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*Archaic Sovereignty and Colonial Law: The reintroduction of corporal punishment in colonial India, 1864–1909**

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Abstract

The judicial and summary punishment of whipping—absent from the Indian Penal Code (IPC) of 1860—was passed into law through Act No. VI of 1864. This legislation, tacked on as an appendage to the IPC, invested the judge with wider discretionary powers to administer violence across Indian society. In this case what emerged was an evolving attempt to enlarge the colonial state's capacity for quotidian violence, targeting certain bodies to reaffirm, manage, and police the social hierarchies upon which colonial sovereignty depended. In the context of a slow imperial movement away from the cast-iron distinctions that had been made between groups in the early nineteenth century—distinctions that had, among other things, supported a legally enforced system of slavery—new methods to mark the value of different bodies were created. The events of the 1850s, in particular the rebellion of 1857–1858, saw the re-emergence of the colonial idea that certain bodies could withstand violence, and that violence itself could be used to create economically productive colonial societies, in debates around penal law and punishment. This article will trace this history through formal legal restrictions and informal legal-cultural practices in relation to corporal punishment in colonial India. Over the course of the period under study, this legislation introduced into law what one official termed 'the category of the "whippable"'.[1] Charting the changing shape of this legal category along lines of race, gender, caste, class, and age, the article will argue that a logic of exceptionality, channelled here through the application of judicial violence, attempted to structure and manage Indian society in complicated ways.

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[1] Deputy Commissioner of Bara Banki district to United Provinces Government (hereafter UPG), 19 August 1905, United Provinces State Archives (hereafter UPSA), Lucknow Branch (hereafter LB), List 43 Judicial (Criminal) Block/Judicial (Criminal) Department/United Provinces Proceedings/Dec. 1905/Nos. 1–62.

Introduction

For Michel Foucault, violent and public displays of punishment represented an archaic form of sovereignty which disappeared from sight with the construction of modern institutions of surveillance and discipline.[2] However, within the conflicted space of colonial modernity, the implementation of a purportedly modern, codified legal infrastructure, which, for many observers, surpassed the criminal law of the metropole, did not result in the same withdrawal of these expressions of violence and power. As the Indian Penal Code (IPC) was implemented in India between 1860–1862 it was instead accompanied by a sustained recourse to these supposedly residual modes of sovereignty, remaining dependent on various exemplary and spectacular acts of violence. With a number of scholars acknowledging the limitations of the Foucauldian schematic when attempting to understand the colonial world, this article attempts to shed further light on the peculiarly colonial political rationality which buttressed penal law and everyday violence in India.[3] It does so through an examination of Act No. VI of 1864, the legislation which reintroduced whipping as a judicial punishment.[4] Though important scholarship has analysed corporal punishment in the British East India Company in the late colonial period, as a military punishment, and as part of wider histories of juvenile discipline, its reintroduction as a judicial punishment has been comparatively unexplored.[5] Analysis of everyday violence has

[2] Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, (trans.) Alan Sheridan, (London: Penguin, 1977).

[3] While Foucault's writings have long been understood as problematic when positioned outside of his primarily European interests, attempts to repackage his insights into an analytical framework more suited to colonial spaces have still proven fruitful. See Mark Brown, *Penal Power and Colonial Rule* (New York: Routledge, 2014), pp. 17–46; Deanna Heath, *Purifying Empire: Obscenity and the Politics of Moral Regulation in Britain, India and Australia* (Cambridge: Cambridge University Press, 2010), pp. 8–34; David Scott, 'Colonial Governmentality', *Social Text*, 43 (1995), pp. 191–220.

[4] This reliance on violent punishment alongside claims of providing civilized governance has, in another study, been termed 'the paradox of colonial discipline'. See Steven Pierce and Anupama Rao, 'Introduction', in *Discipline and the Other Body: Correction, Corporeality, Colonialism*, (eds) Steven Pierce and Anupama Rao (Durham: Duke University Press, 2006), p. 4.

[5] For the early Company period, see Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi: Oxford University Press, 1998), pp. 246–253. For analysis of the legislation for whipping in late colonial India, see Taylor Sherman, *State Violence and Punishment in India* (London: Routledge, 2009), pp. 26–31, 88–89. For

alternatively and primarily focused on the persistent leniency offered to violent Europeans charged with crimes in the colonial law courts.[6] In examining this widely applied punishment, the study attempts to reorient attention to the banal brutality of the colonial state, evident here in the provision of its criminal justice.

To attempt to untangle these issues, and to trace the colonial logic regulating this violence, Dipesh Chakrabarty's study of colonialism and modernity offers the broad framework for the argument posed. Here it was posited that political modernity, understood by European intellectual thought in the nineteenth century, created a stagist reading of history which left colonial populations in 'an imaginary waiting room of history'.[7] Placing the Indian population within a universal paradigm of progress, colonial politics determined that India's only route to political modernity would be the slow infusion of European ideas, at a speed judged by the metropole. Attempting to build on this argument, this article contends that the colonial population was not simply positioned as '*not yet* civilized enough' in the imaginary path to self-government, but was constantly ordered and reordered in a queue of relative civility.[8] This process of reordering attempted to create a sensation of motion towards an empowered political subjectivity, while in reality created new forms of subjugation within that society, privileging some communities while punishing others. An exploration of the 'whippable' subject can help unpack the process through which colonial ideas of relative distance from modern citizenship were quantified across Indian society, through law and violence.[9] First exploring

military discipline, see Radhika Singha, 'The "Rare Infliction" the Abolition of Flogging in the Indian Army, circa 1835–1920', *Law and History Review*, 34:3 (2016) pp. 1–36; Douglas Peers, 'Sepoys, Soldiers and the Lash: Race, Caste and Army Discipline in India, 1820–50', *The Journal of Imperial and Commonwealth History*, 23:2 (1995), pp. 211–247. For the use of corporal punishment for juveniles, see Satadru Sen, *Disciplined Natives, Race, Freedom and Confinement in Colonial India* (New Delhi: Primus Books, 2012), pp. 178–185.

[6] See Jordanna Bailkin, 'The Boot and the Spleen: When was Murder Possible in British India?', *Studies in Society and History*, 48:2 (2006), pp. 462–493; Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2010); Jonathan Saha, 'Histories of Everyday Violence in British India', *History Compass*, 9:11 (2011), pp. 844–853.

[7] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2007), p. 8.

[8] Ibid.

[9] This leans heavily on Stoler's work on imperial formations and sovereignty. See, particularly, Ann Laura Stoler, *Duress: Imperial Durabilities in our Time* (Durham: Duke University Press, 2016), particularly Chapter 5.

the historical background behind its reintroduction, the article will then trace the evolution of this Act at three different points: 1864, 1900, and 1909.

The reintroduction of 'moderate flogging'

The legislation for corporal punishment in 1864 was part of a longer history connected to changing ideas of punishment, race, and civilization in imperial and British political circles. By the early nineteenth century, a number of humanitarian and philanthropic reformers in the metropole had begun campaigning for more humane methods of punishment in the form of cellular jails and improved rights for prisoners. In their opinion, the British legal system had become unwieldy and irregular, relying on random acts of violence.[10] These reformers believed that law should instead prioritize the careful administration of punishment along the lines of modern jurisprudential and reformatory principles.[11] Closely related to abolitionist movement discourses that connected the violence of corporal punishment with the institution of slavery, the flagrant use of public whipping had become a point of particular criticism in Britain in the 1820s and 1830s.[12] While this earlier criticism led to a decline in its use, the pinnacle of nineteenth-century opposition to public displays of judicial violence was reached in the 1860s, with public floggings abolished in 1862 and public hanging in 1868. By this point the only crimes punishable by whipping were attacks on the Queen and, in response to the 1862 London garrotting panic, robbery with violence.[13]

[10] Phil Handler, 'Forgery and the End of the "Bloody Code" in Early Nineteenth-Century England', *The Historical Journal*, 48:3 (2005), pp. 700–702.

[11] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Macmillan, 1978), p. 75.

[12] See Martin J. Wiener, *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* (Cambridge: Cambridge University Press, 1990), pp. 92–96. A falling use of corporal punishment has also been noted in other parts of the empire in this period. See, for instance, Penelope Edmonds and Hamish Maxwell-Stewart, '"The Whip is a Very Contagious Kind of Thing": Flogging and Humanitarian Reform in Penal Australia', *Journal of Colonialism and Colonial History*, 17:1 (2016).

[13] Jennifer Davis, 'The London Garrotting Panic of 1862: A Moral Panic and the Creation of a Criminal Class in Mid-Victorian England', in *Crime and the Law: The Social History of Crime in Europe since 1500*, (eds) V. A. C. B. Herman and G. Parker (London: Europa, 1980), p. 208.

In India, the late eighteenth and early nineteenth century saw a number of public and violent forms of punishment remain in operation.[14] Examples such as gibbeting, *tashir* (punishment through public humiliation), and public floggings were regularly applied judicial punishments. Between 1800 to 1860, much like the case in Britain, many of these punishments fell out of the penal machinery under the influence of reformist efforts.[15] This resulted in 1825 in the prohibition of women being flogged in Bengal on the grounds of 'delicacy and humanity'.[16] In this spirit, and during the 1830s 'age of reform', the governor general of Bengal William Bentinck replaced all punishments of whipping with imprisonment in 1834.

In the preamble to the abolition of whipping Bentinck commented on its poor effectiveness, its degrading nature, and the necessity of the colonial government to 'present in its own system the principles of the most enlightened civilization'. Bentinck commented further that the aim of the Act was to 'encourage the native states to exchange their barbarous and cruel punishments of maiming, or torture … for those of a more merciful and wise character by which the individual may be reformed and the community saved from these brutalizing exhibitions'.[17] This represented a significant move. Concurrent reform efforts in India were aimed at problems that could be framed as specifically Indian, such as *sati* or *thuggee*. The abolition of whipping alternatively tackled an issue that was equally applicable in the metropole as the colony, yet went further than any legislation passed in Britain.[18] Moreover, unlike the campaign directed towards *thuggee*, which had expanded the colonial state's capacity for violence and the

[14] Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law, 1769–1817* (Wiesbaden: Steiner, 1983).

[15] Singha, *A Despotism of Law*, pp. 229–274.

[16] Clare Anderson, *Legible Bodies*: *Race, Criminality and Colonialism in South Asia* (New York: Berg, 2004), p. 37. This was followed by similar regulations in other provinces: for Madras, *A.D. 1833, Regulation II, The Regulations of the Government of Fort St. George In Force at the End of 1847; To Which Are Added The Acts of the Government of India In Force in That Presidency* (London: J and H Cox, 1848), p. 551.

[17] Regulation II of 1834, British Library, India Office Records (hereafter BL, IOR), V/8/21.

[18] It is worth noting that those charged with attempting to codify English criminal law in this period also excluded corporal punishment in two of their reports; however, it later re-entered the draft code in 1843 for acts of treason. See Leon Radzinowicz and Roger Hood, *A History of English Criminal Law: Vol. 5, The Emergence of Penal Policy* (London: Stevens and Sons, 1986), pp. 690–691.

discretionary authority of its magistrates, these laws curbed such powers.[19] This was quickly followed by legislation in 1835 that removed whipping as a punishment in the 'native army'. This legislation stood out as a particularly distinctive anomaly in the wider colonial context, creating a set of circumstances in which Indian soldiers, for a short period of time, were immune to a punishment that could still be applied to British soldiers.[20]

The 1830s also saw the first completed draft of the Indian Penal Code. In a detailed section on the efficacy and morality behind different forms of punishment, a number of violent and public punishments were excluded. Among these, whipping was again considered inappropriate. Published in 1837, the draft stated:

> Being satisfied, therefore, that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps, and to re-establish throughout the British territories a practice which, by a policy unquestionably humane and by no means proved to have been injudicious has recently been abolished through a large part of those territories.[21]

Though this opposition to whipping was reinforced in later drafts, its abolition in Bengal received significant criticism from sections of the colonial administration, while corporal punishment persisted in different formats in Madras and Bombay. The army in particular felt that the reform legislation was an unnecessary and potentially dangerous threat to discipline. Denigrating these restrictions, the military historian John William Kaye went as far as to argue that even the Indian soldiers whom the regulation benefited disliked the law. He wrote in 1864: 'It was looked upon less as a boon than as a concession—less as the growth of our humanity than of our fear. So the Sipahi did not love us better, but held us a little more in contempt.'[22] Under pressure in both the civil and military spheres, whipping was reintroduced in a piecemeal fashion soon after its abolition. It was first justified as a

[19] For the relationship between judicial discretion, colonial state formation, and the campaign against *thuggee*, see Kim Wagner, *Thuggee: Banditry and the British in Early Nineteenth-Century India* (Basingstoke: Palgrave Macmillan, 2007), pp. 209–216; Singha, *A Despotism of Law*, pp. 168–220.

[20] Singha, '"Rare Infliction"', p. 6.

[21] 'Notes', in *A Penal Code Prepared by the Indian Law Commissioners* (Calcutta: Bengal Military Orphan Press, 1837), BL, IOR, V/27/144/1, p. 13.

[22] John Kaye, *Kaye and Malleson's History of the Indian Mutiny of 1857–8: Vol. I* (London: Longmans, Green and Co., 1897), p. 199.

temporary measure for larceny in 1844 under the premise that it was 'expedient, until adequate improvements in prison discipline can be effected'.[23] Its remit then expanded over the period before peaking dramatically under the martial law of the rebellion of 1857–1858.[24]

Within this violent milieu, new legislation in 1858 extended the use of corporal punishment beyond the formal end of the rebellion. The measure was initially defended as part of an effort to maintain law and order following the destruction of jails and the escape of prisoners during the uprising. These events, the legislation stated, had resulted in 'the want under existing circumstances for the means for the confinement of Convicts'.[25] In response to this problem, the law empowered magistrates to punish offenders who had been found guilty of a selection of offences related to property or petty crimes in which fines had not been paid.[26] Unlike the law that would follow, here whipping was premised on simply defined racial lines. Excluding European British subjects and Americans, it targeted Indian men only.[27] At the time of legislation, the duration of this measure was limited to two years.

The nature of punishment throughout this earlier period had varied in application across regions, both in the number of lashes that were deemed acceptable, the instrument used to administer the punishment, the part of the body to be whipped, and the location in which the punishment was given. In Bombay flogging was administered under Regulation XIV of 1827, which empowered judges to sentence criminals to up 100 stripes on the bare back with a rattan, administered in blocks of 25. These punishments were dispensed publicly and were applicable for a wide range of crimes.[28] Under the criminal justice system in Madras, the instrument used was changed from a rattan to a cat o' nine tails in 1828 as this was deemed less likely to inflict 'serious bodily injury, far beyond the intention of the law'. The maximum number of stripes that could

[23] *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws, 1864, Vol. III*, BL, IOR, V/9/6-9, p. 22.

[24] Streets narrates the violence in Bareilly in which three scaffolds and six whipping posts were set up and over 700 men were summarily executed and punished. Heather Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857–1914* (Manchester: Manchester University Press, 2010), p. 40.

[25] Act No. XI of 1858, BL, IOR, V/8/36.

[26] Ibid.

[27] Ibid.

[28] A.D. 1827, Regulation XIV, Section VIII, BL, IOR, V/8/24.

be administered in this case was 150.[29] In comparison, when reintroduced in Bengal by Act III of 1844, magistrates were empowered to punish offenders with 30 stripes with a rattan; however, no specific part of the body was stipulated.[30] The result of the patchwork nature of penal law functioning across India during this period was the construction of an uneven colonial economy of legal violence, often with very little regulation at the local level. Within this penal structure, extreme brutality and punitive violence was sanctioned by law and, with the exception of the short period following Bentinck's abolition, maintained consistent institutional support.

The loosely controlled administration of sanctioned colonial violence became a point of contention for those who disagreed with the punishment. A particularly harrowing account of the results of this laxly managed violence was offered from a magistrate of the North-Western Provinces opposed to new legislation after the rebellion. He described a judicial flogging in the following terms:

> In districts where flogging is a favourite punishment, you find a couple of specially powerful and thoroughly trained tent-pitchers invested with the office of floggers. The man who is to be punished is stript and tied up to the triangle: one of the 'clashes' also stript to his waist, steps out armed with a rattan about 5 ½ feet long, he takes two paces to the left of the triangle, measures the distance, so that the end of his weapon will exactly fall across the offender's body, makes a slight scratch on the ground with one foot to guide his after movements, steps back two paces further, firmly grasp in both hands the rattan, and then, swinging it round his head, and bounding forward to the line, delivers with the whole strength of his arm and the whole weight of his body, a blow that screeches through the air like a rifle bullet. An instant after there is a long gash on the body almost like a sword wound, from which the blood streams before the second blow descends. The first 'clashee' gives five such stripes, and the second then steps forward, to be again succeeded after five more stripes by the next, and so on till the torture, which I should say lasted fully a quarter of an hour, is concluded. The first twenty stripes are usually laid about an inch apart and just parallel to each other and the last ten are *crossed* over these. Strong men habitually faint at the second or third crossed stroke, and men have died during the disturbances, from the effects of fifty well administered stripes.[31]

The letter was read by Charles Jackson in the Legislative Council in 1861. At this point Jackson was the sole voice at this echelon of government to reject the efficacy of corporal punishment in India. With

[29] A.D. 1828, Regulation VIII, BL, IOR, V/8/28.
[30] A.D. 1844, Act II, BL, IOR, V/5240.
[31] Legislative Council Proceedings, 31 August 1861, BL, IOR, V/9/3-6.

the Council stacked against his position, Jackson's intention was to shock other members into moderating the number of lashes administered and to consider changing the instrument used rather than defeating its eventual full reinstatement. To some degree this was successful, as he garnered sympathy for his wider philosophy and condemnation for this form of flogging. Yet, while most members agreed to his proposals to lower the maximum limit of lashes and to reconsider the instrument being used more carefully, support for the punishment itself remained resolute.[32]

The letter was part of a wider series of discussions between 1857 to 1864 concerning the utility of corporal punishment and its relationship to the final implementation of the Indian Penal Code. Underwriting these discussions was the considerable colonial question of finance. In aiding the reduction of prison sentences, the punishment was a fiscally prudent option for a colonial state unwilling to invest in infrastructure on a comparative level to the metropole.[33] By this point, rather than representing a real debate about whether the punishment should be used, the overwhelming support it carried meant the question now being considered was how to incorporate the punishment into the evolving criminal legal system and then translate it smoothly into colonial political discourse. From a logistical point of view, discussions revealed that corporal punishment had in fact been added to a draft form of the Indian Penal Code in 1857. However, unlike the officially published drafts, this addition had not passed through the formal process that first gathered the opinion of regional governments and officials. According to one estimate, at its very shortest this would take six months to complete. With the target of fully implementing the IPC by 1 May 1861, and with these debates ongoing in September 1860, the chairman informed the Council that a separate bill would need to be passed to avoid delaying the more important penal code.[34] Pertinently, some supporters of corporal punishment also saw a certain benefit in

[32] Charles Jackson in fact was keen to restrict the instrument to a rattan rather than cat o' nine tails but the final bill made no clear decision on this. Ibid.

[33] On the comparative underinvestment in the legal system, one journalist commented 'England spends on judges alone for thirty millions of people covering an area of 119,924 square miles, more than twice the amount spent on the administration of justice on the same number of people in the North Western Provinces. Where England spends £2,600,000, besides the unpaid labour of an enormous number of magistrates and justices of the peace, India spends £247,000 and has no such honorary judges.' *Friend of India*, 8 January 1863, p. 32.

[34] Legislative Council Proceedings, 8 September 1860, BL, IOR, V/9/3-6.

divorcing the more controversial and violent nature of the whip from the IPC. With this separation, corporal punishment could be more easily positioned as a temporary measure, thus still allowing the IPC to be recognized as a modern and permanent piece of legislation.[35] This also meant that from the IPC's full implementation in 1862 to the passing of the 1864 Whipping Act, there was another brief interlude in which whipping was prohibited as a judicial punishment.

For the consistent minority who opposed this Bill, arguments were based on the notion that the IPC in its original form deserved a fair trial period, that the Indian law commissioners and enlightened governors such as William Bentinck had regarded it as unnecessary, and that civilized governments should avoid violent forms of punishment. Among the imperial critics of the Bill, Sir Charles Trevelyan, Lord Canning, and later politicians such as Sir Henry Cotton all aired concern about a piece of legislation that delivered violence so openly into the hands of colonial authorities. Likewise, in light of the recent violence of the rebellion in which corporal punishment had been widely resorted to, its return was seen as an ill-advised reminder of colonialism's violent underbelly. As Mr Campbell, the judicial commissioner of Oudh, wrote in 1860:

> The constant participation in such scenes must have a more or less a brutalizing effect on almost any man's mind, and must tend to perpetuate that harsh and severe feeling which, not unnaturally resulting from the scenes of 1857, it must now be our object to soften down and eradicate.[36]

Further concerns were raised regarding the perceived relationship whipping had with slavery, which had only been made illegal in India in 1843, and the prevalence of torture, which as recently as 1855 had been a cause of controversy as a result of the Madras Torture Commission.[37] One detractor stated this explicitly, arguing bluntly that the legislation would in effect 'establish and legalize torture throughout

[35] Ibid.

[36] *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws, 1864, Vol. III*, BL, IOR, V/9/6-9, p. 25.

[37] See Anupama Rao, 'Problems of Violence, States of Terror: Torture in Colonial India', *Interventions*, 3:2 (2010), pp. 186–205. In other contexts, the link between slavery and corporal punishment in a post-abolition society retained very substantive links. In law courts in early nineteenth-century America, for instance, whipping was at times used as evidence of the previous slave status of an individual. See Rebecca Scott, 'Social Facts, Legal Fictions, and the Attribution of Slave Status: The Puzzle of Prescription', *Law and History Review*, 35:1 (2017), p. 26.

India'.[38] Others warned that European judges would be unwilling to be present for the whipping, leaving only Indian officials to dispense colonial justice, a disconcerting inversion of racially structured power relations.[39]

Notably, the logic and language used to oppose this Bill did not drastically diverge from the key liberal vocabulary employed by those officials who defended it. With the 1860s shift towards what Thomas Metcalf has branded 'authoritarian liberalism', colonial lawmakers who supported the punishment now sought to invest the same key reference points of 'humanity', 'progress', and 'civilization' with a new cynicism regarding political enfranchisement, racial difference, and a recognition of the productivity of violence.[40] With this shift in mind, when the utility of whipping was being debated, many of these officials candidly accepted the premise that violence equated to an uncivilized form of punishment that they personally disliked.[41] However, for this group, the impact of the rebellion had had a profound impact on the way they viewed Indian society. As one official tersely stated in support of the Bill:

> I agree with Mr. Ross in thinking that the mutinies have proved that we have made great blunders in our endeavours to place the Natives of India on a level with ourselves in matters of legislation.[42]

With the rebellion confirming to these legislators that India and Britain needed to be treated as distinct spaces for governance, a narrative was produced in which there was no requirement for compassionate and

[38] *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws, 1864, Vol. III*, BL, IOR, V/9/6-9, p. 22.

[39] The Legislative Proceedings stated: 'Our Judges would not readily submit to be turned into executioners; such scenes were so painful that no English gentleman would be present at them, who could possibly avoid it, and, the superintendence of the infliction of the punishment would be left to irresponsible Natives.' Ibid., p. 24.

[40] Thomas Metcalf, *Ideologies of the Raj* (Cambridge: Cambridge University Press, 1995), p. 56.

[41] Bartle Frere, a supporter of the Bill, was representative of this position when he claimed, 'He was convinced he spoke for every one in that council anxious to see the punishment at once entirely and for ever abolished. His objection to its immediate abolition rested mainly on his belief that too many classes and in many parts of the country imprisonment or any other punishment which could be substituted for flogging was in reality the more inhuman of the two.' Legislative Council Proceedings, 8 September 1860, BL, IOR, V/9/3-6.

[42] 'Letter from the Secretary to the Government of the North-Western Provinces to the Secretary to the Government of India, 441A Nynee Tal, 23rd June 3rd', National Archives of India (hereafter NAI), Home (A)/Legislative/December 1862/Nos. 10–148.

ethical rule to rely on universal principles of governance, but on specific forms of knowledge extracted from that society.[43] For H. B. Harington, a prominent supporter of corporal punishment in the Indian context, acting in a 'humane' fashion equated to treating individuals according to their position in a social and civilizational hierarchy. He defended the Bill in the following terms:

> in the present state of civilization, among three-fourths of the population, and in the present defective state of prison discipline, he was satisfied that corporal punishment was a necessity in this country. As regarded a great majority of the criminal population, it was a more humane punishment, had more power as a deterrent, and was not more demoralizing than imprisonment.[44]

In this new dominant colonial political discourse, the reversal to policies previously felt to be unsavoury by modern standards and deemed not applicable in the metropole were supported as the necessary burden of imperial governance.

This formula of a liberal language of rule articulated alongside an enlarged capacity for state violence, squared through these freshly articulated ideas of civilizational 'backwardness', was nowhere more visible than in colonial accounts of the tribal figure. For these officials, the imprisonment of tribal groups from across frontier and border regions had resulted in a significantly higher rate of mortality in prison.[45] Relying on the opinion of medical officers who argued that this was due to physiological problems which made prison particularly traumatic for these groups, corporal punishment was framed as the empathetic alternative to what one Legislative Council member

[43] For an extended analysis of this ideological shift, see Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Imperial Liberalism* (Princeton: Princeton University Press, 2010).

[44] *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws, 1862, Vol. 1*, BL, IOR, L/V/9/8, p. 52.

[45] Bartle Frere perhaps embodied this position most clearly, stating in support of corporal punishment: 'There were hundreds of thousands of savages and uncivilized tribes on all the borders of Bengal, in Berrbhoom and Bhangulpoor in Assam and on the Burmese frontier, among whom the mortality of prisoners shut up in jail was enormous, compared with the mortality of other classes. It was the simple confinement that killed them, and no device had yet been found by which the mortality of these savages when shut up in prison could be kept within such limits as were usual with other classes.' Legislative Council Proceedings, 8 September 1860, BL, IOR, L/V/3-6.

described as the 'certain death' of imprisonment.[46] As part of this attempt to render violent punishment into a permissible form of criminal justice in the Indian context, the comments made by the British official John Beames were typical. Working in Punjab in the late 1850s, Beames complained about the number of sentences that ended up being sent to a higher court for appeal. Regularly turning to the summary punishment of the whip, he explained his position, writing, 'It was partly the frequency of appeals and partly the suitability of physical punishment for a simple race that led to the frequent use of the cane … the people themselves preferred this summary disposal to the tedium of imprisonment or the long indebtedness of resulting from a fine.'[47] Capturing the wider shift towards colonial ethnography, enumeration, and scientific principles of punishment that was underway during the passing of this legislation, the post-rebellion logic of colonial governmentality ensured that legally sanctioned quotidian violence did not fall out of its utilitarian apparatus of discipline.[48]

A second and connected justification was the notion that crime was contagious and that the underdeveloped colonial prison facilitated its spread. Many officials contended that India's prisons were less sophisticated than the English models, and that without thorough provision of cellular jails, prisoners mixed more regularly. Under these conditions, arguments were made that the current prison infrastructure was unable to offer modern reformatory rehabilitation. Given the circumstances, whipping was posited as a comparably more productive and effective punishment. Henry Maine, for instance, stated:

[46] Ibid. Parallels can be drawn to other examples in the British empire. The Aboriginal Offenders Act of 1892, for instance, brought back whipping as a summary punishment specifically for indigenous groups in Western Australia. See Dinesh Joseph Wadiwel, 'Thick Hides: Whipping, Biopolitcs and the White Soul of Power', *Social Semiotics*, 19:1 (1999), pp. 47–57; Amanda Nettelbeck, 'Flogging as Judicial Violence: The Colonial Rationale of Corporal Punishment', in *Violence: Colonialism and Empire in the Modern World*, (eds) Philip Dwyer and Amanda Nettelbeck (Basingstoke: Palgrave Macmillan, 2017), pp. 111–131. See also Stephen Peté and Annie Devenish, 'Flogging, Fear and Food: Punishment and Race in Colonial Natal', *Journal of Southern African Studies*, 31:1 (2005), pp. 3–21.

[47] John Beames, *Memoirs of a Bengal Civilian* (London: Chatto and Windus, 1961), p. 102. I thank one of my reviewers for pointing me towards this reference.

[48] For the production of colonial knowledge in this period, with particular reference to ideas around caste, see Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

that a man who went into prison simply a knave, would come out a finished ruffian; that his family might be destitute during his imprisonment, and that if he had had any caste, he would leave the Jail an out-cast.[49]

For Maine and many other supporters of the legislation, the modern jail was a space for the habitual or serious offender who could be clearly demarcated from law-abiding society. Within this colonial paradigm, the danger of this type of individual lay not just in their criminal past, but in their ability to pass on criminal traits to wider society. In the minds of these men, the reformatory potential of the jail was thus undermined by the production of broken family units and the hardening of petty criminals. The 'whippable' subject, not suitable for prison yet still labelled a criminal, signalled a larger governmental strategy that distinguished serious offenders from petty ones, but meanwhile ensured the separation that distinguished these two groups of criminals was conceptualized as fragile and collapsible. Allied with the construction of Indian criminality as particularly infectious, the flimsily conceptualized boundaries dividing serious and petty crime helped justify legislation that weakened the restraints placed on the colonial state's discretional, executive, and violent everyday capabilities.

Nonetheless, some concerns with the new Bill were aired by those who supported its reinstatement. These aptly concentrated upon the change to the legislation from the 1858 model in which a racial distinction disqualifying white bodies from this punishment had been dropped.[50] These anxieties were alleviated by legislators who emphasized that a distinction would be made between the letter of the law and what those who had drafted the IPC termed the law's guiding 'spirit'.[51] As a discretionary punishment invested in the authority of the judge, it was stated that, 'In determining whether an accused person guilty of an offence, punishable with corporal punishment should be flogged, the Court or Magistrate would necessarily take into consideration many circumstances which could not be put into law.'[52] It was then argued that Europeans had been punishable by the whip in the Supreme Court, but none had been given that punishment in the last 12 years.

[49] *Abstract of the Proceedings of the Council of the Governor-General of India Assembled for the Purpose of Making Laws, 1864, Vol. III,* BL, IOR, V/9/6-9, p. 35.

[50] Legislative Council Proceedings, 18 August 1860, BL, IOR, L/V/9/3-6.

[51] See W. Morgan and A. G. Macpherson (eds), *Indian Penal Code (Act XLV. of 1860) with Notes* (Calcutta: G. C. Hay and Co., 1863), Chapter IV, Section 95, p. 72.

[52] Legislative Council Proceedings, 31 August 1861, BL, IOR, L/V/9/3-6.

As it was retained as an optional and discretionary punishment, and with the system of Supreme Court judges moving directly into the High Courts, an unofficial impunity would therefore continue.[53]

In essence, a dominant political discourse was developing in which the implementation of what one Legislative Council member rebranded 'moderate flogging' could be folded relatively uncritically into a wider liberal language of progress and development.[54] By claiming this liberal vocabulary while concurrently drawing out the renewed importance of civilizational difference following the rebellion, the colonial state no longer asserted the necessity of leading by example, nor attached itself to the same limitations that restricted its violence in the metropole. Instead, it now governed through a set of tools defended in relation to knowledge produced about the specific society being ruled. The acceptance of corporal punishment was therefore not a simple return to retributive ideas of violence and punishment that had existed earlier. By injecting the liberal principles of reformatory punishment with these new ideas of difference, colonial rule was asserting its ability to turn violence into a tool for civilizational pedagogy. While the notion that British justice needed to be translated into culturally specific forms for Indian audiences has been examined in reference to the spectacular violence of martial law in recent scholarship, particularly in punishment practices such as cannonading, in this instance it had seeped into everyday colonial legal norms during peacetime.[55]

As the next sections will show, once passed into law this legislation did not target colonial subjects uniformly. Instead, particular groups and communities were the evolving target of this judicial punishment, very much in line with broader developing and intersecting ideas of caste, class, gender, and race that were being consolidated in this period.

[53] Ibid.

[54] The full quote from Mr Harington states 'But moderate floggings as a punishment for certain classes of offences not of the most heinous kind has, we think, many advantages over other punishments, especially in this country.' Legislative Council Proceedings, 18 August 1860, BL, IOR, V/9/3-6.

[55] On cannonading, see Kim Wagner, *The Skull of Alum Bheg: The Life and Death of a Rebel of 1857* (London: Hurst and Company, 2017), pp. 175–189. For recent scholarship that has examined similar themes in relation to the 'Kooka' outbreak of 1872 in Punjab, see Mark Condos, *The Insecurity State: Punjab and the Making of Colonial Power in British India* (Cambridge: Cambridge University Press, 2017), pp. 103–139.

The evolution of corporal punishment, 1864–1909

The 1864 law authorized subordinate magistrates who had a certain qualification to punish criminal behaviour with corporal punishment. The whipping was to be executed with a medical officer present, who would confirm that the offender was in a fit state to receive the punishment, as well as a justice of the peace.[56] For adults, whipping was limited to a maximum of 30 stripes with the rattan or 150 stripes with a cat o' nine tails. For juveniles, it was to be 'inflicted in the way of school discipline with a light rattan'.[57] Local governments were invested with the authority to decide which measure they felt was appropriate. In neither the IPC nor the later Code of Criminal Procedure of 1872 was it stated whether the nature of execution should be public or private. Even after Charles Jackson's earlier efforts to standardize the whip, the relative autonomy given to local governments to decide the method of execution meant that by 1907 every region in India was still employing different procedures for punishment and public whippings were not uncommon.[58] Without any real effort to hold judges to a centrally enforced standard and an unwillingness to standardize the varying conditions of local courts, the mixed application of corporal punishment could court controversy and, at times, led to complaints of illegal punishments.[59] However, if the method of applying corporal punishment remained laxly defined, as the legislation progressed, the legal subjects it targeted became increasingly precise, carving society into those considered suitable or unsuitable for this form of violence.

In its 1864 form the law could be used for a number of first offence crimes and a range of other repeated offence crimes. Mr Harington, head of the Select Committee which drew up the original Bill, stated that the crimes chosen were those which 'carried with it a greater

[56] Act No. VI of 1864, BL, IOR, V/8/39.

[57] Ibid.

[58] A comparison between Madras and Bombay in 1907 reveals that in the city of Madras whipping was carried out in the Penitentiary; in the mufassil, it usually took place in court and in public, but in some districts in the street or even the marketplace. In Bombay, there was no consistency: some whippings were carried out in prison, others in the precincts of the court. Where on the body whipping occurred also varied between the buttocks and bare shoulder. NAI, Home (A)/Judicial/March 1907/Nos. 167–183.

[59] Complaints of illegal whippings, for instance, were not uncommon; see 'Proposal to amend the Whipping Act (VI. Of 1864)', NAI, Home (A)/Judicial/August 1878/Nos. 19–21.

degree of social and moral degradation than was the case as regarded the punishment of other offences'.[60] As the law evolved over time, this concern with crimes of moral obliquity or turpitude was regularly cited to justify additions or removals. The crimes that fell into this category in the law's early stages centred on three themes: crimes connected to personal property, crimes that diverted the course of justice, and crimes of a sexual nature. Out of the ten crimes for which whipping could be used in lieu of other punishments, eight had some relation to theft or property and two with extortion.[61] Out of the 18 repeated offence crimes punishable by whipping, three related to fabricating evidence, two to unnatural offences, two to forms of sexual violence towards women, six to theft and property, and five to forms of forgery.[62]

Inserted into the legislation were also provisions that expanded the state's ability to whip certain groups. All juveniles guilty of a crime, excepting capital offences, could be punished by the whip, and those residing in jurisdictions assigned as a 'Frontier District or any wild tract of country' could be whipped for all 28 listed crimes in lieu of other punishments at the discretion of the local government.[63] If the boundaries for corporal punishment were enlarged for some groups, they were restricted for others. Women, men over the age of 45, and those who had been sentenced to imprisonment for more than five years or to capital punishment were excluded from the whip.

With the letter of the law stipulating the basic remit for corporal punishment, the informal practices of law further shaped the legal subjects to be targeted with this form of violence. As Radhika Singha has shown in relation to the punishment for bad-livelihood, rather than removing judicial discretion, the shift towards legal codification instead worked to systematize it.[64] Leaving the decision to use the whip to the magistrate was another example of the careful distribution of discretionary spaces within the overarching, codified penal legal

[60] Legislative Council Proceedings, 5 Jan. 1861, BL, IOR, V/9/3-6.

[61] I have included among the eight crimes relating to theft or property, varying forms of theft, dishonestly receiving stolen property, house trespass, or house-breaking. See Act No. VI of 1864, BL, IOR, V/8/39.

[62] To clarify some of these groupings, the crimes of sexual violence towards women included 'Assaulting or using criminal force to any woman with intent to outrage her modesty' and rape.

[63] Act No. VI of 1864, BL, IOR, V/8/39.

[64] Radhika Singha 'Punished by Surveillance: Policing "Dangerousness" in Colonial India, 1872–1918', *Modern Asian Studies*, 49:2 (2014), p. 4.

structure. In this light, though it was not seen as politically fitting to openly insert clauses that distinguished between classes and castes, whipping was widely considered inappropriate for high caste Hindus and well-to-do Muslim men.[65] In a discussion concerning a later reform in 1905, the commissioner of Baillie summarized this consistently acknowledged position in relation to the punishment. He argued:

> To a Brahmin a Rajput, or a Muhammadan of decent birth a whipping by order of a magistrate is a lifelong stain; to a chamar or a sweeper it is simply temporary suffering, which, as a rule, they would themselves prefer to suffer rather than be taken away for even a week or two from their homes.[66]

In distinguishing between subjects along lines of caste and class, a strained utilitarian logic was being used. The argument was that, as the social implications of being whipped differed across society, the law had to make distinctions premised upon the social position of the criminal in order for colonial punishment to be experienced equally. Investing the ultimate decision over whether to use the whip in the magistrate, these individuals were expected to traverse social and cultural lines to consider the implications of administering the whip. As predicted, this discretion also ensured that Europeans in India, outside of the army, were not at the receiving end of the whip.

The result was the presentation of the 'whippable' subject as a juvenile or lower class male, not yet past working age. In creating this class of criminal, the law consolidated the remit and target for colonial violence in both its physical and epistemic forms. In justifying the necessity of this type of legislation, and in reducing the restrictions on the colonial state's route to judicial violence, the legislation contributed to the wider normalization of the legal employment of corporal violence towards certain colonial bodies. Meanwhile, the law conflated this group with crimes that implied a predilection towards rejecting the importance of property, respect for the procedural basis of the law, heteronormative sexual behaviour, or violence towards the female body. This, in turn, strengthened the deeper political discourse upon which colonial rule existed: colonial society's incapability of presently meeting the

[65] As one official commented: 'The law can, of course, make no difference between persons of good castes and others. But executive order could direct magistrates to respect the general feeling except in the case of juveniles.' H. C. A. Conybeare to UPG, 11 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial (Criminal) Department/United Provinces Proceedings/Dec. 1905/Nos. 1–62.

[66] D. C. Baillie to UPG, 20 July 1905, ibid.

requirements of modern citizenship. The law was transformed into an instrument for carving society across newly constructed or pre-existing social boundaries and categories. And the suitability of an individual to receive violent punishment thus served as one marker by which to organize the distribution of unevenly valued colonial legal subjects across society at this point.

Following this particular legislation across the period, the association of moral obliquity with caste, class, and an idea of immature Indian low-caste masculinity became increasingly prominent. Under evolving historical conditions various concerns were raised in regional governments about the suitability of removing or adding crimes to the law. Although earlier debates had occurred in the 1880s, the reform in 1900 represented the first significant change in the structure of the legislation.[67] First, the amendment extended the use of whipping to juveniles by allowing local governments to administer it for all local and special laws that lay outside of the IPC.[68] Secondly, discussions considered adding two crimes to the Bill for adults: gang-rape and rioting with a deadly weapon. It was here where the larger political motivations behind the legislation were revealed.

The concerns around the first of these crimes, that of gang-rape, should be considered in relation to two larger and intertwined colonial narratives: the colonial language of paternalism, on the one hand, and the colonial language of difference, on the other. In this instance, the crime was one of a violent and sexual nature, and its victims were Indian women generally understood to be married. It was described as mainly being perpetrated by Muslims of the lower classes who waited for moments when women were 'unprotected by the absence of her husband or her parents'.[69] During legislative debates the crime was stated to be prevalent mainly in certain districts of eastern Bengal, especially Mymensing.[70] Although the crime never triggered the same degree of

[67] While this was criticized by the legislative council, a circular sent in Madras in 1882 had expressed this view to judicial officers in clear terms, stating 'whipping should not ordinarily be inflicted in cases in which the offender holds a respectable station in life'. NAI, Home (A)/Judicial/May 1882/Nos. 105–111.

[68] See C. E. A. Bedwell, *The Legislation of the Empire: Being A Survey of the Legislative Enactments of the British Dominions from 1898 to 1907: Vol. III* (London: Butterworth and Co., 1909), p. 9.

[69] BL, IOR, L/PJ/6/533.

[70] It was admitted, though, that there were also reports of the crime taking place in Burma and the British Army. A particularly harrowing example of such case in Burma is described in Kolsky, *Colonial Justice*, pp. 199–200.

response as earlier fears of collective Indian criminality, it had entered colonial discourse in a similar fashion to previous colonial panics and, at the time, was compared to the concerns previously raised by the London garrotting epidemic of the 1860s.[71] In an extended statement, it was described as

> peculiarly brutal and inhuman wanting in many instances, even the poor palliation of overmastering desire, and presenting in its most loathsome, its most despicable aspect, the tyranny of numbers over a weak and defenceless woman to her utter and irreparable injury.[72]

Crucial here, and laced throughout the debates on these punishments in legislative discussions, was the employment of colonial disgust with these forms of violence. In the earlier debates in 1864, while the application of whipping for other crimes was more vigorously contested, the notion that rape reflected a 'peculiarly demoralized mind' faced considerably less critique.[73] This had not changed by 1908 when one official defending the legislation claimed, 'Women always require extra protection, and when the utter helplessness of Indian women is considered the need for the extra severity becomes acuter.'[74]

Nonetheless, if the disgust vocalized in Legislative Council assemblies and in government circulars ensured that this punishment remained in the colonial arsenal, in practice it was rarely used in response to the crimes which that emotion had evoked. Between the years 1896–1905, there were 262,542 whippings in lieu of other punishments, the vast majority imposed for theft and other house-breaking offences. None was for rape or assault. In the same period the whip was used 30,735 times in addition to other punishments, out of which it was used 62 times in cases of rape.[75] This of course should be placed within a wider context in which, as Elizabeth Kolsky records, there was an increasing leniency in conviction rates in cases of rape between 1860–1947.[76] As the historiography has shown, the discourse of the colonial state protecting Indian women from Indian men played a central role in the

[71] BL, IOR, L/PJ/6/533.
[72] Ibid.
[73] Legislative Council Proceedings, 5 Jan. 1862, BL/IOR/V/9/3-6.
[74] BL, IOR, L/PJ/6/805.
[75] NAI, Home (A)/Judicial/March 1907/Nos. 167–183, p. 42.
[76] Elizabeth Kolsky, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947', *Gender and History*, 22:1 (2010), p. 115.

intellectual and discursive foundation of imperialism.[77] With this in mind, and with the courts' empirical reticence to use the punishment for crimes of sexual violence, the emphasis on the welfare of women performed the dual task of strengthening this hollow but discursively important paternalist discourse, while simultaneously helping to protect the wider practice of using summary acts of colonial justice in response to petty acts of criminality.

The second narrative to which this crime spoke was that of colonial difference. Unlike crimes such as homicide, which were constructed in fairly similar ways across imperial legal spaces, the legal response to gang-rape, later defined as 'being a member of an assembly of two or more persons, the common object of which is to commit rape as defined in section 375 of the Indian Penal Code', was made particular to the Indian context.[78] In Britain, the distinction between rape and gang-rape was not separated by the same degree of legal difference, while whipping was not a punishment for either crime.[79] However, if the laws were constructed differently, the essence of this criminal act was not absent from Victorian Britain. Carolyn Conley's study of rape places the number of gang-rapes in Kent between 1859 to 1870 at 25 per cent of the overall convictions for rape.[80] Moreover, as Gatrell et al. have shown, although violent crime in general decreased in England between 1850 and 1890, sexual assaults kept rising and peaked between 1886–1890.[81] In a final parallel, in both Britain and India trends in

[77] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?', in *Reflections on the History of an Idea: Can the Subaltern Speak?*, (ed.) Rosalind C. Morris (New York: Columbia University Press, 2010), pp. 237–291.

[78] Act No. V of 1900, BL, IOR, V/8/63.

[79] That is not to say that support for corporal punishment in response to crimes of a violent sexual and non-sexual nature towards women and children did not exist in Britain. However, the numerous attempts to reinstate the punishment in law in comparable terms in this period ultimately failed. See Radzinowicz and Hood, *A History of English Criminal Law*, pp. 693–696.

[80] Carolyn Conley, 'Rape and Justice in Victorian England', *Victorian Studies*, 29:4 (Summer 1986), p. 525. Discussion of gang-rape in nineteenth-century Britain can also be found in Kim Stevenson, '"Ingenuities of the Female Mind": Legal and Public Perceptions of Sexual Violence in Victorian Britain, 1850–1890', in *Everyday Violence in Britain, 1850–1950*, (ed.) Shani D'Cruze (London: Routledge, 2014), pp. 89–91; Martin Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian Britain* (Cambridge: Cambridge University Press, 2004), pp. 104–108.

[81] V. A. Gatrell, Bruce Lenman and Geoffrey Parker, *Crime and the Law: The Social History of Crime in Western Europe since 1500* (London: Europa Publications, 1980), p. 289. Though the authors are wary of placing too much emphasis on the value of these statistics, scholars like

conviction rates had begun shaping the perception of sexual violence as a predominantly lower class crime.[82]

With colonialism dependent on maintaining a civilizational distance between metropole and colony, one method of ensuring the perception of difference in light of evidence of similarity was the creation of subsets of crimes deemed unique to India. As recent work has shown, an emphasis upon the rape of children was one example of this, fashioned into 'a seemingly exotic phenomenon' detached from ideas of British criminality.[83] Another example involves concerns raised about female infanticide, constructed as a form of criminality wedded to Hindu customary practices and therefore again understood as dissimilar to Britain's own struggles with infanticide.[84] The emphasis on a new legal category of gang-rape can be interpreted as a further example, ensuring that differences along lines of race would overwhelm any perceptions of similarity between British and Indian men in their treatment of women. Thus, whereas in Britain the perception would remain that these were rare crimes within the broader umbrella legal category of rape, in the colony, gang-rape was naturalized in the colonial mind as specifically related to certain communities.

The second offence—rioting with a deadly weapon—was discussed in a drastically different tone. This was a crime chiefly found in agrarian regions and its perpetrators were presumed to be mainly zamindars, cultivators, or their servants. The connection drawn between property-respecting subjects and their unsuitability for violent punishment was consistently opposed to this addition to the law. The crime was described as 'a respectable offence' or the result of a zamindar who 'has allowed his passion for a bit of land to involve him in a fight'.[85] The politicization of criminal law was made most explicit by one colonial commissioner who described the potential realization of

Kim Stevenson have argued that, given the underreported nature of sexual crimes, as well as the cost of prosecution to the victims, these numbers should not be quickly dismissed.

[82] As Conley shows, in 81 per cent of cases involving men of higher status than soldier or labourer, charges of rape were lessened to attempted rape or indecent assault. Carolyn Conley, 'Rape and Justice in Victorian England', *Victorian Studies*, 29:4 (1986), p. 523.

[83] Ishita Pande, 'Phulmoni's Body: The Autopsy, the Inquest and the Humanitarian Narrative on Child Rape in India', *South Asian History and Culture*, 4:1 (2013), pp. 10–11.

[84] Daniel Grey, 'Gender, Religion and Infanticide in Colonial India, 1870–1906', *Victorian Review*, 37:2 (2011), pp. 107–120.

[85] 'Notes and Orders' Commissioner, Fyzabad, UPSA, LB, List 2 Judicial (Criminal) Department/N.W.P and Oudh/Nov. 1889/Nos. 51–67.

this proposal 'a political blunder'.[86] Concerned principally with the North-Western Provinces, including Oudh, the official's fears of antagonizing the landlord classes echoed a more conciliatory approach to governance in this area following the rebellion, which had included financial rewards and titles offered to this section of society. [87] Notably, the final legislation concluded with the addition of gang-rape, but dropping of rioting with a deadly weapon.[88] Compounding the growing relationship between class and colonial violence, the 1900 Bill strengthened the notion that sexual violence was attributable to lower class men and reinforced the idea that a section of Indian society was unsuitable for modern citizenship. In slowly removing or rejecting the addition of crimes understood as being connected to respectable Indians, the protection from corporal violence informally offered to this section of society mirrored wider structural changes to colonial governance and ideology in this period.

The final Bill, passed in 1909, completes the series of reforms in this period. Differing from the earlier two reforms, amendments made at this juncture were at least in part a response to a series of unanticipated events between 1900–1909 which had contributed to a growing momentum for change. The first of these events was the death of a 'habitual' offender in 1903 after a judicial whipping. Ramji Hariba had been convicted of theft and was sentenced to corporal punishment in Bombay. Soon after receiving the punishment he died from blood poisoning, resulting from neglected wounds. In the defence of the treatment provided to Hariba, the local authorities stated he was a drunk and that they had administered 'native remedies' to his wounds.[89] However, his death caused controversy in both India and Britain, prompting inquiries to be made in parliament and for reports taken from both the Bombay government and the Government of India.[90] The circular that followed this event asked a number of questions; chief among them was whether an offender should remain in prison until his wounds were healed, how to avoid the breaking of the

[86] Ibid.

[87] See Thomas Metcalf, *Aftermath of Revolt: India 1857–1870* (Princeton: Princeton University Press, 1964).

[88] Act No. V of 1900, BL, IOR, V/8/63.

[89] 'Notes', NAI, Home (A)/Judicial/March 1907/Nos. 167–183.

[90] *Hansard*, 21 July 1904, cc. 755–756. From Secretary to Government of India to Secretary to Government of United Province, 8 June 1905, British Indian Association Papers, Nehru Memorial Museum and Library, New Delhi.

skin, and whether a medical officer should always be present during the procedure. In response, it was clear that the size of cane, the strength of floggers, and the process of medical treatment before and after varied considerably across India.[91]

As seen in the debates which led to the reintroduction of the punishment in 1864, colonial sociology had attempted to rationalize corporal punishment within a colonial discourse that embraced both scientific and utilitarian legal ideas of governance, and a renewed faith in racial and civilizational difference. The unforeseen death of a subject exposed the emptiness of these colonial claims concerning its capacity to tame violence and administer a 'just measure of pain'.[92] In light of this, Hariba's death became a lightning rod for a number of growing criticisms about the colonial legal system. These included the growing power of the executive, the increasing visibility of colonial violence, and a clear tension between the supposed uniformity of codified law and the unscientific nature of corporally measured pain. Following Hariba's death, the second spark for reform came from the emerging Swadeshi movement in Bengal and its revolutionary violence. The controversial partition of Bengal in 1905 had seen a rise in juvenile offenders arrested for political activity. Controversially, many of these individuals were punished with the whip, which drew critical commentary from Indian legal circles and vernacular newspapers.[93] By this point, when government circulars were sent to gather opinions from judges and notable local groups, large numbers expressed their dissatisfaction with the law and called for its abolition.[94] Under pressure from various directions, the government mitigated the severity of the law to reflect

[91] 'Statement showing how the sentence of whipping is carried out in the different provinces', NAI, Home (A)/Judicial/March 1907/Nos. 167–183.

[92] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (London: Macmillan, 1978).

[93] There was significant criticism of corporal punishment in its various forms from Indian newspapers, lawyers, and nationalist politicians, from its reintroduction in 1864 and peaking in this period. For perhaps the most thorough example of this critique, see Hiralal Chakravarti, *Whipping in India: A Plea for its Abolition* (Calcutta: Majumdar Library, 1908). For a more sustained analysis of corporal punishment as a site of anti-colonial nationalism, see Alastair McClure, 'Violence, Sovereignty, and the Making of Colonial Criminal Law in India, 1857–1914', PhD thesis, University of Cambridge, 2017, Chapter 6.

[94] These included the British Indian Association, the Eastern Bengal Landholders' Association, and the Provincial Muhammadan Association, BL, IOR, L/P/J/6/805.

the 'ever-increasing disfavour' of public opinion towards whipping.[95] Confirmed into law in 1909, the revised legislation significantly streamlined the number of offences for which judicial whipping was possible. However, if the breadth of this punishment was diminished, the political bent of its targeting remained acute.

For adults, the whip was now only enforceable for ten crimes; chief among these were three in relation to rape, voluntarily causing hurt in committing or attempting to commit robbery, and dacoity.[96] In this process, receiving stolen property was removed. Resonating with the earlier debates concerning rioting with a deadly weapon, this removal was justified by lawmakers as it was a crime that 'frequently belongs to respectable classes', the whipping of whom 'would outrage native opinion'.[97] With particular connection to the events in Bengal, which had seen this rise of youths whipped for crimes of a political nature, the number of stripes for juveniles was limited to 15.[98] At the other end of this social spectrum, the revision to section six of the Act, which dealt with groups in frontier regions, expanded its remit. This transitioned from 'any of the offences specified in section four of this Act' to that of 'any offence punishable under the Indian Penal Code with imprisonment for three years or upwards'.[99]

Through this legislation the class lines drawn around the judicial use of the whip which had been evolving over the period were again made forcefully clear. Typical was A. W. McNair, the deputy commissioner of Bara Banki, who argued in an earlier discussion for this legislation:

> My own opinion is that respectable persons should not be flogged, but that that form of punishment should be reserved for those whose sense and sensibility was sub-normal. But how is this difficulty to be met? Legislation cannot well lay down any distinctions of class and determine what castes shall be included in the category of the 'whippable'; nor can the hands of the magistracy be tied by strict rules on the subject. If legislation in any direction be proposed, it must, I think, move towards restricting the imposition of this form of punishment to

[95] Ibid.

[96] The crimes in relation to rape were rape, abetment to rape, and attempt to commit rape.

[97] Magistrate of Banda to Secretary to UPG, 11 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial (Criminal) Department/United Provinces Proceedings/Dec. 1905/Nos. 1–62.

[98] Statement of Objects and Reasons, 11 March 1908, BL, IOR, L/PJ/6/805.

[99] Ibid.

those offences which are nearly always committed by members of the lower classes.[100]

Within the same paragraph, the commissioner defended the importance of the legal norm that rejected any explicit acknowledgement of difference between class and caste in legislation, and then explained the methods by which the basic premise of that transgression could be achieved in the construction of law. As the period of this study drew to a close and changes were made to the legislation in 1909, the deputy commissioner's rationale brought into stark view the functioning logic of colonial exceptionality that was built into the everyday legal regime in India.

As an instrument of colonial power, this law initially disciplined subjects on a pedagogical register of citizenship that, although it had a wider remit for punishment at the start of the period, was less clear in its sense of who represented a legitimate target for corporal punishment. However, by the early twentieth century the colonial scales of respectability were more defined and the previously capacious category of the 'whippable' subject had become restricted. Instead, the violence of the whip began to isolate a smaller group of crimes of a largely sexual nature and then focus upon lower caste men. By this point, the role of class in Indian society was playing a more defined role in the way colonial law was made, undoubtedly at least a tacit recognition of the growing reliance in the colonial administration upon upper caste Indian lawyers. What was consistent across these various changes, however, was the protection of strategic spaces for discretionary and quotidian legal violence that dehumanized and infantilized certain Indian subjects, while shielding and promoting others. When following the evolution of this legislation across the century, the whip as a judicial punishment therefore provides insight into one of numerous examples by which a logic of colonial violence, both in physical and epistemic form, could be used to structure society and legal subjectivity.

Ageless juveniles and perpetual children

While the previous section focused primarily upon the relation corporal punishment had to an evolving idea of the lower class man, fluid ideas

[100] Deputy Commissioner of Bara Banki to Secretary to UPG, 19 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial (Criminal) Department/United Provinces Proceedings/Dec. 1905/Nos. 1–62.

of race, gender, and age were similarly important factors in dividing society along lines of relative suitability for this punishment. From its inception legislators had presented the punishment as particularly appropriate for juvenile offenders. Over time this resulted in an expansion of the remit for corporal punishment in relation to juvenile delinquency. This peaked with the 1900 reform which allowed all offences, except those punishable by death, to be used in response to juvenile crime.[101] Yet, although the legal category of 'juvenile' had been defined as individuals under the age of 16 in the Code of Criminal Procedure of 1861, the discussions and justifications for the broader application of this punishment highlighted the porous and gendered boundaries separating ideas of children, juveniles, and adults in colonial discourse and legal practice.[102] Instead of acting to settle these terms, the practice of corporal punishment and the debates that ensued around it revealed varying, and often contradictory, conceptions of age and maturity, most apparent at the point at which the law required definition.[103]

The emergent category of the juvenile and the child, fixed in law during the mid-nineteenth century, has received valuable attention in recent scholarship. This work has focused upon child-specific legislation to emphasize the importance of these categories in penal law and in the production of colonial modernity more broadly.[104] Using examples such as the Reformatory School Act of 1876 and the Age of Consent Act of 1891, this work has roughly divided the female child and the boy juvenile into discrete targets in the colonial disciplinary regime, carrying different value in political discourse.[105] With some exceptions, the criminal child was generally portrayed as a male figure and who constituted the broader category of juvenile delinquency in the late

[101] Act No. V of 1900, BL, IOR, V/8/63.

[102] See W. Theobald (ed.), *Code of Criminal Procedure* (Calcutta: Messrs Thacker, Spink and Co., 1861), Chapter 31, Section 433.

[103] This section has been informed by new scholarship which analyses age as a category of historical analysis. See, for instance, Rachel Leow, 'Age as a Category of Gender Analysis: Servant Girls, Modern Girls, and Gender in Southeast Asia', *The Journal of Asian Studies*, 71:4 (2012), pp. 975–990.

[104] See Sen and the 'juvenile periphery' as symbolic of the broader colonial position on the periphery of modernity. Satadru Sen, *Colonial Childhoods: The Juvenile Periphery of India, 1850–1945* (London: Anthem Press, 2005), pp. 1–8.

[105] See ibid.; Pande, 'Phulmoni's Body'.

nineteenth century.[106] It was not until the modification of the Reformatory School Act in 1897 that girls were even included as a juvenile offenders and, as Satadru Sen points out, even then the formal process was discouraged.[107]

Unlike these other laws, however, the Whipping Act targeted both juveniles and adults, positioning the male child and the criminal adult together in one punitive legal frame. While various officials made distinctions between the rationale of punishing juvenile boys and adult men, it was similarities rather than differences that drew together the underlying logic of punishing these two groups with the whip. Central throughout the period was the notion that this punishment was particularly suitable for both children and men who, through their criminal actions, displayed infantile and juvenile characteristics. Juvenility here was interchangeable with biological youth and perceived intellectual infantilism. While citing the fiscal benefits that the whip offered in reducing the prison population,[108] for juveniles the whip was also justified in large part as a way to produce good subjects. As one official argued:

> With boys, whose character is in process of forming, the advantages of a light whipping, followed by residence at a reformatory school, where they are instructed in the means of earning an honest livelihood, are undoubted, and have been asserted as strongly by Sir Charles Crosthwaite's predecessors in office as by himself.[109]

If the whip took its place within a colonial armoury of reforming younger offenders in the proclaimed pursuit of creating an individual who could earn an 'honest livelihood', faith in the punishment's pedagogical potential could carry very literal connotations in relation to adults. After connecting the caste of certain criminals and the class of certain crimes to varying degrees of intellect, various officials argued that the whip should be reserved for those of lesser intelligence. One judge stated that 'the form of punishment should be reserved for those whose sense and sensibility was sub-normal'; another argued that the

[106] Exceptions included concerns around child prostitutes. See Satadru Sen, 'A Separate Punishment: Juvenile Offenders in Colonial India', *The Journal of Asian Studies*, 63:1 (2004), p. 85.

[107] Sen, *Colonial Childhoods*, p. 115.

[108] Sec. to Gov NWP to the Sec. to Gov of India, 7 December 1893, NAI, Home (A)/ Judicial/Jan. 1894/Nos. 109–116.

[109] Ibid.

removal of the whip as punishment for perjury and forgery was justified because these crimes were 'committed by men of a higher intellectual type than criminals against the body and professional criminals against property'.[110] As crimes that were deemed 'respectable' were slowly removed from the Act, the collective targeting of the boy and the lower caste man began to dissolve biological and sociological distinctions separating juveniles from this group of men.[111]

In more serious offences, mainly those of a violent nature towards women, the adult men who committed these crimes were again infantilized by colonial law. In response to the concerns around gang-rape, Mr Woodroffe, a select committee member, argued that:

> To satisfy this condition the offender who can with propriety be whipped must have committed offences of great moral turpitude, offences which by their very nature mark out the offence as one devoid of all the nobler qualities of manhood, one whom whipping cannot degrade.[112]

Though an extreme example, Woodroffe's comments drilled into the crux of the discourse that this legislation was seeking to remake into a comprehensible social reality. The 'whippable subject', a figure spread across lower caste male society aged up to 45, located bodies biologically determined as male, but at a stage of current or permanent distance from a culturally constructed idea of 'manhood'.

If the logic of this law recognized a similarity between children of a certain age and adults of a certain intellect, even defining the physical distinction differentiating juveniles and adults was a contentious process. Discussing the age restriction of juveniles to 16 in 1900, the theoretically determined legal category of the juvenile still seemed to occupy an undefined position in the minds of many legislative members. As reliable information concerning the specific age of offenders was often absent, the law empowered the magistrate to decide the age of the individual in the courtroom. For some members, the cultural differences between Indian and British family units meant that certain Indian boys shouldered adult responsibilities while they were technically defined as

[110] Deputy Commissioner of Bara Banki to Secretary to UPG, 19 August 1905, UPSA, LB, List 43 Judicial (Criminal) Block/Judicial (Criminal) Department/United Provinces Proceedings/Dec. 1905/Nos. 1–62.

[111] Variations on the phrase 'Whipping is considered a suitable punishment for boys and for low caste thieves', for instance, emerged on numerous occasions. See District and Sessions Judge of Cawnpore to Secretary to UPG, ibid.

[112] BL, IOR, L/PJ/6/533.

juveniles. One member, for instance, proposed that 'in this country a juvenile offender means and includes a man who has probably two or three children'.[113] For others, the numerical age of individuals from the lower classes was a secondary concern to their physical development. In this context, another member argued:

> It is notoriously impossible to ascertain exactly the age of a native of the poorer classes. And if a lad whose age cannot be ascertained exactly is so developed physically that he looks as if he were sixteen; it surely is only reasonably that he should be treated as if he really was sixteen; for the probability is that his mind and character will have developed together with his body.[114]

As with the mixed procedure for the application of corporal punishment, the reality was that distinctions separating the category of the adult and the juvenile remained fuzzy throughout the late nineteenth century. More important for the consolidation of colonial political discourse was the continued production of colonial knowledge, extracted through proactive legislation, which ensured that these boundaries remained unstable. Thus, if the juvenile was measured through a legal definition of 16 years of age, areas of confusion, as well as varied legal practice, safeguarded a situation in which numerical age and culturally constituted ideas of juvenility were both nebulous concepts and not indivisibly bound together in the eyes of those producing and practising colonial law.

If the partial collapse of the Indian adult male into the figure of the criminal child acted to drag the perceived maturity of the lower class Indian man into a state of potentially perpetual political juvenility in colonial political discourse, the absence of the woman from the whip spoke to a starker system of depoliticization. As Ishita Pande has argued, before the production of a more gender neutral legal category in the Child Marriage Restraint Act of 1929, the female child had been predominantly wrapped up in the 'women's question'. This in turn had acted to blur the idea of the female child and adult within the colonial project of women-rescue.[115] Preceding the transitional notion of maturity that was projected onto various male bodies through an idea of juvenility as one stage from adulthood, women were alternatively constructed in the more distant category of childhood.

[113] Ibid.
[114] Ibid.
[115] Ishita Pande, 'Coming of Age: Law, Sex and Childhood in Late Colonial India', *Gender and History*, 24:1 (2012), pp. 205–230.

In both formal legal terms and informal legal practice, those left absent from the whip represented an unusual collection of subjects: European men, elite Hindus and Muslims, property owners, criminals guilty of more serious offences, males over the age of 45, and women. With the whip widely accepted in colonial circles as an uncivilized punishment, and its main purpose to respond to groups of society themselves deemed uncivilized, exemption for Europeans and elite Indians reflected the state's recognition of a 'civilized' identity and a privileged position in society. The exemption for women and girls, however, was part of a different process. The female body (adult and child) had been excluded from this form of judicial violence in 1825, considerably earlier than any other group. Similarly tied into gendered ideas of citizenship and political maturity, this move was part of an increasing imperial aversion to committing state violence towards female subjects that was reverberating throughout the empire in this period. As Diana Paton has noted in the context of colonial Jamaica, it was the image of the flogged female slave that drew the harshest criticism from abolitionist campaigners.[116] In Steven Pierce's examination of punishment in colonial Nigeria in a slightly later period, he similarly notes that flogging was perhaps the only topic where women received more coverage and concern than men.[117] A key century in terms of large-scale reform projects as well as the expansion of British imperial power, the emergence of a staunch language of paternal protectionism was both central to the processes that undergirded colonial state formation across the empire and decisive for the role that would be played by gender and race in the construction of modern colonial political and legal subjectivity.

To return to the Indian context, the removal of women from the targeted discipline of colonial law in this example did not reflect a subsequent invisibility of the legal position of women in the larger legal-political debates of the century. In fact, from campaigns against widow immolation in 1829 to the Widow Remarriage Act in 1856 and the Age of Consent in 1891, the backbone of many legal reform

[116] Diana Paton, *No Bond but the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780–1870* (Durham: Duke University Press, 2004), pp. 6–7. See also Henrice Altink, '"An Outrage on all Decency": Abolitionist Reactions to Flogging Jamaican Slave Women, 1780–1834', *Slavery and Abolition: A Journal of Slave and Post-Slave Studies*, 23:2 (2002), pp. 107–122.

[117] Steven Pierce, 'Punishment and the Political Body: Flogging and Colonialism in Northern Nigeria', *Interventions*, 3:2 (2001), p. 210.

movements had centred around the legal capability of the female child and the legitimacy of the state to intervene on their behalf. At the core of many of these discussions lay the contested relationship between biological age and its implications for women and girls' ability to give consent to domestic, religious, and sexual practices that presented the possibility of harm. Before its abolition in 1829, earlier *sati* legislation in 1812, for instance, sought to fix consent at puberty, declaring this the point at which immolation became legally possible.[118] The 1891 Bill saw the age of legal consent for all girls, married or unmarried, raised to 12, the age at which harm was judged unlikely to result from intercourse.[119]

If the image of the vulnerable female child provided a powerful symbol in the period, most scholarly work has discredited any notion of the consequential empowerment of Indian women through reform. Instead, these reform movements are argued to have manipulated the female body into the grounds for political engagement in religious traditions or class contestation.[120] In the period in which the idea of male enfranchisement started to carry increasing weight, the result of such paternalistic legal reform for the Indian female chipped away at a parallel belief in the capacity of women to give political consent. The absence of the whip on the body of the woman was thus still part of this wider system of violence, reflective of a far deeper structural effort at political disempowerment. This has been described by Michel Foucault as a coercive imposition of silence, a form of repression equating to 'an affirmation of nonexistence, and, by implication, an admission that there was nothing to say about such things, nothing to see, and nothing to know'.[121] If the law in action produced an idea of a juvenile boy (even if in purely superficial terms) who was trainable in the pursuit of political adulthood, the absence of the law in relation to the female spoke to a more complete denial of individual political

[118] Tanika Sarkar, 'A Just Measure of Death? Hindu Ritual and Colonial Law in the Sphere of Widow Immolations', *Comparative Studies of South Asia, Africa and the Middle East*, 33:2 (2013), p. 169.

[119] T. Sarkar, 'Rhetoric against Age of Consent: Resisting Colonial Reason and Death of Child-Wife', *Economic and Political Weekly*, 28:36 (1993), pp. 1869–1878.

[120] See Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998); Lucy Carroll, 'Law, Custom, and Statutory Social Reform: The Hindu Widow's Remarriage Act of 1856', *The Indian Economic and Social History Review*, 20:4 (1983), pp. 363–388; Sarkar, 'Rhetoric against Age of Consent'.

[121] Michel Foucault, *The Will to Knowledge: The History of Sexuality: Vol. I*, (trans.) Robert Hurley (London: Penguin, 1978), p. 4.

agency. This refusal to whip the Indian female body reflected a wider rejection of the possibility of political maturation, leaving the Indian female frozen in a political space of silent 'nonexistence'—a permanent state of childhood.

This relationship between an absence of law and the depoliticization of the Indian female was not constricted to whipping, of course. The IPC began to invest some of the Indian woman's individual legal personality in the overriding authority of her husband. Moreover, in the period after the rebellion, a number of laws were passed that were gender-specific. Elopement, for instance—not a crime stipulated in the IPC but a terminology much described in newspapers—fell under the law for being 'forcibly taken away' and was either charged as abduction or enticement. As Aparna Bandyopadhyay has argued, punishment for this crime was dependent on the denial of the female's sexual agency. If the woman's complicity could be proven, conviction for the crime itself was much less likely to happen.[122] The legal structure of the colonial system, of which whipping is only one example, was arranged as an infrastructure that forcibly exchanged the agency of the female legal subject in return for this poorly practised idea of protection in many spheres.

Returning to the broader application or non-application of corporal punishment, the shifting logic of this law related back to society by allowing for the minute and gradated entry of individuals into quasi-political communities, often premised on the confluence of legal, scientific, and cultural forms of colonial knowledge. The communities who resided on the frontier—the physical border of British India—were whipped not for pedagogy but because of an understood closeness to savagery, a very explicit connection drawn to the sub-human or animal. The lower caste man and the juvenile boy were targeted through a conflation of political maturity with numerical age, and the racialized relationship made between political immaturity and civilizational difference. The female and the elderly male were left 'protected' from the whip on the basis that their bodies were unsuited to such punishment, facilitating a larger structural practice of political exclusion. Though evolving over time, one constant to these examples was the law's relationship to deeply forged ideas of gender, caste, and age,

[122] Aparna Bandyopadhyay, 'Of Sin, Crime and Punishment: Elopements in Bengal 1929', in *Intimate Others: Marriage and Sexualities in India*, (eds) Samita Sen, Ranjita Biswas and Nandita Dhawan (Kolkata: STREE, 2011), p. 103.

threaded together by an unstable measurement of political maturity embedded in the colonial civilizing mission. Here the law was a mapping tool that constructed legal subjectivity in relation to an idea of the capacity to give, or the potential to learn to give, political consent.

It is worth making one final point. Many nineteenth-century liberal thinkers placed the metaphor connecting age, political maturity, and race at the heart of liberal ideologies supporting imperial political thought.[123] John Stuart Mill's writings, for one, are symbolic examples of this. In *On Liberty*, he described a particular relationship between maturity, 'manhood', and race in the following way:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered in its nonage.[124]

What is interesting about this description is that while these metaphors have been shown to have serious and material consequences for the way in which colonial subjects were treated, the legislation for corporal punishment, to a degree that has not been acknowledged in other colonial practices, quite literally collapsed the biological distinction between child and adult across this notion of absent 'manhood'. In this case, the allegorical relationship between the two was made manifest in the pedagogical justification of the whip as punishment for both lower caste men and juvenile boys. This history of corporal punishment thus offers an example of how physiological signs of maturity, which usually determined the distinctions between child and adult, could become displaced by a dominant cultural construction of age, determined by colonial theories of race, class, and civilization, and then practised in law.

[123] Political theorists seeking to understand colonial discourse have long emphasized the depoliticizing metaphor of the colonial subject as a child. Ashis Nandy, *Intimate Enemy: Loss and Recovery of Self Under Colonialism* (Oxford: Oxford University Press, 2013). Mehta points to the use of the childlike metaphor of Indians in the writings of both Mill, Locke, and Burke, among others. Uday Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999), pp. 31–33.

[124] John Stuart Mill, *On Liberty (1859)* (Ontario: Batoche Books, 2001), p. 14.

Conclusion

This article has sketched out the everyday violence of colonial law and its role in carefully structuring colonial society into gradated and unstable hierarchies of legal subjects. Taking the changing remit of the legislation of Act VI of 1864 to reveal the uneven distribution of judicial violence throughout this period, this article has argued that the law created a false perception of movement towards political enfranchisement for some groups by pitching them favourably against others. Creating a series of minute legal incentives or punishments tailored to different communities in colonial India, the process of making changes to the law through legal and political debates provided regular opportunities to reshape and rearticulate colonial discourses concerning Indian depravity, infantilism, and vulnerability. These narratives were in turn used to rationalize the higher degree of violence intrinsic to colonial justice and to bolster the basic paternalism that bound all of Indian society within a larger system of colonial political domination.

The history of this punishment is also useful in further understanding colonial exceptionality and sovereignty, topics that are receiving increasing amounts of attention in the legal history of empire.[125] In the context of this legislation, a recursive relationship between exception and norm was visible on two levels. First, the legislation represented the introduction of what was widely accepted by colonial legislators as a barbaric and uncivilized form of punishment, appended onto a codified penal structure that was simultaneously being celebrated by the same officials for its modern guiding principles. This existed as an add-on to the normative framework of the IPC, which, while perpetually framed as a temporary measure, remained a permanent feature of colonial law that was only repealed after independence.[126] Secondly, a logic of exceptionality functioned within the framing and practising of the law itself. Regularly asserting the importance of not officially distinguishing between subjects along lines of class or caste, the careful restructuring of the criminal offences punishable with whipping, and the role of judicial

[125] For a useful synthesis of some of this scholarship, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge: Cambridge University Press, 2010), pp. 279–300.

[126] The act was ultimately repealed after independence, under Act No. 44 of 1955, the Abolition of Whipping Act.

discretion in court, saw an incredibly irregular dissemination of colonial violence along these exact lines.

Finally, an attempt has been made to emphasize the importance of tracing the shifting relationship that various subjects have with specific legislation, whether as explicit targets, informal exclusions, or unequivocal absentees. While it is clearly important to consider the space in which law acts very visibly, it is similarly necessary to more fully envelop into legal-historical analysis the space in which law does not intervene or the points at which legislation retreats and refuses to enter. This seems particularly pertinent, given the context of the late nineteenth century which saw the colonial state impose itself on Indian society to a greater extent than any previous legal system. The codification of Indian penal law, for instance, had tied all colonial subjects to a single sovereign, provided a definition for every form of criminal behaviour, and determined a corresponding punishment. Similarly, it is easy to point towards new legislation such as the laws for sedition, the Age of Consent, the Murderous Outrages Act, plague legislation, and many others, in which the colonial state acted with relative forcefulness, plotting new lines of legal intervention into unchartered colonial spaces.[127] Given these moments when the colonial state showed relative conviction in declaring new grounds of legal authority, the decision to not intrude—seen clearly here in the case of the exclusion of women from the whip—also carried serious legal and political historical consequences. When we attempt to formulate the relationship between colonial law and the flow of colonial power, further scholarship can help map this process onto a more complicated matrix of connections and disconnections along these highly nuanced intersectional threads.

[127] For the Murderous Outrages Act, see, for instance, Mark Condos, 'License to Kill: The Murderous Outrages Act and the Rule of Law in Colonial India, 1867–1925', *Modern Asian Studies*, 50:2 (2015), pp. 1–39. See also Elizabeth Kolsky, 'The Colonial Rule of Law and the Legal Regime of Exception: Frontier "Fanaticism" and State Violence in British India', *American Historical Review*, 120:4 (2015), pp. 1218–1246. For sedition, see Janaki Bakhle, 'Savarkar (1883–1966), Sedition and Surveillance: The Rule of Law in a Colonial Situation', *Social History*, 35:1 (2010), pp. 51–75.