govern the frontier because of its strong reputation for turbulence and lawlessness. The types of violence they encountered here, however, were often quite different from the sorts of pitched battles and other 'orderly' confrontations to which they were accustomed. Raiders who attacked outposts and villages had little regard for formal declarations of war (usually retreating as suddenly as they appeared), and family disputes, agnatic rivalries, and personal blood feuds tended to take on a life of their own.[46] The seemingly quotidian nature of violent conflict in this region once led Herbert Edwardes to quip that the Pashtuns of Bannu 'were literally never at peace unless they were at war!'[47] For the most part, this type of violence was relatively inconsequential to the British (aside from it being a blemish on their record of being able to enforce law and order), since it was restricted predominantly to the local Pashtun population. Violence directed against British personnel (European and non-European alike), however, was an altogether different matter, and elicited a strong reaction from colonial officials.

During his settlement of Bannu between 1848 and 1849, Edwardes was the target of two separate assassination attempts.[48] Both Reynell Taylor and John Nicholson also experienced similar attempts on their lives during their respective tenures in Bannu.[49] Between 1849 and

[44] James, H. R. (1865). *Report on the Settlement of the Peshawur District*, Dependent Press, Lahore, IOR, W/874, para. 207, p. 70.

[45] Letter No. 302–3254 from G. R. Elsmie to the Commissioner and Superintendent, Peshawar Division, 11 November 1873, IOR, P/137, para. 9, p. 927.

[46] *Badal* (revenge or vendetta) and its closely related concept of *tarboorwali* (agnatic rivalry) were central precepts of *Pashtunwali*, and often led to conflicts and internal disputes within Pashtun society: Ahmed, *Pukhtun Economy and Society*, pp. 90–91.

[47] Edwardes, H. (1851). *A Year on the Punjab Frontier in 1848–49*, 2nd ed., Richard Bentley, London, Vol. 1, p. 71.

[48] Ibid. See also *Political Diaries of Lieut. H. B. Edwardes, Assistant to the Resident at Lahore 1847–1849*, The Pioneer Press, Allahabad.

[49] *Political Diaries of Lieutenant Reynell G. Taylor, Mr. P. Sandys Melvill, Pandit Kunahya Lal, Mr. P. A. vans Agnew, Lieutenant J. Nicholson, Mr. L. Bowring and Mr A. H. Cocks, 1847–1849*, The Pioneer Press, Allahabad. John Nicholson was also attacked by a fanatic during his tenure as deputy commissioner of Bannu between 1851 and 1856: Letter no. 60 from S. F. Graham to the PG, 6 May 1869, IOR, L/PS/6/566, coll. 198.

1867, a total of 16 Europeans and their servants were killed or wounded in similar sorts of attacks, which came to be known as 'murderous outrages'.[50] On the afternoon of 28 February 1866, a particularly shocking episode of murderous outrage occurred when the wife of Lieutenant Ashton Brandreth, the executive engineer of Kohat, was shot at close range with a pistol while being carried in her *jampan* (a closed litter) near the Kohat cantonment bazaar. Mrs Brandreth was shot in the collarbone, and the bullet passed straight through the front of her neck. The injury was not fatal, and her attacker, an Afridi man named Summad, was quickly arrested by a group of nearby sepoys.[51] Summad readily admitted to the crime. Under section 307 of the Indian Penal Code, the highest punishment permitted for attempted murder was transportation for life, but in light of the fact that this was the third such attack in the span of about a year, Colonel J. R. Becher, the commissioner of Peshawar, resolved that it was 'necessary to adopt more than ordinary measures to prevent an evil so grave and so fraught with political consequences' from reoccurring.[52]

Becher took the bold decision to recommend to the Punjab government that Summad be summarily executed, knowing full well that this would require him to exceed his judicial authority and violate the Indian Penal Code. The punishment for such a 'cruel and cowardly crime', he argued, 'should be signal and swift for the sake of example', and he insisted that such a course of action was both 'right and expedient'.[53] The Punjab government granted Becher the approval he sought, and on 3 March, just a day after his trial, Summad was executed by hanging.[54] The attack on Mrs Brandreth had sparked fury among frontier officials, and their desire for revenge was palpable. Captain G. Shortt, the deputy commissioner of Kohat and arresting officer, for example, noted with 'regret' how Summad had been apprehended unharmed.[55] The extraordinary lengths that

[50] Legislative Council Proceedings, 4 January 1867, IOR, V/9/10, p. 6. Nine Europeans and one Indian official were killed or injured in the Peshawar, Kohat, and Hazara districts between 1851 and 1865: Letter no. 162–611 from the PG to the GOI, 17 April 1867, NAI, Foreign/Political A/May 1867/nos. 30–31, no. 30.

[51] Copy of letter no. 107 from G. Shortt to the PG, 1 March 1866, NAI, Foreign/Political A/March 1866/nos. 131–33, no. 30, paras 2–3.

[52] Court of the Commissioner of Peshawur Division, 3 March 1866: The Crown *versus* Summad Afreedee, NAI, Foreign/Political A/March 1866/nos. 137–39, no. 138.

[53] Ibid.

[54] Copy of letter no. 15 from J. R. Becher to the PG, 3 March 1866, Ibid., para. 4.

[55] Copy of letter no. 107 from G. Shortt to the PG, 1 March 1866, NAI, Foreign/Political A/March 1866/nos. 131–33, no. 132, para. 10.

both Becher and the Punjab government went to in order to secure a speedy execution for Summad are particularly revealing of how notions of 'justice', in this case, amounted to little more than the ability to inflict a swift and terrible reprisal—a 'blood for blood' mentality.

In obtaining their pound of flesh, both Becher and the Punjab government had violated the laws of India. However, instead of reprimanding or criticizing them for this, the Government of India not only retroactively indemnified them against prosecution, but agreed with the Punjab government that 'special legislation' was needed to deal with similar offences, 'more severely and promptly ... than is authorised by the Indian Penal Code and Code of Criminal Procedure'.[56] In a subsequent letter to the Government of India, the lieutenant-governor of Punjab, D. F. McLeod, argued that such laws were necessary for the 'special protection' of the 'ruling race' in parts of India where these types of crimes were commonplace.[57] As he elaborated:

> There can, I think, be no doubt in the mind of anyone that this class of offences wholly differs in character from ordinary outrages, and should be dealt with differently from them ... In Great Britain and Ireland, where happily the causes which give rise to such acts can rarely arise, resort is had to Martial Law, or suspension of the *Habeas Corpus* Act ... But in this country, where he [*sic*] relations between the Rulers and the ruled are so widely different, and more especially in those parts inhabited by turbulent or excitable races, such acts may at any time occur ... [and] would not ... be adequately met by such special action.[58]

The man who was tasked with the creation of this new 'special' legislation was none other than the influential jurist, Henry Maine. Maine's complicity in the drafting and enaction of one of the most brutal-minded laws ever passed in colonial India is deeply revealing about the priorities and logic that lay at the heart of British colonial legality. During his seven-year stint as law member of the Governor-General's Council between 1862 and 1869, Maine worked tirelessly both to help bring India under a unified code of procedural law, and to ensure that British administrators abided by these new laws. Maine believed that Indian administrators had 'been too much used to do as they pleased' when it came to the interpretation and application of

[56] Letter no. 118–172 from the PG to the GOI, 5 March 1866, Ibid., no. 131, para. 8.

[57] Memorandum by His Honour the Lieutenant-Governor of Punjab, D. F. McLeod, 20 November 1866, IOR, P/438/15, no. 14, p. 14.

[58] Ibid., p. 15.

the law.[59] It is interesting to note that, in Maine's view, this desire to maintain unchecked forms of executive authority derived from an essentially 'military mania' that prevailed in India.[60]

Maine, therefore, was often deeply suspicious of preserving 'exceptional' forms of executive authority throughout India, insisting that the powers of colonial officers needed to be rooted in the rule of law, rather than arbitrary sovereignty and personal discretion. He was a staunch and outspoken critic of the so-called 'Punjab school' of governance, in particular, claiming that its unique concentration of revenue, police, and judicial powers in individual officers represented a 'warlike' form of government.[61] In a Minute from March of 1864, Maine called for a separation of these powers, and urged the Punjab administration to conform to the more procedural and institutionalized forms of India's regulation provinces. 'There will be no real security for the prompt and accurate discharge of judicial duties,' he wrote, 'until the special qualities and special knowledge required for those duties are recognized by appointing separate officers to perform them in all the higher grades.'[62]

The Punjab government's stubborn resistance in adhering to India's new judicial codes was an especially contentious issue for Maine. In January of 1864, Maine admonished the Punjab government for its attempts to obtain an exemption from the Indian Penal Code and the Code of Criminal Procedure in its administration of the valley of Spiti and other areas they deemed too 'backward' for regular law and administration.[63] Maine insisted that it did not matter what type of

[59] Letter from Henry Maine to Charles Wood, 19 February 1864, *Charles Wood Collection*, IOR, Mss/Eur/F78/114/2, fp. 41.

[60] Letter from Charles Wood to Henry Maine, 24 March 1864, *Henry Maine Papers*, IOR, Mss/Eur/C179, fp. 79.

[61] Letter from Henry Maine to Charles Wood, 19 February 1864, *Charles Wood Collection*, IOR, Mss/Eur/F78/114/2, fp. 41.

[62] In his view, 'The peculiar system of the Punjab, the accumulation of diverse functions, political, fiscal, administrative, and judicial, in the same hands, is, no doubt, excellently adapted for countries which are just settling down from the anarchy of Native Government; but it is most unjust to retain such a system after it has ceased to be necessary, and to sacrifice all other considerations to the transient need of concentrated authority': Minute by H. S. Maine, 26 March 1864, NAI, Foreign/Political A/May 1865/nos. 98–123, no. 109, p. 2.

[63] According to the Punjab government, while such 'elaborate and comprehensive enactments' were appropriate for sufficiently 'advanced' societies, in Spiti and other 'backward' areas, they represented nothing but 'superfluous and bewildering abstractions'. In their opinion, before 'civilized' law could be brought to such areas, they first needed to be thoroughly subjected by a more rough-and-ready form of

law a people—'either civilized or savage'—lived under, and that these types of arguments were based less on the actual existence of truly exceptional circumstances than on the Punjab government's simple unwillingness to adhere to any sort of law at all.[64] 'I think it might be as well to remind the Punjab government,' he wrote, 'that the difficulty does not arise from anything in the people, but from the want of agency sufficient to carry out even one of the simplest of written laws.'[65]

Aside from his general contempt for the arbitrary authoritarianism of the Punjab system, Maine was concerned about enacting any sort of blanket legislation that would enable cases of attempted murder to be tried as capital offences.[66] He noted, for instance, that the Punjab government's proposed amendments to an early draft of the Murderous Outrages bill, submitted in June 1866, amounted to 'little less than a proposal to suspend all regular law throughout the Punjab in a very large number of cases of murder and attempted murder'.[67] In his opinion, 'It sets all law aside, for our Code of Criminal Procedure

administration: 'throughout India there must be many tracts into which rules and forms as simple as possible are all that can for many years to come, be profitably introduced, and that it will more conduce to the ultimate subjection of primitive populations to sound legislation to accustom them to temporary regulations adapted to their backward circumstances': Letter no. 19–22 from the PG to the GOI, 9 January 1864, IOR, P/204/71, no. 287, paras 7–8, pp. 502–03.

[64] For example, in July of 1866, Maine again had to rebuke the Punjab government following their attempt to apply illegal exemptions for their officers from the Code of Civil Procedure without the consent of the governor-general by using the authority of one law to circumvent another. 'It is too much the habit in India,' Maine complained, 'to suppose that we are bound to submit to all the preposterous or inconvenient consequences which to follow from the inadvertent use of over-general language in legislative enactments': 'Minute by Henry Maine', 6 July 1866, and 'Minute', 9 July 1866, in *Minutes by Sir H. S. Maine, 1862–69: with a Note on Indian Codification* (1892), Office of the Superintendent of Government Printing, India, Calcutta, IOR, V/3130, pp. 85–89.

[65] 'Minute by Henry Maine', 28 January 1864, in Ibid., p. 26. D. G. Barkley made a similar observation in his 1871 compilation of early colonial law in Punjab: 'There are ... many indications that for a long series of years the notion was generally current that no enactments, whenever passed into law, or however general in their terms, were applicable to the Punjab, except so far as it was found convenient in practice to act upon them': Barkley, D. G. (1871). *The Non-Regulation Law of the Punjab*, Punjab Printing Company, Lahore, IOR, V/5507, p. iii.

[66] Although Maine was willing to concede that some cases of attempted murder did, in fact, merit capital punishment, he pointed out that most of these were 'so various' that they required careful consideration on a case-by-case basis: Ibid. Interestingly enough, this view was also expressed by Becher: see Copy of Memorandum by Colonel J. Becher, 11 August 1866, IOR, P/438/15, no. 13, p. 11.

[67] 'Minute by Henry Maine', 11 September 1866, in *Minutes by Sir H. S. Maine*, p. 93.

has no application to such a Court and system as this. And, further, it seems to me to afford no security against wholesale and hasty executions.'[68] Instead, Maine urged caution, pointing out how this law, perhaps more than most, needed careful consideration before it was enacted, and should not be a knee-jerk reaction, inspired by passions. As he saw it, 'the danger of the Bill arose from the probability of its being applied somewhat under the influence of panic, and therefore, it was desirable that the utmost reasonable time for reflection and enquiry should be secured'.[69]

Based on his abiding legalism, Maine seems quite an unlikely candidate to be the man who drafted the Murderous Outrages Act. The great irony of all this is that what eventually swayed him into putting his full support behind this law was the fact that it would finally provide legal sanction and a clearly defined procedure for practices that had actually hitherto been considered 'criminal'. Though it may have been the straw that broke the camel's back, Becher's illegal execution of Mrs Brandreth's assailant was actually just one of several instances in which frontier officials had taken the law into their own hands in order to deal with these types of criminals. Up until this point, the Government of India had always been content to retroactively pardon officers who committed these infractions—and it is interesting to note that even the Home government back in Britain was aware of and supported these practices.[70] In the wake of the sensational imperial scandal surrounding Governor Eyre's brutal suppression of the Morant Bay Uprising of 1865 in Jamaica, however, colonial officials were increasingly wary of the perils involved in transgressing legal boundaries.[71]

Together with the renewed emphasis that codification placed on adherence to the rule of law, even the most inveterate champions of executive authority found themselves urging caution when it came to dealing with these types of frontier attacks. In October of 1866, for example, Viceroy John Lawrence stressed how it was necessary

[68] Ibid., p. 94.
[69] Legislative Council Proceedings, 4 January 1867, IOR, V/9/10, p. 8.
[70] Legislative Council Proceedings, 22 February 1867, IOR, V/9/10, p. 89.
[71] Legislative Council Proceedings, 21 December 1866, IOR, V/9/9, p. 245; Legislative Council Proceedings, 22 February 1867, IOR, V/9/10, p. 89. For a recent look at the important political and legal debates that sprung up as a result of the Eyre controversy, see Kostal, R. W. (2008). *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, Oxford University Press, Oxford. See also Benton, *A Search for Sovereignty*, pp. 211–12.

to ensure that frontier officials were able to deal with these types of crimes 'legally'.[72] The injurious effect of officers overstepping their legal authority, as well as the connection to Eyre, was made abundantly clear by J. E. L. Brandreth (no relation to Mrs Brandreth). During the Legislative Council debates over the drafting of the Murderous Outrages Act he pointed out that Becher had been, 'in a legal and technical point of view, as much guilty of murder as any one [sic] who could be guilty of any offence under the Penal Code'.[73] Yet, Brandreth continued,

> this act had been approved of and considered morally justifiable. Surely such a disagreement between the legal and moral sense should not be suffered to continue any longer. It was not right to lay on the District Officer the responsibility of thus ignoring the law in order to check these crimes. If a District Officer were a less determined man, he might be deterred by the fear of a prosecution such as the late Governor of Jamaica is at present threatened with.[74]

Aside from their own officers taking matters into their own hands, British officials were equally worried that similar sorts of attacks directed against their non-European subordinates would incite the latter to take action outside the bounds of the law as well. Though it may have been attacks against Europeans that had prompted the creation of the Murderous Outrages Act, the targets of these types of crimes were hardly confined to the white population. Sikh soldiers and police, in particular, seem to have been popular targets for assassins.[75]

[72] According to Lawrence, 'it would be better not to allow our officers to act *extra vires* ... I think that on the whole it is a lesser evil politically to insist on officers acting in accordance with the law, than to authorize a violation of the law, such violation of the law is understood by the people, and is considered more or less a grievance, and has a tendency to excite compassion for the criminal. Whereas a law however stringent, being limited to special cases, has the effect of upholding the authority of the State, and exciting a just terror in the would-be murderer, while it is not objected to by the people in general. Moreover, in my mind, it has an injurious effect on our judicial officers allowing them thus to exceed their powers: Keep with (K. W.) note by John Lawrence, 11 October 1866, NAI, Foreign/Judicial/March 1867/nos. 12–14. Lawrence reiterated this point again during the Legislative Council debates over the Murderous Outrages Act. It was a 'very great evil in itself that officers should act above and beyond the law', he remarked, and was equally 'fraught with evil and danger that outrages of this description should take place, and yet that there should be no law permitting summary trial and execution in such cases': Legislative Council Proceedings, 4 January 1867, IOR, V/9/10, p. 8.

[73] Legislative Council Proceedings, 21 December 1866, IOR, V/9/9, p. 245.

[74] Ibid.

[75] See NAI, Foreign/Frontier A/January 1905/nos. 7–9; NAI, Foreign/External B/October 1894/nos. 53–56; NAI, Foreign/External A/September 1901/nos. 9–21.

According to Charles Mansfield, the commander-in-chief, 'Nothing was more certain, than that, if we did not give our officers and our agents the means of immediately striking down such crimes as those contemplated by this Bill, our officers would ultimately not be able to prevent their soldiers and Police, and possibly the population, from taking the law into their own hands.'[76] As Maine put it, 'if this sort of outrage had been committed in the most civilised portions of the world—let us say in the cities of London or Paris... the murderer would have run much risk of being torn to pieces by the mob'.[77] For Maine and many other colonial officials, then, the Murderous Outrages Act was seen as both an absolutely essential way of checking these types of frontier attacks, as well as a way of regulating the conduct of their own personnel.

Thus, at a time when both Indian and wider imperial developments were making it increasingly taboo and dangerous for colonial officers to exceed their legal authority, the Murderous Outrages Act presented a crucial opportunity for officials in India, Maine foremost among them, to rein in and regulate admittedly illegal practices that had long prevailed along the frontier. Recognizing the sheer sense of fear, acrimony, and desire for revenge these sorts of attacks inspired in the local British population along the frontier,[78] the authorities chose to channel these sentiments and rehabilitate them through legislation. In a sense, then, the law really was being used to legitimize a pervasively criminal culture of colonial punishment along the frontier: the Murderous Outrages Act literally did legalize lawlessness. One of the quintessential features of lawfare, as John and Jean Comaroff have pointed out, is that it 'always seeks to launder brute power in a wash of legitimacy, ethics, propriety'.[79] Maine himself perhaps expressed this sentiment best during the Legislative Council debates over the Murderous Outrages Act. 'The Bill,' he argued, 'was not so much a Bill permitting officers on the trans-Indus frontier to order summary execution, as a Bill recognizing the fact that summary trial and

[76] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, pp. 199–200.
[77] Ibid., p. 196.
[78] When the Murderous Outrages Act bill was first introduced, the Legislative Council remarked how they 'could easily imagine the feeling of utter insecurity, not to say also of vehement indignation, on the part of the small European community, when one of their number lost his life, by the hand of some fanatical miscreant, so long as the murderer remained unpunished': Legislative Council Proceedings, 21 December 1866, IOR, V/9/9, p. 245.
[79] Comaroff and Comaroff, 'Law and Disorder in the Postcolony', p. 31.

execution were occasionally unavoidable in the trans-Indus territory, but placing the practice under regulation and restraint.'[80]

Frontier war and frontier fanatics

The Murderous Outrages Act was ultimately based on a very specific set of claims about the purportedly 'exceptional' character of the frontier that made it necessary to place this region outside the bounds of the regular legal order. One of the most powerful and pervasive of these claims was the assertion that the frontier existed in a perpetual state of warfare. As we have seen above, the frontier was a region that was fundamentally associated with danger and violence. This was a place considered by many to be one of the most violent and turbulent parts of the entire British empire.[81] Moments of peace were seen to be few and far between, and most years were, in fact, characterized by minor border skirmishes and sometimes even larger military campaigns, referred to as 'punitive expeditions',[82] launched

[80] Legislative Council Proceedings, 4 January 1867, IOR, V/9/10, p. 8; Legislative Council Proceedings, 22 February 1867, IOR, V/9/10, p. 89.

[81] See, for example, Bellew, H. W. (1868). *Our Punjab Frontier: Being a Concise Account of the Various Tribes by which the North-West Frontier of British India is Inhabited*, Wyman Bros. Publishers, Calcutta; Davies, C. C. (1932). *The Problem of the North-West Frontier 1890–1908, with a Survey of Policy since 1849*, Cambridge University Press, Cambridge; Howell, E., Repr. (1979). *Mizh: a Monograph on Government's Relations with the Mahsud Tribe*, Oxford University Press, Karachi; Caroe, O. (1964). *The Pathans 550 B.C.–A.D.*, Macmillan, London. Recent scholarly work, however, has attempted to revise this 'myth' of perpetual frontier violence and warfare by showing how more pacific, political alternatives existed. See, for instance, Beattie, *Imperial Frontier*; Tripodi, C. (2011). *Edge of Empire: The British Political Officer and Tribal Administration on the North-West Frontier 1877–1947*, Ashgate, Farnham; Banerjee, M. (2000). *The Pathan Unarmed: Opposition and Memory in the North West Frontier*, James Currey, Oxford; and Leake. E. M. (2013). 'The Politics of the North-West Frontier of the Indian Subcontinent, 1936–65', PhD thesis, University of Cambridge.

[82] Between 1849 and 1855 alone, no less than fifteen military expeditions were launched by the British: Temple, R. and Davies, R. H. (1865). *Report Showing the Relations of the British Government with the Tribes of the North-West Frontier of the Punjab from Annexation in 1849 to the Close of 1855; and Continuation of the Same to August 1864*, Punjab Government Press, Lahore, IOR, V/27/273/1/1, p. 61. This highly influential report was first compiled by Temple in 1856 and later expanded by Davies in 1865. A great deal of literature has focused on the brutality of these campaigns, but as Gavin Rand has recently pointed out, many of these expeditions saw very little direct fighting and were often more about 'penetrating' tribal territory as a 'performance' of British power, than they were about razing villages and killing tribesmen: Rand, Gavin '"Lifting the Purdah": The Black Mountain Expeditions', Paper presented at

against the independent Pashtun 'tribes'[83] who inhabited the hilly, or 'unsettled', districts beyond the border of the British-administered 'settled' districts (see Figure 1).[84]

Punitive expeditions, as well as other coercive measures—including blockades (*bandish*) and hostage-taking—were part of a concerted British effort to 'quarantine the disorder of the tribal areas'.[85] As Major G. J. Younghusband put it, 'On every tribe and clan, on every pass and trade route along this immense extent of frontier, the Indian Army has to keep its steadiest watch and ward. . . . For against the solid wall of British rule the sea of outer barbarism beats ever restlessly.'[86]

In a scathing critique of frontier affairs from 1876, the governor of Bombay and former chief commissioner of Sind, Bartle Frere, remarked that the Pashtuns 'are in a position quite unlike anything known either to European or Indian diplomacy. We are neither at peace or war with them—an armed truce would perhaps be the nearest description of any similar state elsewhere.'[87] Frere's pronouncements echoed those made by Henry Durand nearly a decade earlier during the debates over the drafting of the Murderous Outrages Act in order to justify the creation of such a law. '[W]e might be said to be in a chronic truce,' argued Durand, 'a watchful truce with hostility

the ReNewing the Military History of Colonial South Asia conference, University of Greenwich, London, 22 August 2013.

[83] This article fully recognizes the problematic nature of the term 'tribe' but retains it for the sake of simplicity and because this was the word invariably employed by the British. For scholarly literature deconstructing the meaning and history of this term, see Scott, *The Art of Not Being Governed*; and Tapper, R. (1983). *The Conflict of Tribe and State in Iran and Afghanistan*, Croom Helm, London.

[84] Although these plains districts retained a strong reputation for being 'turbulent' and 'lawless', they were nonetheless subject, if only nominally, to more regularized British administrative mechanisms of revenue collection and judicial administration. Pashtuns from the hilly, 'unsettled' or 'tribal' districts of the frontier, on the other hand, lived largely outside British jurisdiction and control, and continued to be governed by the precepts of *Pashtunwali* and the rulings of tribal *jirgas*, or councils: Ahmed, A. S. (1983). 'Tribes and States in Waziristan', in Tapper, *The Conflict of Tribe and State*, p. 196; Christensen, R. O. (1988). 'Tribesmen, Government and Political Economy on the North-West Frontier', in Dewey, C., *Arrested Development in India: The Historical Dimension*, Manohar, New Delhi, p. 171. For more on this subject, see Ahmed, *Pukhtun Economy and Society*.

[85] Hopkins, B. D. (2009). Jihad on the Frontier: A History of Religious Revolt on the North-West Frontier, 1800–1947, *History Compass*, 7:6, p. 1460.

[86] Younghusband, G. J. (1898). *Indian Frontier Warfare*, Kegan Paul, Trench, Trübner and Co., London, p. 1.

[87] Memorandum by H. B. E. Frere on Systems Pursued in the Administration of the Sind and Punjab Frontiers, 22 March 1876, NAI, Foreign/Political A/February 1878/nos. 149–156, p. 2.

Figure 1. The North-West Frontier, *circa* 1901. *Source*: The author.

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ever impending; and maintained towards frontier tribes notorious for the blood-feuds which raged among themselves.'[88] Commander-in-Chief Charles Mansfield took this even one step further by describing frontier policy towards the Pashtuns as 'one of armed repression' in which the British 'did not condescend to a truce, but enforced peace by putting down border crimes'.[89] According to this logic, attacks against British personnel were not merely 'breaches of the peace', or 'crimes', but rather they were 'acts of war against the British empire', committed by 'enemies of the Queen from beyond the border'.[90] Within this formulation, the distinction between judicial action and military action ceased to exist altogether, and the law became a tool for the extension of the killing function of war. This conflation of judicial action with military action, moreover, was one that was often made on a regular basis by the Punjab government in justifying punitive expeditions against the Pashtuns.[91]

As British officials saw it, they were men 'under siege', and this justified the use of any means necessary to protect the lives of the 'ruling race' along the frontier. This was a point that was argued particularly forcefully by Mansfield. He accused those who opposed the bill of being 'so beset by the necessity of strictly adhering to law as administered in peaceable districts ... that they had hardly been able to imagine the real state of things on the Panjáb frontier'. They

> could not conceive, what it was to live in the midst of a population in which English gentlemen could not return from mess to their own houses without arms; where the whole cantonment, as at Pesháwur, was girdled with sentries and watched by mounted patrols. Chief Commissioners had been struck down in their own verandahs; commanding officers had been murdered in their own

[88] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, p. 198.

[89] Ibid., p. 199.

[90] Ibid. This was a point made by the Punjab government as well in their initial correspondence petitioning for the creation of a special new law to prosecute such crimes: Letter no. 118–172 from the PG to the GOI, 5 March 1866, NAI, Foreign/Political A/March 1866/nos. 131–33, no. 131, para. 8.

[91] As R. H. Davies put it, 'the dispatch of an expedition into the hills is always in the nature of a judicial act. It is the delivery of a sentence and the infliction of a punishment for international offences. It is ... the only means by which retribution can be attained for acknowledged crimes committed ... and by which justice can be satisfied or future outrages prevented. In the extreme case in which expeditions are unavoidable, they are analogous to legal penalties for civil crime,—evils in themselves inevitable from deficiencies of preventive police, but redeemed by their deterrent effects': Davies, R. H. (1865). *Narrative of our Relations with the Mahommedan Tribes on our North-Western Frontier from the close of the year 1855 to 1864*, NAI, Foreign/Political A/March 1865/nos. 11–12, no. 12, pp. 14–15.

lines; a lady had been struck down at Kohat: such a state of things was not conceivable in a civilized country, and could only be considered to be a feature of but half-suppressed war and flagrant hostility.[92]

One of the most disturbing features for the British about this unremitting frontier 'war' was that it appeared to be motivated, in large part, by 'fanaticism'. Although the term 'fanatic' was adopted by the British shortly after they assumed control of the frontier in the 1840s, it did not acquire its overwhelmingly pejorative meaning until after the Uprising of 1857.[93] During the virulent anti-Muslim climate of the 1860s and 1870s,[94] the term was increasingly used to brand individuals who were believed to be part of an endemic culture of Muslim criminality and conspiracy.[95] Since their earliest encounters with the Pashtuns, British frontier officers, including Edwardes, Taylor, and James Abbott, had portrayed the Pashtuns as an endemically 'priest-ridden' and 'fanatical' community.[96] Following the malignant transformation of the term in the wake of 1857, descriptions of Pashtun fanaticism were increasingly used to signify their 'barbarity' and 'cruelty'. One highly influential report from 1865 summed it up as follows: 'Mohamedanism, as understood by them, is no better, or perhaps is actually worse, than the creeds of the wildest races on earth. In their eyes the one great commandment is blood for blood, and fire and sword for all infidels ... for all people not Mahomedans.'[97] The attacks that occurred against British officers along the frontier, therefore, were viewed by many as 'but another

[92] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, p. 200.

[93] According to Benjamin D. Hopkins and Magnus Marsden, it was used mainly to refer to religious 'excess': Hopkins, B. D. and Marsden, M. (2011). *Fragments of the Frontier*, Hurst and Company, London, p. 80.

[94] W. W. Hunter's infamous *The India Musalmans* (1871) was central in mobilizing British anti-Muslim hysteria following 1857: Hunter, W. W. (1871). *The Indian Musalmans: are they Bound in Conscience to Rebel against the Queen?*, Trübner and Co., London.

[95] Padamsee, A. (2005). *Representations of Indian Muslims in British Colonial Discourse*, Palgrave Macmillan, Basingstoke, pp. 56–64. In this sense, the use of this term was similar to the project of classifying the Thugs and other supposedly criminalized communities: see Singha, *A Despotism of Law*; and Wagner, *Thuggee*.

[96] This was a particularly powerful and enduring trope that reoccurs again and again in colonial discourse. See, for example, Edwardes, H. *A Year on the Punjab Frontier; General Report upon the Administration of the Punjab Proper, for the Years 1849–50 & 1850–5* (1854), Chronicle Press, Lahore, paras 42, 88–89, pp. 15, 27; and Bellew, *Our Punjab Frontier*, p. 12. According to Bellew, 'The most notable traits in their character are unbounded superstition, pride, cupidity and a most vengeful spirit': Ibid., p. 207.

[97] Temple and Davies, *Report Showing the Relations of the British Government with the Tribes*, para. 106, p. 62.

form, another exhibition of that spirit of fanatical vengeance which prevailed among the tribes'.[98]

During his trial for the shooting of Mrs Brandreth, Summad claimed that he had been fulfilling 'God's will' by attacking a European, and that he had been told this was a 'meritorious action' by a *mullah* (religious leader).[99] Based on this, Becher had confidently concluded that this 'savage' crime had been motivated by 'religious fanaticism'.[100] However, despite Becher's ability to discern a 'fanatical' attack when he saw one, the precise definition of what constituted a 'fanatic' or a 'fanatical' attack was much more ambiguous and elusive. In their initial correspondence petitioning for the creation of this new law, the Punjab government had referred to these types of criminals almost exclusively as *ghazis*.[101] Both Maine and Durand, however, objected to the use of this term, since, according to them, it still retained an 'honorific' sense, and its use might be considered offensive to Muslims.[102] It was also considered inexpedient to single out Muslims, since Sikhs and Hindus had also been known to commit similar types of 'fanatical' crimes.[103] In light of this, the Select Committee in charge of revising the Murderous Outrages bill suggested replacing the term *ghazi* with the expression 'political or religious fanatic', but this too proved contentious, as officials were divided over whether it was either possible or desirable to separate political from religious motivations in these attacks. In the end, the Legislative Council finally settled on the simplified and more all-encompassing term of 'fanatic', largely at the insistence of Maine and Durand. As Mansfield put it, 'it would be a matter of regret were the Council to encumber a somewhat anomalous

[98] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, p. 198.

[99] Court of the Commissioner of Peshawur Division, 3 March 1866: The Crown *versus* Summad Afreedee, NAI, Foreign/Political A/March 1866/nos. 137–39, no. 138.

[100] Ibid.

[101] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, pp. 196–97; Grant Duff, M. E. (1892). *Sir Henry Maine: a Brief Memoir of his Life*, John Murray, London, p. 259. Derived from the Arabic *ghazvah*, a word that historically referred to religious warfare against non-Muslims, the use of the word *ghazi* (religious warrior) was part of a repertoire of religious rhetoric that had been increasingly used to frame anti-imperial struggles against non-Muslim polities along the frontier since the time of the Sikh kingdom: Hopkins, Jihad on the Frontier, pp. 1461–463.

[102] Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, pp. 197–98.

[103] Copy of letter no. 56 from F. R. Pollock to the PG, 14 August 1866, IOR, P/438/15, no. 13, para. 8, p. 11; and Copy of Memorandum by Colonel J. Becher, 11 August 1866, Ibid., p. 11.

procedure with a too nice definition'.[104] Nevertheless, the term *ghazi* (or 'ghazee' as it often appears in the records) remained a popular one among colonial officials, so much so that the Government of India was even compelled to issue an official ban against the use of the term in official correspondence in 1900.[105]

The most effective punishment that was to be meted out to these fanatics was another issue that proved deeply controversial during debates over the drafting of the Murderous Outrages Act. In his judgment in the case of Mrs Brandreth, Becher had justified the use of extraordinary methods to execute Summad on the grounds that fanaticism represented an existential threat to British officials along the frontier. 'The fierce fanaticism directed against the lives of the ruling race of India is a special danger of this frontier,' he wrote, 'and one which requires to be taken into account in determining punishment.'[106] However, whereas Becher was content merely to execute Summad summarily, other officials insisted that even this type of punishment was insufficient when dealing with these types of fanatical crimes. A culturally specific punishment that cut to the heart of these attacks was, in the words of John Lawrence, required to instil 'a just terror in the would be murderer.'[107] For Lawrence, the punishment most 'calculated to strike terror'[108] into the hearts of these individuals entailed burning their bodies following execution. The idea of burning the body of a fanatic was one which derived largely

[104] As he argued, 'the Council [set] out to render easy the business of the Commissioner who was to try offenders under the Act, and not tie him up with a definition which might hereafter cast uncertainty on his acts, and render the proceedings actually liable to the very delay for the avoidance of which the present measure was proposed': Legislative Council Proceedings, 22 February 1867, IOR, V/9/10, p. 93.

[105] In their eyes, 'Terms which rightly apply to "holy warfare" serve, when used in connection with foul murder, to keep alive the ignorance and mistaken credulity to which these crimes, in part, owe their origin': Letter No. 2057F from the GOI to the PG, 11 August 1900, NAI, Foreign/Frontier A/August 1901/nos. 63–72.

[106] Court of the Commissioner of Peshawur Division, 3 March 1866: The Crown *versus* Summad Afreedee, NAI, Foreign/Political A/March 1866/nos. 137–39, no. 138.

[107] K. W. noted by John Lawrence, 11 October 1866, NAI.

[108] This is a term I have borrowed from Kim Wagner and his recent work on exemplary forms of punishment and the spectacle of public execution in colonial India. In it, Wagner argues that the British were deeply concerned with finding 'culturally specific' forms of punishment when conventional methods, such as hanging, were deemed to be ineffective in 'translating' British notions of justice into the Indian world: Wagner, "'Calculated to Strike Terror"'.

from the 'Moplah Act'.[109] Since Muslims bury their dead, burning was designed to exploit what the British believed was a deeply entrenched 'superstition' among Muslims that this would destroy the soul, and therefore prevent the fanatic from ascending to Heaven as a reward for their actions.[110] Though not explicitly alluded to during the debates over the drafting of the Murderous Outrages Act, the practice of physically destroying the body of criminals and rebels by strapping them to the mouths of cannon, as was done with the 'mutineers' of 1857, was another British practice that was used both before and after the Uprising as a means of denying individuals access to the afterlife.[111] In addition to its deterrent effect, the destruction of the body also had another benefit in that it would prevent the grave of the convicted from being converted into a *ziarat* (shrine) and becoming a site of reverence and inspiration for similar fanatical acts.[112]

[109] Section 3 of the Moplah Outrages Act contained the proviso regarding burning: 'Act No. XXIII of 1854, An Act for the Suppression of Outrages in the District of Malabar', in Williams, *The Acts of the Legislative Council of India relating to the Madras Presidency*, IOR, V/4589, p. 294.

[110] As John Lawrence put it, 'I am in favour of burning the body of a Mahomedan assassin, not that I desire to outrage his corpse, but that knowing that burning it has a deterrent effect on the Native mind, I consider that we are fully justified in making use of such a superstition': K. W. note by John Lawrence, 11 October 1866.

[111] Wagner, '"Calculated to Strike Terror"'. In April of 1900, F. D. Cunningham, the superintendent and commissioner of the Peshawar Division, did actually suggest that fanatics might be executed with cannons, but his recommendation does not seem to have been seriously considered by his colleagues. 'I am inclined to think,' Cunningham wrote, 'that blowing from a gun might be more effectual—it strikes more dread ... There is nothing inhuman or barbarous in it, and nothing in hanging to compel us to stick to it alone. One nation beheads, another kills malefactors by an electric shock, another by the Garrotte, we hang; I see no reason why we should not blow from a gun'. Note by F. D. Cunningham on the Suggestion for Checking Murders of which the Motive is Religious Fanaticism, 3 April 1900, IOR/L/PJ/6/583, file 2012.

[112] In a letter to the Punjab government from November of 1873, D. C. MacNabb, the superintendent and commissioner of the Peshawar Division, wrote that, 'It is often shown to be a mistake to hand over the bodies of executed criminals to their friends for burial, as the murderer's grave frequently becomes a shrine decorated with flags, and the cowardly assassin comes to be venerate as a "sháhid," or martyr. Burning the body is a punishment that is often condemned as vindictive, but I confess I have never been able to understand the grounds for this objection. I think, however, that this (to a Muhammadan) terrible aggravation of the sentence of death should be reserved to cases of the greatest atrocity': Letter no. 183–3254 from D. C. MacNabb to the PG, 14 November 1873, IOR, P/137, p. 925. Burning had yet another benefit as well, since it would ensure that British jails would not be overrun by the bodies of dead fanatics and converted into cemeteries: see K. W. Report on the Question of the Burning of the Dead Bodies of Ghazis by E. H. S. Clarke, 12 June 1895, NAI, Foreign/Secret F/May 1896/nos. 322–332.

Durand, for one, was a firm believer in the efficacy of burning, arguing that, 'With the masses it enhances the effect of the punishment.'[113] Most of the other officials consulted at the time of the drafting of the Murderous Outrages Act, however, were deeply opposed to Lawrence's proposal to burn the bodies of Muslims, pointing to the fact that this would actually serve only to engender even greater hatred towards the British.[114] Though the issue never came up officially during the Legislative Council debates, the strong opposition against this measure ensured that the provision explicitly permitting the body of the convicted to be burned was ultimately struck from the Murderous Outrages Act. Instead, at the insistence of Lieutenant-Governor McLeod and Viceroy John Lawrence, both of whom strongly supported burning,[115] the wording of the section that covered the disposal of bodies was left purposefully vague, empowering the commissioner who passed the sentence to use their own discretion in the matter.[116]

Although legislators were uneasy about burning, most of the frontier officers actually disposing of these cases had no such qualms, and, over the next three decades, frequently seized upon the opportunity to burn the bodies of convicted fanatics.[117] An official enquiry by the Government of India into the incidence of burning found that between 1883 and 1895, the bodies of at least 17 convicted fanatics had been burned in Punjab and Baluchistan, leading to the conclusion that 'it has been almost the invariable practice to burn the bodies of Ghazis'.[118] Lieutenant-Governor Dennis Fitzpatrick (1892–97), a strong opponent of burning, was deeply disturbed by the evidently widespread prevalence of this practice, believing that it served only

[113] Ibid.

[114] See Copy of letter no. 56 from F. R. Pollock to the PG, 14 August 1866, IOR, P/438/15, p. 11; and Copy of Memorandum by Colonel J. Becher, 11 August 1866, IOR, P/438/15, p. 11.

[115] K. W. Report on the Question of the Burning of the Dead Bodies of Ghazis by E. H. S. Clarke, 12 June 1895.

[116] 'Murderous Outrages in the Punjab, Act No. XXIII of 1867', IOR, V/8/119, para. 7, p. 462. In leaving out a specific provision about burning, it was also noted how this would enable officers to inflict similarly punitive measures against the bodies of any Hindu fanatics by burying them.

[117] There were numerous reported Murderous Outrages Act cases where fanatics' bodies were burned. See, for example, NAI, Foreign/A. Pol. E./June 1884/nos. 704–714; NAI, Foreign/A. Pol. E./July 1884/nos. 5–6; NAI, Foreign/External B/July 1892/no. 150; and NAI, Foreign/External B/October 1894/nos. 53–56.

[118] K. W. Report on the Question of the Burning of the Dead Bodies of Ghazis by E. H. S. Clarke, 12 June 1895.

to 'create a feeling of disgust against us in the minds of loyal Mussalmans'.[119] On 20 February 1896, at the insistence of Fitzpatrick, the Government of India therefore issued a formal ban against the practice of burning without their express permission, and only in 'extreme and exceptional cases when there may be good reason to believe that such a measure will check, or put a stop to, what might be called an epidemic of assassination of fanatics'.[120]

For the next nine years, burnings remained relatively rare along the frontier. Viceroy Lord Curzon (1899–1905), however, took an altogether different stance on the subject of burning than his predecessor, Lord Elgin (1894–1899). In a speech delivered at a durbar in Quetta on 12 April, 1900, Curzon forcefully announced his intention to use any means necessary to put a stop to these sorts of attacks once and for all. 'I wish you to cherish no illusions,' he stated, but 'I am determined, so far as lies in the power of Government, to put a stop to these abominable crimes. I shall shrink from no punishment, however severe.'[121] True to his word, Curzon made the war against frontier fanaticism one of his top priorities, and set about contemplating new ways to make the punishment for these types of crimes even more severe.[122] In 1905, Curzon officially reversed his

[119] Ibid.

[120] Letter no. 490F from the GOI to the PG, 20 February 1896, NAI, Foreign/Secret F/May 1896/nos. 322–332. See also Letter no. 99 from the GOI to George F. Hamilton, 19 May 1896, Ibid.

[121] 'Believe me, Sirdars,' he stated, 'that the idea that any one can earn the favour of Almighty God by killing some one else against whom he bears no grudge, and who has done him no wrong, simply because he follows another religion—which is only another way of worshipping the same God—is one of the stupidest notions that ever entered into the brain of a human being. If we could lift the *purdah* of the future world and see what fate has attended these wretched murderers, I do not think that there would be many future *ghazis* on the Pathan border, or in Baluchistan': Raleigh, T. (1906). *Lord Curzon in India: Being a Selection from His Speeches as Viceroy & Governor-General of India, 1898–1905*, Macmillan and Co., London, p. 413.

[122] In 1901, for example, Curzon briefly considered having prisoners flogged before being executed and then burned, though this was eventually abandoned in light of objections raised by Hugh Barnes, the former revenue commissioner for Baluchistan under Robert Sandeman: K. W. note by Curzon, 8 March 1905, NAI, Foreign/Secret F/July 1905/nos. 178–182. H. A. Deane, the chief commissioner of the North-West Frontier Province (NWFP), for one, was a great enthusiast for this type of punishment, and lamented the fact that flogging was not incorporated into the newly enacted Murderous Outrages Regulation in the NWFP in 1901: 'I venture to think that it is much to be regretted that the Regulation does not allow flogging, combined with execution, followed by burning. The fanatic may be flogged and sentenced to imprisonment for life, but if flogged for the murder, he must not be hanged. I confess that it has often struck me that a frontier officer might have first tried the murderer,

predecessor's decision to prohibit burnings, and actually called for an expansion of the practice, stating that it 'should be adopted as a general rule'.[123] However, although this certainly pleased a number of frontier officials who had been deeply distressed by the Government of India's decision to ban burning in 1896,[124] it ultimately did not prove effective in stopping these types of attacks.

The Murderous Outrages Act was conceived of as a response to what was believed to be a very special type of frontier crime and, as such, it was always meant to be applied only in the most extreme and truly 'exceptional' of circumstances. Initially, colonial officials seem to have taken this charge very seriously, applying the law sparingly in just five different cases between 1867 and 1877.[125] The following two decades, however, saw a drastic reversal of this relative self-restraint. Following the extension of the Murderous Outrages Act to Baluchistan in 1881, the frequency with which the law was invoked increased dramatically. Between 1881 and 1905, a total of 93 different cases of fanatical outrage were recorded in Baluchistan alone. At least 40 individuals were tried and executed in these cases (not including those who either died or committed suicide before their trial or execution); another 16 were killed outright during the attacks before they could be apprehended; and only 11 were spared

say, for a theft of a cartridge, or similar offence, and flogged him for this; and thereafter tried the man for the murder, and quietly spirited him away to a down country jail to be hanged, as allowed by the Regulation. Flogging on the bare person is absolutely awful disgrace to a Pathan; every frontier officer knows this, and yet it is rarely resorted to. The effect is infinitely more deterrent than the fear of hanging. If we could only flog, hang, and burn, how much more so it would be': Qtd. in K. W. note by E. H. S. Clarke, 8 March 1905, Ibid. Clarke himself noted how, 'If it so pleased the Court, there is nothing to prevent the Court from ordering a fanatic to be hanged, drawn, and quartered': Ibid.

[123] Letter from the GOI to H. A. Deane, Chief Commissioner and Agent to the Governor-General in the NWFP, 13 March 1905, NAI, Foreign/Secret F/July 1905/nos. 178–182.

[124] In April of 1896, following the GOI's decision to ban burning, Major-General James Browne, the agent to the governor-general in Baluchistan, compared frontier fanaticism to a 'contagious disease' that was 'beyond all imagination of legal British opinion'. 'The burning and supposed annihilation of the body,' he continued, 'is the only measure which has the least deterrent effect upon Afghans, or even, under certain circumstances, upon Baluchis … The bacillus of the ghazi rabies which can only be fed by the hopes of a future life, can only be starved by the collapse of all future spiritual hopes for the soul, as the result of the annihilation of the body': Letter no. 2842 (confidential) from James Browne to the GOI, 8 April 1896, NAI, Foreign/Secret F/May 1896/nos. 322–332.

[125] IOR, P/862, Table B.

capital punishment and sentenced to either rigorous imprisonment or transportation.[126] In all likelihood, however, these numbers were actually even greater. In addition to the alarming propensity of certain frontier officers towards burning—a punishment that was itself meant to be reserved only for the most heinous Murderous Outrages Act cases—the Government of India's 1896 inquiry also found that there were a number of instances where officers had either improperly or only 'casually' reported Murderous Outrages Act cases.[127] Such lax and spotty reporting makes it difficult to obtain an exact picture of the frequency with which this law was used, and raises questions about how many other cases were either lost in the bureaucratic shuffle or even never reported in the first place. Together with an apparent willingness on the part of officers to employ the law in cases where its applicability was dubious at best and even sometimes technically illegal,[128] it is clear that frontier officers were abusing the extraordinary latitude and discretion that had been entrusted to them by this law.[129]

[126] *Statement of Fanatical Outrages in the North-West Frontier Province and Baluchistan* (1905), Intelligence Branch, Quarter Master General's Department, Simla, IOR/L/PS/20/203. Between 1895 and 1905, there were 23 recorded cases of fanatical outrage along the Punjab (after 1901, the NWFP) frontier. Twelve of these cases resulted in execution, eight saw the attackers killed outright, and there was even one very exceptional case in which the accused was actually acquitted: Ibid.

[127] Ibid. For further correspondence regarding the improper reporting of Murderous Outrages Act cases, see NAI, Foreign/Frontier B/June 1896/no. 38.

[128] One particularly ironic example of this occurred in January of 1869, following the murder of a Sikh sepoy outside the fort in Bannu. Acknowledging that the Murderous Outrages Act had not yet been extended to the Derajat Division, Commissioner S. F. Graham petitioned the Punjab government for permission to proceed regardless. T. H. Thornton, the secretary to the Punjab government, noted full well how this 'would not be legal,' but concluded that 'illegality may be risked'. Despite being 'much vexed' by the apparent necessity for such an illegal act, Viceroy Lawrence, the man who had hitherto forcefully argued in favour of the Murderous Outrages Act so that officers could try fanatics 'legally', grudgingly assented: see Telegram from the PG to D. F. McLeod, Lieutenant-Governor of Punjab, 9 January 1869, IOR, L/PS/6/566, coll. 198; and Telegram from Lt.-Gov. Punjab, to the Secy. to the PG, 11 January 1869, Ibid.

[129] This problem was so severe, in fact, that the Government of India was forced to 'impress' upon its officers 'that proceedings under the Act should be strictly limited to cases of true fanatical outrage—*e.g.*, cases of men whose object is to gain martyrdom by killing an infidel and who seek that object by assassination—as distinct from acts of guerilla warfare, such as firing into camps, plundering convoys, etc. ... The Government of India admit that it is difficult to define what is a fanatical outrage, and what is not; but provided that it is clearly understood that the special treatment provided for fanatical outrages is applicable to such outrages only': Letter no. 490F from the GOI to the PG, 20 February 1896, NAI, Foreign/Secret F/May 1896/nos. 322–332.

Conclusion

On 3 February 1925, the eminent Indian jurist and nationalist leader, V. J. Patel, introduced a bill to the Legislative Assembly of India for the repeal of laws that were deemed 'repressive'. The laws included such draconian legislation as the Bengal, Madras, and Bombay Regulations (1818, 1819, 1827); the State Prisoners Act (1850); and the Seditious Meetings Act (1911).[130] All of these laws, Patel argued, had one thing in common: they armed the executive with an alarming set of powers that could be used to deprive people of their elementary rights. When the Assembly met again several weeks later to discuss the details of Patel's bill, one of its supporters proclaimed that 'the days of Regulations and Ordinances are long past, and they are anachronism in all civilised systems of jurisprudence'.[131] Yet not everyone in the Assembly shared this view. Diwan Bahadur T. Rangachariar rose to oppose the bill, pointing out that it proposed to strip the government of so many of its executive powers and prerogatives that it would never pass the Council of State. Such powers, Rangachariar argued, were sometimes necessary for a government (whether it be British or Swarajist) to protect the lives of their people, and he therefore urged Patel to amend his bill so as to omit from repeal those laws and powers which were deemed absolutely necessary for the security and 'defence' of India.[132] One law, in particular, was singled out for exemption from repeal by Rangachariar: the Murderous Outrages Act.[133]

When Patel first introduced his bill, the home member, Alexander Muddiman, had questioned his choice to include in it the Murderous Outrages Act, and accused him of potentially endangering the lives of British officials by attempting to 'withdraw such little protection as the law can give to those officers of Government who daily and hourly are risking their lives for the safety of India, in India's passes in the north, liable at any moment, at any moment I say, to murder'.[134]

[130] Legislative Assembly Debates, 3 February 1925, IOR, V/9/66, p. 709.
[131] Legislative Assembly Debates, 19 March 1925, IOR, V/9/68, p. 2649.
[132] Ibid., pp. 2660, 2664.
[133] Ibid., pp. 2656, 2660, 2664. The Murderous Outrages Act was officially repealed in Punjab in1901 at the time of the creation of the NWFP and its provisions were immediately re-enacted in the NWFP and Baluchistan under the auspices of the Murderous Outrages Regulation of 1901; however, the original Murderous Outrages Act remained in the statute books: Letter no. 1953F from the GOI to C. E. Yate, 9 August 1901, NAI/Foreign/Frontier A/August 1901/nos. 63–72.
[134] Legislative Assembly Debates, 3 February 1925, IOR, V/9/66, p. 711.

During the subsequent debate over the bill, Rangachariar, who had himself visited the frontier, echoed this sentiment and claimed that it would actually be a 'crime' to repeal the Murderous Outrages Act.[135] Following Rangachariar's statement, Muddiman then read out an account of a recent and brutal assault committed at the Peshawar Cantonment railway station in which a 'Ghazi' had repeatedly stabbed the station master as well as his wife and seventeen-year-old son.[136] After he finished, even the stalwart constitutionalist, Muhammad Ali Jinnah, rose in support of exempting this law from repeal. Although it was against his 'ideas of justice that any accused person should be tried in the summary manner which this Act provides', Jinnah conceded that because the Murderous Outrages Act was confined to only a few frontier districts, was so restricted in its application to 'fanatics', and was so 'necessary' for the protection of the British along the frontier, that it should stand 'on a very different and special footing'.[137] Confronted with this mounting opposition, Patel grudgingly agreed to strike the Murderous Outrages Act from the bill. Patel's amended bill was subsequently passed by Assembly in a vote of 71 to 40. It was never adopted by the Council of State, and more than ten years later,

[135] Legislative Assembly Debates, 19 March 1925, IOR, V/9/68, p. 2691.

[136] The full account reads: 'After dinner—on the evening of the 7th December 1919, Mrs. E. and her family were sitting in the bed room with Mr. E, station master at the Peshawar Cantonment Railway Station, who was in bed with fever. The eldest boy, aged 17, had occasion to go to the dining room for something and in order to do so had to pass through the sitting room which has three doors leading respectively to the dining-room, bedroom and the garden; as he entered from the bedroom an Indian was coming in from the garden door; the boy at once questioned him as to what he was doing, whereupon the stranger immediately attacked him with an axe which he had hidden behind his back. In parrying the blow the boy's fore-arm was broken. The boy then closed with the man and his shouts for assistance brought his mother into the room. When she arrived the man had dropped the axe and was stabbing her son with a dagger. She rushed at once to the boy's assistance, and threw her arms round the Ghazi to try and prevent him from stabbing her son again. The man then attempted to stab Mrs. E. but the first blow only grazed her nose. She never relaxed her hold, however, and was then stabbed in her side. Even this failed to make her let go, and in spite of her wounds she managed to seize the man by his wrist. At this stage Mr. E. Came from his sick bed to the rescue and the Ghazi wrenched his hand free from Mrs. E. And stabbed her husband in the thigh. Mrs. E. again tried to seize the dagger and at last succeeded in getting hold of the handle, but in so doing received several more wounds on her hand and wrist. Finally with the aid of some servants the assailant was overpowered': Ibid., p. 2692.

[137] Ibid., p. 2693.

Indian legislators were still trying (without much success) to repeal the Murderous Outrages Act.[138]

The ability of even staunch nationalists, such as Rangachariar and Jinnah, to support a law that was seen by many as expressive of the tyranny of colonialism and its attendant ideologies is significant. Aside from the obvious cynicism they both displayed in recognizing that a bill proposing such a radical dismantling of British executive prerogative stood little chance of passing the Council of State, these leaders also appear to have been willing to buy into the claim that the Murderous Outrages Act represented an acceptable compromise to normal ideas of justice because it was so specific and restricted in its scope that it could hardly be a threat to the security and liberties of ordinary Indians. Rangachariar's statement about how strong executive powers would be required even by a Swarajist government is particularly revealing about how notions of sovereignty—whether rooted in colonial conquest, as in the case of the British, or upon claims about the consent of the people in the case of the nationalist movement—retained a strong emphasis on compulsion. Indeed, in the case of post-colonial Pakistan, where this law remains in the statute books, the 'excesses' of colonial legislation have actually been processed into modern forms of statecraft.[139] This is a striking illustration of both the entrenched persistence of that state's own autocratic tendencies, as well as the enduring trope of the 'frontier fanatic' which still pervades contemporary discourse, particularly in discussions surrounding the so-called 'war on terror'.

Despite its relatively limited application to the North-West Frontier, the Murderous Outrages Act must be seen as much more than a merely peripheral piece of legislation. This was a law that cut to the heart of the ideas and debates that helped define British colonial conceptions of law and order during the nineteenth century. In addition to the types of exceptional legal-political regimes that were established along both the North-West and North-East frontiers, India's hinterland was also regularly subject to states of emergency that granted colonial officials

[138] S. Satyamurti introduced a bill that was almost identical to Patel's in 1936, but it was still being delayed by 1938: 'Heavy Programme of Assembly: Ballot for February 6', *The Times of India*, 1 February 1936; 'Assembly Chamber', Ibid., 14 September 1936, p. 5; 'Facts and Fiction', Ibid., 3 September 1937, p. 12; '"Present Assembly is the Best": Mr. Satyamurthy's Broadcast', Ibid., 7 July 1938, p. 3.

[139] 'The Punjab Murderous Outrages Act, 1867', The Commonwealth Legal Information Institute: http://www.commonlii.org/pk/legis/pj/consol_act/pmoa1867302/, [accessed 28 April 2015].

extraordinary executive powers, all in the name of maintaining law and order.[140] The rule of law in colonial India was never about restraining executive authority or weakening the ability of the British to punish recalcitrant colonial subjects. Rather, it was about finding new ways of regulating and making the exercise of sovereign power more uniform and respectable. It was about couching the colonial state's iron fist in a velvet glove.[141] Once again, it was Maine himself who perhaps best expressed this sentiment. In responding to criticisms that the law was an illustration of 'the extreme readiness of the Indian Government to license lawlessness', he countered by arguing that the precise opposite was the case: that it was, in fact, a 'signal example of the tenderness of this Government for law and legality'.[142]

Maine's friend and successor as law member, James Fitzjames Stephen, was one who certainly viewed this as the purpose of laws like the Murderous Outrages Act, and indeed colonial law more generally. The necessity for colonial officials to be able to 'punish' their subjects was paramount for Stephen. In his view, 'The exercise of criminal jurisdiction is both, in theory and in fact, the most distinctive and most easily and generally recognized mark of sovereign power. All the world over the man who can punish is the ruler.'[143] As a staunch imperialist, Stephen was always a firm believer in the need for the British to maintain their prestige as India's 'ruling race' through the preservation of their executive authority.[144] 'I shall not be suspected of undervaluing my own profession,' he once wrote, 'but I must say I

[140] Hussain, *The Jurisprudence of Emergency*.

[141] Lawfare, as John Comaroff points out, while always attentive to the language of the law, is especially so when it comes to its breaches, suspension, and even outright annihilation: Comaroff, J. L. (2002). 'Governmentality, Materiality, Legality', in Deutsch, J-G., Probst, P. and Schmidt, H., *African Modernities: Entangled Meanings in Current Debate*, Oxford University Press, Oxford, pp. 126–27, 130.

[142] 'It was quite wonderful,' Maine argued, 'that people should not be able to throw themselves sufficiently out of surrounding circumstances, to see that the measure was a striking example of the desire of the Indian Government to impose legal order on its officers under the most trying conditions': Legislative Council Proceedings, 15 March 1867, IOR, V/9/10, pp. 195–96.

[143] Ibid.

[144] 'We must have all over the country real and effective governors,' he stressed, 'and no application of the principle of the division of labour ought, in my opinion, to be even taken into consideration which would not leave in the hands of district officers such an amount of power as will lead the people at large to regard them as, in a general sense, their rulers and governors': Ibid., p. 26. Stephen's advocacy of the separation between judicial and executive duties, therefore, was intended only to remove civil judicial duties, and ensure that district officers retained their 'sovereign' power to punish.

can hardly imagine a greater calamity for British India than the undue preponderance of the legal over the executive element.'[145]

The idea of colonial law possessing a certain warlike quality to it is also brought forth quite strongly in Stephen's writings. Stephen once claimed that colonial officials governing 'turbulent and primitive' districts, such as the North-West Frontier, were like 'a highly civilized and carefully selected military force on active service, and the laws which they administer are their orders and articles of war'[146] Stephen's analogy weds law and war together, so that one fulfils the other, and vice versa. Indeed, far from being incommensurable, force and justice were merely different sides of the same coin for Stephen. In one of his more famous analogies, he compared British rule in India to 'a vast bridge over which an enormous multitude of human beings' were passing from a 'dreary land' of brute violence, superstition, and 'cruel war' into a more peaceful, orderly, and industrious existence. This bridge, he argued, rested on the twin pillars of 'military power' and 'justice'. 'Neither force nor justice will suffice by itself,' Stephen insisted. 'Force without justice is the old scourge of India, wielded by a stronger hand than old. Justice without force is a weak aspiration after an unattainable end.'[147] For Stephen, although military power

[145] This line was included in the original draft of Stephen's 1872 *Minute on the Administration of Justice*, which was written in September of 1870: Stephen, J.F. 'Minute on the Administration of Justice', 13 September 1870, IOR, L/PJ/5/437, p. 14.

[146] Stephen, 'Minute on the Administration of Justice', p. 85.

[147] The quotation in full reads: 'The British Power in India is like a vast bridge over which an enormous multitude of human beings are passing, and will (I trust) for ages to come continue to pass, from a dreary land in which brute violence in its roughest form had worked its will for centuries—a land of cruel war, ghastly superstitions, wasting plague and famine—on their way to a country of which, not being a prophet, I will not try to draw a picture, but which is at least orderly, peaceful, and industrious, and which, for aught we can know to the contrary, may be the cradle of changes comparable to those which have formed the imperishable legacy to mankind of the Roman Empire. The bridge was not built without desperate struggles and costly sacrifices. A mere handful of our countrymen guard the entrance to it and keep order among the crowd. If it should fall, woe to those who guard it, woe to those who are on it, woe to those who would lose with it all hopes of access to a better land. Strike away either of its piers and it will fall, and what are they? One of its piers is military power; the other is justice, by which I mean a firm and constant determination on the part of the English to promote, impartially and by all lawful means, what they (the English) regard as the lasting good of the natives of India. Neither force nor justice will suffice by itself. Force without justice is the old scourge of India, wielded by a stronger hand than old. Justice without force is a weak aspiration after an unattainable end. But so long as the masterful will, the stout heart, the active brain, the calm nerves, and the strong body which make up military force are directed to the object which I have defined as constituting justice, I should have no fear, for even if we fail after doing

remained one of the key pillars of British rule, it could not support it alone. A colonial rule of law which imbued officials with strong powers of executive authority was the natural complement to this. In this sense, then, law was simply an extension of military power through other means, since it was ultimately meant to overawe and pacify India's supposedly wayward and turbulent inhabitants.[148] As he wrote several years later, law could provide 'a moral conquest more striking, more durable, and far more solid, than the physical conquest which renders it possible'.[149]

In August of 1881, as officials considered extending the Murderous Outrages Act to Baluchistan following an attack on two sepoys in the Quetta bazaar, one official expressed his irritation at how the British tended to tie their hands with laws. 'It seems to me that it is rather a pity,' he wrote, that 'any reference should have been made to Government about the mode of procedure in the case. Quetta is not British territory; and if the man had been hanged or shot at once, either by the Civil or Military authorities, there would have been no *law* under which any exception could have been taken.'[150] This same officer was eventually to find solace in the Murderous Outrages Act, as it provided for 'a rough-and-ready procedure better adapted to wild frontier lands than the more regular Penal and Criminal Procedure Codes'.[151] The Murderous Outrages Act represented a bare-knuckles approach to colonial governance. It was a bald and overt expression of a distinct logic of colonial legality maintaining that colonial power and the prestige of the 'ruling race' needed to be preserved at all costs. In so doing, it drew a direct connection between the need for colonial officials to be able to wield the sovereign power to punish and kill, but with a veneer of respectability granted through claims about the law. In this respect, it was the ultimate 'warlike' law, in that it enabled the killing function of war to be enacted on a regular basis by frontier officers in court martial-style trials, and in a region of British

our best we fail with honour, and if we succeed we shall have performed the greatest feat of strength, skill, and courage in the whole history of the world': Stephen, J. F. (1878). 'Letter to the Editor', *The Times*, 4 January 1878, p. 3.

[148] Stephen's particular conception of 'colonial' was also exemplified in his notorious pronouncements against the Ilbert Bill in 1883: Stephen, J. F. (1883). Foundations of the Government of India, *Nineteenth Century*, 14:80, p. 563.

[149] Stephen, 'Legislation under Lord Mayo', p. 168.

[150] 'It seems rather a pity,' he continued, 'that in a case of this sort the assailant should be taken alive at all': K. W. note by T. H., 30 August 1881, NAI, Foreign/Political A/October 1881/nos. 353–355.

[151] Ibid.

India that was itself assumed to exist in a perpetual state of war. The ultimate purpose of colonial law for Maine, Stephen, and many other colonial officials was to temper the steel of colonial rule, not to dull it. In this sense, laws such as the Murderous Outrages Act simply became yet another sort of 'weapon' that could be used to wage an endless war against the colonized.