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Cover Page Footnote

Max Weber Fellow, European University Institute. Thanks to the members of the European University Institute's Legal and Political Theory and History of Ideas and Imperial History Working Groups. Thanks also to the editors of the Chicago Journal of International Law for their insightful comments and diligent support.

From the State of Emergency to the Rule of Law: The Evolution of Repressive Legality in the Nineteenth Century British Empire

Christopher Roberts*

Abstract

Why are contemporary laws and techniques that state authorities use to crack down on political dissent so similar across countries? This Article argues that at least part of the answer may be found by turning to colonial history. The Article has two Parts. In the first Part, the Article explores the manner in which, over the course of the nineteenth century, the British deployed various different legal and institutional approaches in response to an Irish polity that consistently refused to submit to British authority. In the second Part, the Article examines the manner in which the approaches developed in Ireland were exported to other parts of the empire, in particular to India, South Africa, and Nigeria, over the course of the late nineteenth and early twentieth centuries. Along the way, the Article considers the big picture significance of such developments relative to the nature of the rule of law. While, over time, the deployment of increasingly legalized and formalized approaches may have played a positive role insofar as they served to soften and displace the potential for more direct violence, enabled by declarations of martial law, such developments came at the cost of the incorporation of much of the repressive approach employed in contexts of emergency rule into everyday legality. Far from conflicting with the rule of law, this development represented the form in which the expansion of the rule of law primarily occurred—serving to entrench and legitimize the repressive practices in question.

* Max Weber Fellow, European University Institute. Thanks to the members of the European University Institute's Legal and Political Theory and History of Ideas and Imperial History Working Groups. Thanks also to the editors of the *Chicago Journal of International Law* for their insightful comments and diligent support.

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I. INTRODUCTION

Across the former British Empire, human rights advocates encounter similar modes of rights violations in country after country. Among the repressive techniques encountered are declarations of states of emergency, often accompanied by the use of special and military tribunals;¹ a reliance upon over-militarized security services, generally operating with impunity;² the imposition of collective punishments;³ limitations on and the use of excessive force against assemblies;⁴ controls on the press and trials of those mounting public criticisms on charges of sedition or libel;⁵ and sharp limits to the formation and operation of civil society associations.⁶

¹ See, for example, *Media Rights Agenda v. Nigeria*, Communication 224/98, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (Nov. 6, 2000), <http://perma.cc/964X-SM2E>; *Centre for Free Speech v. Nigeria*, Communication 206/97, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (Nov. 15, 1999), <http://perma.cc/XE2F-N4KV>; *Egypt: 7,400 Civilians Tried in Military Courts: Torture, Disappearances Used to Elicit Confessions*, HUMAN RIGHTS WATCH (Apr. 13, 2016), <http://perma.cc/4DQ4-YH5X>; *The Military Courts*, B'TSELEM (Nov. 11, 2017), <http://perma.cc/9PZ5-FEQE>.

² See, for example, Meenakshi Ganguly, *Security Forces in India Engage in Extrajudicial Killings, Then Are Protected: Protests against Shopian Encounter Killings Are a Reminder that Security Forces Need Deep Reforms*, HUMAN RIGHTS WATCH (Mar. 20, 2018), <http://perma.cc/C5PF-BXLD>; Priscilla Nyagoah, *Sudanese National Intelligence Service Empowered to Violate Human Rights*, AMNESTY INTERNATIONAL (Mar. 19, 2015), <http://perma.cc/5ZRL-5KWK>.

³ See, for example, *Israel: Surge in Unlawful Palestinian Home Demolitions: 126 in West Bank Left Homeless*, HUMAN RIGHTS WATCH (Aug. 22, 2015), <http://perma.cc/3GYC-P33L>; *Mass Trials and the Death Penalty in Egypt*, REPRIEVE US (Apr. 4, 2018), <http://perma.cc/C9CJ-SQG7>; *Nigeria: Military Massacres Unpunished: Obasanjo's Human Rights Progress Called into Question*, HUMAN RIGHTS WATCH (Apr. 1, 2002), <http://perma.cc/96BM-8N7Z>; *Pakistan: End Collective Punishment in Swat: Forced Evictions, House Demolitions Undermine Fight against Taliban*, HUMAN RIGHTS WATCH (July 22, 2010), <http://perma.cc/DFZ2-RUAV>.

⁴ See, for example, AFTE, EIPR, & CIHRS, *THE RIGHT TO FREEDOM OF ASSEMBLY IN EGYPT* (Mar. 15, 2014), <http://perma.cc/T74F-Z7TP>; *Amnesty International Public Statement: South Africa: Investigate Excessive Use of Force against "Fees Must Fall" Protesters*, AMNESTY INTERNATIONAL SOUTHERN AFRICA REGIONAL OFFICE (Nov. 14, 2016), <http://perma.cc/NQ7Y-RTGQ>; *Blind to Justice: Excessive Use of Force and Attacks on Health Care in Jammu and Kashmir, India*, PHYSICIANS FOR HUMAN RIGHTS (Dec. 1, 2016), <http://perma.cc/Y569-Y9KS>.

⁵ See, for example, *India: Crackdown on Freedom of Expression Must End*, AMNESTY INTERNATIONAL (Feb. 17, 2016), <http://perma.cc/H742-DSLT>; *Israel's Attacks on Press Freedom Violate Right to Freedom of Expression*, AL HAQ (Oct. 30, 2017), <http://perma.cc/Q7EN-P86D>; *"Not Worth the Risk": Threats to Free Expression ahead of Kenya's 2017 Elections*, HUMAN RIGHTS WATCH (2017), <http://perma.cc/Q257-ESQ6>.

⁶ See, for example, *Close Case 173*, AMNESTY INTERNATIONAL (July 19, 2018), <http://perma.cc/25AT-WU3T>; *India: End Legal Restrictions against Civil Society*, ISHR (May 26, 2015), <http://perma.cc/L459-D9H5>; *Israeli Knesset Approves Controversial Law Targeting Foreign-Government Funding for NGOs*, FIDH (July 18, 2016), <http://perma.cc/P43Q-GMTG>.

When, where, how and why did these techniques of repression arise, and how did they develop over time? The history of such measures is, needless to say, complex. One thing is clear however—the history of these measures cannot be recounted without considering the history of global empire. Inevitably, imperial rule was met with local resistance, though naturally the forms of that resistance varied from place to place and time to time. In response, imperial powers developed a new range of tools in order to suppress local resistance. Such new modes of repression, in turn, gave rise to new modes of resistance. Thus, resistance and repression quickly became locked in a cycle of mutually reinforcing coevolution.

This Article tracks the development of such repressive legal tools in the most extensive and powerful global empire, the British Empire, by examining the development of such tools in Ireland over the course of the nineteenth century and their subsequent dissemination across the empire in the years that followed. In most instances such measures were not adopted according to some grand scheme or design, but rather on an ad hoc basis in response to particular challenges and according to contingent features of local situations at different moments in time. Nonetheless, once new tools of repression were adopted, they had a tendency to become entrenched and to proliferate—testifying to the fact that repressive powers are much more readily agglomerated than they are stripped away.

A. Theorizing Emergency Rule

The repressive regimes in question bear a complex relationship to the idea of military or emergency rule.⁷ Emergency rule was seen as troubling in the British Empire both due to the conflict between the measures taken in such a situation and ‘rule of law’ norms,⁸ as well as due to the fact that declaring martial law was tantamount to admitting a particular situation had gotten out of control, an admission of failure on the part of the authorities. The repressive regimes examined in this Article were hence seen as superior to emergency rule, insofar as they replaced it with a more regularized legal order. At the same time, however, the repressive approaches adopted in such a context did not simply replace emergency rule with an entirely separate order. Rather, they invariably ended up

⁷ “Emergency rule” and “emergency law” herein are meant to refer to the general category of exceptional, discretionary, executive-power governance, generally recognized as problematic, but justified in the name of some overarching “emergency”-related concern. “Military rule,” “military law,” and “martial law” refer to a sub-category of emergency rule, in which the military in particular is granted enhanced powers in a certain area. Various typical component features of martial law in the British context are discussed below.

⁸ See RANDE W. KOSTAL, *A JURISPRUDENCE OF POWER* 462–88 (2005).

incorporating various components of that rule into an increasingly standardized, routinized everyday legal practice.

A natural place one might look to obtain a better understanding of how and why this took place is the scholarly literature on states of exception and emergency rule more broadly. There are two prominent branches in this literature—one more theoretical, one more practical. On the theoretical side, three authors stand out. First, Carl Schmitt has been particularly influential. In simplest terms, Schmitt argues that exceptional situations will arise from time to time; that any attempt to limit by law the recourse to, and the boundaries of, exceptional measures will be doomed to failure; and that this is not a bad thing, as the ability to proceed through exceptional measures is necessary in order to meet the emergencies that will be faced.⁹ Schmitt's argument is hence open to challenge on numerous grounds. Normatively, his support of the state of exception is problematic given the political trajectory of his career.¹⁰ Descriptively, Schmitt's account is criticized on the grounds that it is overly existential,¹¹ overly focused on major events, and overly credulous and supportive of those who claim that certain situations are in fact "emergencies" that justify the imposition of exceptional measures. Moreover, Schmitt's work is also subject to critique because of its narrow focus on the manner in which states of exception and emergency have been declared and deployed historically, while ignoring how the legal situations stemming from such declarations and deployments have evolved in practice.

Giorgio Agamben heavily relied upon Schmitt's account.¹² In contrast to Schmitt, Agamben sought to limit recourse to states of exception, based in significant part on his fear that they might become entrenched, a process that he argued had occurred within Nazi Germany as well as in the post-9/11 U.S., at least relative to presumed "enemy" detainees.¹³ Despite his adoption of a more sympathetic normative stance, however, Agamben's work ultimately replicated many of the other problematic characteristics of Schmitt's text, both by continuing to emphasize major moments of exceptional law, rather than more mundane and

⁹ See generally CARL SCHMITT, *DICTATORSHIP: FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE* (1921); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (1922); CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1932).

¹⁰ Carl Schmitt joined the Nazi party on May 1, 1933, and went on to serve as a prominent Nazi jurist for the next three and a half years. See CLAUDIA KOONZ, *THE NAZI CONSCIENCE* 58–9 (2003). For extensive contemplation of the meaning of Schmitt's joining of the Nazi party, together with an assessment of his critique of liberalism generally, see JOHN MCCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* (1997).

¹¹ See Andrew Norris, *Sovereignty, Exception, and Norm*, 34 J. L. & SOC'Y 31 (2007).

¹² See GIORGIO AGAMBEN, *STATE OF EXCEPTION* (2005).

¹³ See *id.* at §§ 1.2–1.3.

ongoing processes of exceptional legality, and by writing an abstract, existentialized account instead of a more concretely and historically-grounded one.

The third frequently-encountered major theoretical reference point for state of exception debates is Walter Benjamin's *Critique of Violence*.¹⁴ Benjamin's approach is more promising than Schmitt's or Agamben's due to its greater recognition that what is deemed 'exceptional' violence is actually found in the everyday operations of the law. Despite its merits, however, Benjamin's text is limited by its more "messianic" elements,¹⁵ which impede Benjamin's ability to articulate a more functional or grounded critique.

In addition to these more theoretical texts, there is also a substantial body of more pragmatic work addressing emergency rule. In particular, in the years after the attacks on the U.S. on 9/11, a number of prominent legal scholars weighed in on the debate on emergency powers. These scholars took different positions on the question of how to most effectively limit the danger that comes with the deployment of emergency powers. Some contended emergency powers should be quarantined entirely outside the law to prevent the possibility of infection.¹⁶ Others suggested such a position was overstated, and argued that in fact it is possible to contain and limit the harms caused by exceptional measures through legal means, including both *ex ante* rules and *ex post* review.¹⁷ Others still contended

¹⁴ See WALTER BENJAMIN, *Critique of Violence*, in 1 WALTER BENJAMIN: SELECTED WRITINGS (Michael Bullock & Michael W. Jennings eds., 2004).

¹⁵ As Derrida puts it, Benjamin's *Critique of Violence* is perhaps best described as "messianico-marxist"; see Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 920, 1045 (Mary Quaintance trans., 1990). The troubling messianic element of Benjamin's text arises most centrally from the importance he attaches to an elusive concept of 'divine violence' in which he seems to locate many of his hopes for systemic change.

¹⁶ Oren Gross was the chief exponent of this point of view. See Oren Gross, *Extra-Legality and the Ethic of Political Responsibility*, in EMERGENCIES AND THE LIMITS OF LEGALITY (Victor Ramraj ed., 2008); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 ISR. Y.B. HUM. RTS. 13 (2003).

¹⁷ For a variety of positions within this broad sphere, see David Dyzenhaus, *The Compulsion of Legality*, in EMERGENCIES AND THE LIMITS OF LEGALITY (Victor Ramraj ed., 2008); David Dyzenhaus, *The State of Emergency in Legal Theory*, in GLOBAL ANTI-TERRORISM LAW AND POLICY (2005); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Time of Crisis*, 101 MICH. L. REV. 2565 (2003); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); David Dyzenhaus, *Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security*, 28 AUSTL. J. LEGAL PHIL. 1 (2003); John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 INT'L. J. CON. L. 210 (2004); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PENN. J. CON. L. 1001 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

neither avenue can save us, and that we must rely instead on democratic political opposition.¹⁸

The diverse suggestions offered by such authors as to how to best limit and fight back against the harmful spillover effects of emergency law are thoughtful and worthy of sustained contemplation. At the same time, thanks to the extent to which the more recent “emergency” sparked by 9/11 occupies the center of their attention, such authors have generally failed to delve in depth into the concrete, messy, and often comparatively mundane long history of the manner in which emergency powers have been deployed and have evolved in practice.

This failure to closely examine the history has helped to obscure much of the reality of contemporary emergency governance. While our attention is captured by exceptional events, our ability to discern the exceptional is measured only by the rubric of what we do, and do not, take for granted. The question that should be posed, in contrast, is to what extent exceptional legality already informs the institutions and legal systems under which we live.¹⁹

B. The Rule of Law

The reality of the contemporary situation becomes clearer if we shift our focus from the state of exception to its purported opposite: the rule of law. While these two concepts are generally supposed to be at odds, on closer inspection it becomes apparent that they are in fact closely intertwined.

In order to see why, it is necessary to understand the nature of the rule of law as such. The concept of the rule of law is often associated with certain positive characteristics. On a narrower view, the concept of the rule of law is associated with certain key principles of legality—including for example the principles of clarity and of universality. On a broader view, the rule of law encompasses all such basic principles, together with essential human rights guarantees.

On a more fundamental level, however, the rule of law simply requires and refers to governance by a regime that can reasonably be described as legal. For

¹⁸ See, for example, Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* (Mark Tushnet ed., 2005); See also Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* (Mark Tushnet ed., 2005).

¹⁹ Mark Neocleous’s work is a relatively rare early exception to this trend, and tacks a course entirely in accordance with that developed here. See Mark Neocleous, *The Problem with Normality: Taking Exception to “Permanent Emergency”*, 31 *ALTERNATIVES* 191 (2006). Nassar Hussain’s work also points in such a direction, in terms of its emphasis on the close and little understood interrelationships between the ideas of emergency rule, colonialism, and the rule of law; see NASSAR HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2003). More recently, John Reynolds has compellingly made a similar point, in a brilliant work entirely aligned with the argumentation presented here; see JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* (2017).

example, in some states, the rule of law may exist when the authorities promulgate laws that play a key role in advancing the project of governance.

This does not describe every situation, of course. Often, before authorities are able to extend such a legal form of power, they will expand their reach through pure, discretionary power. When this discretionary power is replaced by legal power, it may come as a relief because a more immediate and violent rule is being replaced by a more regularized and predictable one.

While the rule of law may be less immediately violent, it is stronger and more effective. In promulgating laws, establishing and extending the reach of court systems, and employing and deploying prosecutors and policemen, central authorities are able to extend their reach over an increasingly expansive area while asserting tighter control over an increasingly extensive set of affairs. The extension of the 'rule of law' is, hence, first and foremost a project through which law-makers expand their power.

On an abstract level, it seems at first blush plausible that such an advance might be achieved in a purely positive manner—as discretionary, suppressive authority is replaced by an impartial, clearly defined order respectful of individual liberty and rights. History, however, tells a different story. The rest of this Article explores the manner in which the rule of law replaced the more immediate emergency and discretionary rule in one particular context—imperial Britain in the nineteenth and early twentieth centuries.

The first portion of the Article examines the manner in which, over the course of the long nineteenth century, the British attempted—after a period of more exceptional, emergency governance—to bring Ireland under the control of the law. This was not a process of extending rights to the Irish, however, but rather one of attempting to find the most effective methods of limiting Irish opposition to British rule.

British control in this context developed in several phases. In the early period, British approaches were largely responsive, that is, geared at responding in a reactive manner to the forms of resistance the British encountered. To counter resistance, the British developed repressive approaches and directly incorporated these approaches into the law, albeit typically in a piecemeal or carefully contained and delimited manner. As time went on, the British became savvier and found more effective ways to present the modes of control they were developing, including, for instance, by portraying them as crime control. At the same time, the forms of control in question also gradually evolved. More explicitly martial law-reminiscent approaches were replaced by controls over expression, the press, associations, and assemblies. In addition, new institutions—a more professionalized (and in the colonial context, quasi-military) police force and judiciary, public prosecutors, and a new, modern intelligence service—were developed and deployed, providing the authorities with new means of expanding the power and reach of the law.

While the new modes of legality that were evolving in colonial Ireland were more moderate than emergency law *per se*, they were also more pernicious insofar as they incorporated many components of emergency legality into a more legitimized and normalized frame. In sum, the story of the evolution of repressive legislation in Ireland is a story of the incorporation of many of the repressive potentials of emergency governance into a strengthened and legitimized form of everyday legality.

However, the history explored below does not end there. While developments in Ireland were particularly important, if they had applied in Ireland alone, their power and relevance would be comparatively limited. Instead, the approaches to repressive public order legality that developed there would come to be exported and disseminated more widely. The second portion of this Article considers the manner in which the repressive approaches developed in Ireland over the course of the nineteenth century were transferred to other British colonial territories, a process which occurred with particular intensity around the end of the nineteenth and the beginning of the twentieth centuries. As in Ireland, such laws generally replaced a more extreme and discretionary, but also weaker, pre-existing legal frame. Wider dissemination signified the growing force and acceptance of such approaches, and helped to further entrench their visibility and acceptance as basic components of governance in turn. The end result of this process of experimentation, dissemination, and normalization was not only to extend a repressive legal and institutional archetype across much of the globe, but also ultimately to make that archetype seem like the very model of the rule of law.

II. THE IRISH LABORATORY

The account that follows will explore the manner in which, over the course of the nineteenth century, emergency law gradually gave way to a more regularized, legalized approach to control in Ireland. While this transition may have taken some of the edge off the worst potentials of emergency law, in many other ways the situation became more problematic as the repressive functions of emergency law were transferred into a less harsh, but more effective, legal form.

In the British context, emergency law has generally been synonymous with martial law. The history of martial law is a long and convoluted one, which has formed a major matter of discussion for British legal theorists from the early modern period on.²⁰ It is not the intention to delve into these debates here, which

²⁰ On martial law and its contested meaning within British history, see KOSTAL, *supra* note 8 (“As matters stood in October 1865, English lawyers did not agree even on the definition of the term ‘martial law.’ The relevant literature contained at least three distinct meanings. According to the famous statement of Lord Wellington during the Ceylon debate of 1851, the term was a misnomer; martial law was not law at all, but the ‘will of the General who commands the Army’ . . . In another

would necessitate a piece of much greater length. It will suffice instead, for present purposes, to highlight a few key features. Most broadly, the fact that the scope and meaning of martial law were deeply contested before, during, and after the period in question is important—as this recognition helps to make clear that ‘martial law’ is better understood as a collection of concerns and potentials, rather than as a clear, unified concept. In particular, it is worth separating out five different understandings and components of martial law. First, martial law may refer to direct governance by the military. Second, martial law often involves the displacement of the jurisdiction of the ordinary courts by special courts, typically military tribunals, which employ procedures that accord less respect to due process. Third, martial law allows for more assertive use of force. Fourth, martial law allows for extended powers of search and detention, the seizure of property, the compulsion of labor, and restrictions on freedom of movement such as curfews. Fifth, martial law is generally closely linked to its purported purpose—the protection of public safety and national security—which is considered to have maximum force and thus trump all other concerns. It will be helpful to bear these various affiliated features in mind as the following analysis proceeds, as by doing so it will be possible to see the various ways in which, while some of the more overt features of emergency or martial law were gradually replaced by more legalized approaches, other features of emergency and martial law became embedded in new legal regimes.

A. Suppressing Popular Uprisings

Prior to the nineteenth century, Ireland was governed by a combination of martial law and the use of more traditional tools of riot control, in particular the 1714 Riot Act, which was also the primary means of attempting to control unrest in England.²¹ While this bi-polar alternation between martial law and more

account, one later endorsed by the Lord Chief Justice of England, martial law was the temporary displacement of civilian rule by ‘military law’ . . . according to yet another and radically different account of the term, martial law was nothing more than an exotic instance of the common law defence of public necessity . . . In October 1865, the law of martial law was dauntingly complex, perhaps utterly incoherent. But these difficulties did not make it any less pertinent.”); *id.* at Chapter 4; JOHN COLLINS, *MARTIAL LAW AND ENGLISH LAWS, c. 1500–c. 1700* (2016) (emphasizing that martial law should be understood as a form of law, with its own traditions and points of substantive and procedural emphasis, rather than simply as the absence of law).

²¹ The full title of the Riot Act was “an act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters.” Riot Act 1714, 1 Geo. St. 2 c.5 (Eng.). The Riot Act allowed for a justice of the peace (as well as other specifically enumerated law enforcement officials) to approach a crowd of “twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public[] peace” (tumultuous assembly, flexibly, was defined as a disturbance leading to the alarm of “someone of reasonable courage and firmness”), and from “among the said rioters, or as near to them as he can safely come, [to] with a loud voice command” a proclamation calling on the rioters “to disperse themselves, and peaceably to depart

traditional mechanisms of control would continue from the eighteenth century into the nineteenth century, the British increasingly experimented with new modes of specially crafted repressive legislation to restrict and silence protest.

An early progenitor of this new approach came with a series of acts known as the Whiteboy Acts. These acts targeted an Irish agrarian organization—known as the whiteboys—that defended tenants’ rights through nightly raids and the leveling of fences. The most significant Whiteboy Acts were the 1775 Tumultuous Risings Act²² and the 1787 Riot Act.²³ Among other things, the Tumultuous Risings Act stipulated that those “ris[ing], assembl[ing], or appear[ing] . . . to the terror of his Majesty’s subjects” while armed, or disguised “in any manner whatsoever”, or “wearing any particular badge, dress, or uniform not usually worn by him, her, or them upon . . . lawful occasions,” would be guilty of a high misdemeanor. Those “knowingly excit[ing], encourag[ing], or promot[ing] . . . unlawful meetings . . . by sound of drum, horn, musick, fire, shoutings, or other signal” would similarly be found to have committed a high misdemeanor.²⁴ The act also allowed magistrates to order searches of the houses of Catholics on reasonable suspicion of the presence of arms, and to compel persons to appear before them to provide evidence. The 1787 Riot Act, meanwhile, penalized those administering and taking illegal oaths, and authorized capital punishment for those engaged in seizing arms, forcing contributions to their cause by force or intimidation, or publishing notices tending to produce riots or “unlawful combinations.”²⁵

The next round of tensions was linked to the rising revolutionary tide. Inspired by the French Revolution, the Society of United Irishmen was formed in 1791 with the twin aims of expanding the franchise and ending religious discrimination.²⁶ The group was banned by the 1793 Convention Act, after war was declared between France and Britain.²⁷ The Convention Act observed that “assemblies, purporting to represent the People . . . may be made use of to serve

to their habitations, or to their lawful business.” Should the crowd fail to disperse after one hour, those remaining would be “be adjudged [guilty of] felony without benefit of clergy,” with “the offenders therein . . . adjudged felons” who would “suffer death as in a case of felony, without benefit of clergy.”

²² Tumultuous Risings Act 1775, 15 & 16 Geo. 3 c. 21 (Ir.).

²³ Riot Act 1787, 27 Geo. 3 c. 15 (Ir.).

²⁴ See 15 & 16 Geo. 3 c. 21, at §§ 2, 23 (Ir.).

²⁵ See WILLIAM LECKY, A HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY VOL. 6 408–09 (1887). The Act also introduced the English Riot Act into Ireland.

²⁶ See SEAN CONNOLLY, DIVIDED KINGDOM: IRELAND 1630–1800, 434–42 (2008).

²⁷ The full title of the law was “An Act to Prevent the Election or Appointment of unlawful Assemblies, under Pretence of preparing or presenting public Petitions, or other Addresses to His Majesty or the Parliament.” Convention Act 1793, 33 Geo. 3 c. 29 (Ir.).

the Ends of factious and seditious Persons, to the violation of the public peace, and the great and manifest Encouragement of riot, tumult, and disorder,” and therefore declared such assemblies unlawful and required their dispersal and the apprehension of any persons resisting dispersal.²⁸ In addition, the law stipulated that anyone publishing or distributing a notice pertaining to the appointment of persons to be representatives of such assemblies, or attending or voting for the representatives of such an assembly, would be guilty of a “high Misdemeanor.”²⁹

The outlawing of the United Irishmen only served to further radicalize them, leading the United Irishmen to forge links with the Defenders, a more overly militant organization formed in 1792, and to begin preparations for direct military confrontation.³⁰ In the face of this intensified opposition, the authorities passed the Insurrection Act in 1796.³¹ The act imposed the death penalty on persons administering illegal oaths, and allowed the authorities to proclaim states of

²⁸ THE HISTORY OF IRELAND: FROM THE TREATY OF LIMERICK TO THE PRESENT TIME: BEING A CONTINUATION OF THE HISTORY OF THE ABBÉ MACGEOGHEGAN 372 (John Mitchel ed., 1869).

²⁹ The final clause of the Convention Act 1793 stipulated that it should not “be construed in any Manner as to prevent or impede the undoubted Right of His Majesty’s Subjects ... to Petition His Majesty, or both Houses ... for Redress of any public or private Grievance”—a clause existing in a degree of tension with the previous text. *See* 33 Geo. 3 c. 29 (Ir.), *supra* note 27. This act would be exported back to Britain in 1799, in the form of the “Act for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious Practices,” known as the “Unlawful Societies” or the “Combination and Confederacy” Act. 1799, 39 Geo. 3 c. 79 (Eng.). That act specifically “suppressed and prohibited” the United Irishmen by name, as well as the United Scotsmen, the United Britons, the United Englishmen, the London Corresponding Society, and all other “Corresponding Societies,” as well as other societies involving unlawful oaths or secret membership. In addition, the 1799 Unlawful Societies Act required that those places “used for delivering Lectures or Discourses, and holding Debates ... of a seditious and immoral Nature; and other Places [that] have of late been used for seditious and immoral Purposes, under the Pretence of being Places of Meeting for the Purpose of reading Books, Pamphlets, Newspapers, or other Publications,” as well as every “House, Room, Field, or other Place, at or in which any Lecture or Discourse shall be publicly delivered ... for the Purpose of raising or collecting Money” should be “deemed a disorderly House or Place,” with all those involved subject to fines, while a system of licensing was set up in order to render lectures or readings lawful. The law also required printers to give notice to the authorities both of their work as a printer in general and of any new paper they were printing, as well as to print their name and abode on any publication, on penalty of fine (newspaper were exempted, however, as they were already governed by a separate legal regime).

³⁰ The militants were, moreover, supported by the French, who went so far as sending a force of soldiers to assist the Irish rebellion in December 1796, following a plea from Wolfe Tone, the leader of the United Irishmen; the force was put off from landing by storms, however. For more, see *DIVIDED KINGDOM: IRELAND*, *supra* note 26.

³¹ The Insurrection Act 1796, 36 Geo. 3 c. 20 (Ir.). 1796 also saw passage of an Indemnity Act, designed to protect those magistrates who suppressed the insurgents from any later lawsuits. Indemnity Act 1796, 36 Geo. 3 c. 57 (Ir.).

disturbance in certain districts, allowing for curfews, suspension of trial by jury, and expanded powers of search and detention.³²

Despite the Insurrection Act, open conflict broke out in the form of the United Irishmen Rebellion in 1798. The authorities responded by passing the Suppression of Rebellion Act, authorizing trials by court martial, and imposing martial law.³³ With the help of such measures, together with a campaign of executions, torture, transportation, and collective punishment, the British were able to put down the rebellion.³⁴

In many ways, the various laws of the period appeared to be an application of emergency rule under another name. In particular, such features as the authorization of searches and detentions, the potential for curfews, the potential to compel persons to appear to provide evidence and to suspend jury trials, and the application of capital punishment (including in cases of relatively moderate behavior, such as administering oaths or publishing prohibited notices) all carried a strong hint of legalized martial law. The Suppression of Rebellion Act was the most unambiguous direct authorization of martial law.

At the same time, while such measures may have represented martial law in slightly more legal form, the adoption of that form was significant. In addition, the laws in question went beyond simply authorizing martial law-reminiscent approaches by developing new concerns and targeting new forms of activity. In particular, the Tumultuous Rising Act, the Irish Riot Act, and the Convention Act experimented with the targeting of a wide variety of new subjects—those “rising,” “assembling” or “appearing” to “the terror of his Majesty’s subject”; those “exciting,” “encouraging” or “promoting” “unlawful meetings”; and those administering “unlawful oaths” or publishing “notices” tending to produce “unlawful combinations.”³⁵ This expansive, experimental language—not

³² See 36 Geo. 3 c. 20 (Ir.). The Insurrection Act 1796 was in force until 1802, after which it was resurrected from 1807–1810, from 1814–1818, and again from 1822–1825. From its first resurrection in 1807, however, the penalty of death for administering illegal oaths was downgraded to a penalty of transportation for life.

³³ Suppression of Rebellion Act 1799, 39 Geo. 3 c. 11 (Ir.). Among later acts inspired by the law was the 1863 Suppression of Rebellion Act in New Zealand, which targeted the Maori people.

³⁴ Both martial law and the Suppression Act were extended until 1805. For more on the repressive legislation of the period, see CHARLES TOWNSHEND, *POLITICAL VIOLENCE IN IRELAND: GOVERNMENT AND RESISTANCE SINCE 1848* 55–6 (1983).

Despite the generally repressive climate, a couple positive precedents were formed in the courts. In *Wright v. Fitzgerald* 769, 815, 818–20 (1798) 27 St. Tr. 759, the plaintiff succeeded in a tort action against defendant sheriff, who had ordered the plaintiff flogged while martial law was in place, with the court finding that martial law does not allow for arbitrary and cruel punishment. *Wolfe Tone’s Case* 625–26 (1798) 27 St. Tr. 614, meanwhile ruled that a civilian could not be tried before a military court while civilian courts were operating.

³⁵ See 15 & 16 Geo. 3 c. 21 (Ir.), *supra* note 22; 27 Geo. 3 c. 15 (Ir.), *supra* note 22; 33 Geo. 3 c. 29 (Ir.) *supra* note 27.

uncommon for lawyers who are cautious to prevent loopholes—was, despite its diversity, clearly aimed at a central concern. In particular, all these new penalizations were targeted at various ways in which people might gather or come together, be it in the form of an assembly (or “rising” or “appearance”), a meeting, or a more hidden (and hence more frightening) society formed by the swearing of oaths. If the suppression of what the British themselves managed to aptly term in the aggregate as “unlawful combinations”—including, and perhaps especially, as the Convention Act made clear, those aimed at achieving political change in the name of the people—could be accomplished by law, perhaps a more overt, and hence provocative, form of martial law would become unnecessary.

B. Preserving the Peace

The unrest of the turn of the century was ultimately suppressed by these new legal tools. However, rural violence, disorder, and resistance increased again in the early 1810s, in part enabled by the diminished strength of local military forces as a result of redeployment to the war with France.³⁶ The period also saw the formation and growth of several secret associations, most notably the Ribbonmen, consisting mostly of poor Catholics, who directed their attacks against landlords and tithe servers and grew noticeably in strength.³⁷

The British responded with the first Peace Preservation Act,³⁸ which was pushed forward by Robert Peel, Chief Secretary of Ireland, and passed into law in 1814.³⁹ The Act declared in its preamble that it was targeted against “disturbances,” and allowed for the Lord Lieutenant or other Chief Governors of Ireland to declare particular regions to be in “a State of Disturbance” (as well as

³⁶ Unrest was often the product of a shortage of food, leading to numerous “food riots,” which the police and military were called upon to suppress. See JAMES KELLY, *FOOD RIOTING IN IRELAND IN THE EIGHTEENTH AND NINETEENTH CENTURIES: THE ‘MORAL ECONOMY’ AND THE IRISH CROWD* 172 (2017). The rural unrest was attributed by the British to “banditti armies,” an early instance of what would become a regular trope on the part of the British, and others, to describe those who resisted their rule as “bandits” or the like. See Galen Broeker, *Robert Peel and the Peace Preservation Force*, 33 *J. MOD. HIST.* 363, 364 (1961). As Peel would put it, the bill in general aimed to help the “better class” of people to become free from fear and to assert their authority over the “worse classes.” *Quoted in id.* at 368. For similar later attempts to tar the Ribbonmen as bandits, see Jess Lumsden Fisher, ‘Night Marauders’ and ‘Deluded Wretches’: *Public Discourses on Ribbonism in Pre-Famine Ireland*, in *CRIME, VIOLENCE, AND THE IRISH IN THE NINETEENTH CENTURY* (Kyle Hughes & Donald M. MacRaild eds., 2017).

³⁷ See FISHER, *supra* note 35.

³⁸ Peace Preservation Act 1814, 54 *Geo. 3 c. 131* (Eng.) (in full, “An act to provide for the better execution of the Laws of Ireland, by appointing Superintending Magistrates and additional Constables in Counties in certain cases”).

³⁹ On the passage of the act, see Kyle Hughes & Donald M. MacRaild, *Introduction: Crime, Violence, and the Irish in the Nineteenth Century; Themes and Perspectives*, in *CRIME, VIOLENCE, AND THE IRISH IN THE NINETEENTH CENTURY* (Kyle Hughes & Donald M. MacRaild eds., 2017).

to declare when such a district might be “restated to Peace and good Order”), whereupon they would be enabled to appoint magistrates and constables to oversee, police, and attempt to end such disturbances.⁴⁰ The Act also enabled the creation of a new force of constables, known as the Peace Preservation Force,⁴¹ as well as a new set of superintending magistrates⁴² to support the act’s broader aims. The new force would operate from 1814 until 1822, when they were replaced by a national constabulary.⁴³

⁴⁰ The costs of managing such disturbances would be borne by the local district in question. This payment structure was consciously designed by Peel to pressure those locals who would bear the cost onto the government’s side relative to the forces of local unrest. See Broeker, *supra* note 35, at 366.

⁴¹ The first formal police force in the British Isles had also been set up in Ireland, by the Dublin Police Act 1786, 26 Geo. 3 c. 24 (Ir.)—shortly after similar proposals were rejected in London. For more, see Stanley Palmer, *The Irish Police Experiment: The Beginnings of Modern Police in the British Isles, 1785-95*, in *CRIMINAL JUSTICE HISTORY: THEMES AND CONTROVERSIES FROM PRE-INDEPENDENCE IRELAND* (Ian O’Donnell & Finbarr McAuley eds., 2003). The 1786 act put the Dublin force under the overall control of three magistrates, termed “Commissioners of Police,” and the operational control of a high constable. See JIM HERLIHY, *THE ROYAL IRISH CONSTABULARY: A SHORT HISTORY AND GENEALOGICAL GUIDE WITH A SELECT LIST OF MEDICAL AWARDS AND CASUALTIES* 36 (2nd ed., 2016). The Irish police system was modeled in turn on a similar system that had been put in place in Scotland in 1714. See *id.* The Irish police force was bitterly opposed by the Patriotic Party, which stood for strong Irish self-government within the Empire; thus, for instance, the leader of the Patriotic Party, Henry Grattan, argued “If ever a city entertained an odium capable of being ascertained by numerical calculation, the city of Dublin entertained such a hatred for this institution . . . No measures, no expense, no enormity of administration had ever excited discontent so strong as this abominable establishment.” *Quoted in id.* at 38.

⁴² See 54 Geo. 3 c. 131 (Eng.). These new magistrates would include “resident” magistrates, so known because they were required to reside in the districts to which they were assigned, as well as and “stipendiary” magistrates, so known because they were paid for their services (in contrast to traditional magistrates). Many resident magistrates were former British army officers with little legal training. See Broeker, *supra* note 36, at 366. The act’s combination of a new police force with a new magistrate service would become a powerful model; as Vogler notes, “the amalgamation of police and magisterial functions within a single hierarchy became a common feature of British colonial practice.” RICHARD VOGLER, *READING THE RIOT ACT: THE MAGISTRACY, THE POLICE AND THE ARMY IN CIVIL DISORDER* 19 (1991).

⁴³ The Constabulary Act of 1822, 3 Geo. 4 c. 103 (Eng.), established the new police force. For more, see JAMES DONNELLY, JR., *CAPTAIN ROCK: THE IRISH AGRARIAN REBELLION OF 1821-1824* 302 n. 53 (2009). Amongst other interesting features, this new force was oddly outfitted, some in “blue jackets with silk cord, red cuffs and collars and gold lace girdle, a tall beaver hat with feathers and [with] a long scarlet cloak over their horses’ tails,” some in “hussar fashion,” and some “resemble[ing] dragoons.” In short, the new police force were outfitted in a variety of cast-off, obsolete military garb. HERLIHY, *supra* note 41, at 42, 44. Relative to the new Irish police, Walter Scott in 1825 observed “The public peace is secured chiefly by large bodies of armed police, called by the civil term of constables, but very unlike the Dogberries of Old England, being, in fact, soldiers on foot and horse, well-armed and mounted, and dressed like our yeomen. It is not pleasant to see this, but it is absolutely necessary for some time at least.” *Quoted in id.* at 52.

The Peace Preservation Act was already noteworthy for its name alone—a potent rebranding of the light martial law it imposed as the “preservation” of “peace.” In substance, it combined the legalized, localized potential to escalate the level of coercion in particular districts already seen in the Insurrection Act with the creation of two key institutional structures designed to enforce the order sought. Those structures—the Peace Preservation Force and the new resident stipendiary magistrates—also combined elements of exceptional and everyday legality because the Peace Preservation Force consisted of neither pure soldiers nor unarmed local watchmen, while the stipendiary magistrates were neither fully traditional judicial authorities nor martial law adjudicators.

C. Clamping Down on Unlawful Societies

The Irish Agrarian Rebellion, which began in 1821,⁴⁴ led to passage of the 1822 Insurrection Act,⁴⁵ followed by the 1823 Unlawful Oaths Act.⁴⁶ The 1822 Insurrection Act introduced a curfew as well as summary justice procedures. The 1823 Unlawful Oaths Act declared “any and every society, association, brotherhood, committee, lodge, club, or confederacy whatsoever, now established or hereafter to be established in Ireland,” which utilized ‘oaths’ or other such ‘engagements,’ ‘tests,’ or ‘declarations,’ or which operated with a degree of secrecy, and which were not lawfully registered, to be “unlawful combinations.”

A final coda to this succession of laws was provided by the Unlawful Societies Suppression Act of 1825.⁴⁷ The act declared the following unlawful:

[Any] Society, Committee, or Body of Persons . . . in Ireland . . . exercising the Power of acting for the Purpose or under the Pretence of procuring the Redress of Grievances . . . or the Alteration of any Matters by Law established in Church or State, or for the Purpose of under the Pretence of carrying on or assisting in the Prosecution or Defence of Causes.⁴⁸

The act also outlawed any societies “from which Persons of any Form of Religious Faith allowed or tolerated by Law shall be excluded” or which required their member to take an oath.⁴⁹

These new laws largely continued down lines already marked. The 1822 Insurrection Act, like its predecessor, instituted several measures closely associated with martial law, while nonetheless stopping short of declaring martial

⁴⁴ For more, see DONNELLY, *supra* note 43.

⁴⁵ Insurrection Act 1822, 3 Geo. 4 c. 1 (Eng.). The Insurrection Act was accompanied by a Habeas Corpus Suspension Act 1822, 3 Geo. 4 c. 2 (Eng.).

⁴⁶ Unlawful Oaths Act 1823, 4 Geo. 4 c. 87 (Eng.).

⁴⁷ Unlawful Societies Suppression Act 1825, 6 Geo. 4 c. 4 (Eng.).

⁴⁸ *See id.*

⁴⁹ *Id.*

law as such. The Unlawful Oaths Act and the Unlawful Societies Suppression Act meanwhile picked up the previous concern with “unlawful combinations,” while focusing less on the possibility of assembly and more on the association side of the equation. As with the earlier Convention Act, the new Unlawful Societies Suppression Act was, moreover, very blunt about its overt aim of suppressing what might otherwise seem the quite reasonable aim of “procuring the redress of grievances.”⁵⁰ The laws of this period were nonetheless notable in that they were now largely divorced from the more overtly martial law components of the turn of the century—one more move towards the regularization of the new mode of repressive legal governance.

D. Suppressing Tumultuous Disturbances

The following years saw a series of major marches and demonstrations in both the Catholic and Protestant communities, which increased tensions. After more serious violence was narrowly avoided near Ballybay between the Orangemen⁵¹ and members of a Catholic emancipation march, local magistrates instituted a ban on assemblies, while the Lord Lieutenant declared such meetings illegal across Ireland on the grounds that they threatened the public peace.⁵² The governing authorities put off further repressive legislative action, and instead passed the Catholic Emancipation Act in 1829⁵³ to remove the prohibition on Catholics serving in parliament in an effort to reduce Catholic protests.

While Catholic protests may in fact have diminished, the Orangemen, encouraged by their perceived victory at Ballybay, began to march and hold demonstrations with greater intensity. Around the same time, tensions around the country were heating up due to resentment towards the system whereby all Irishmen, regardless of religion, were forced to pay tithes for the upkeep of the official (Protestant) Church of Ireland, leading to a period of unrest known as the “Tithe War.”⁵⁴

⁵⁰ *Id.*

⁵¹ The Orangemen were a militant Irish Protestant order founded in 1795. For more, see COLONEL WILLIAM BLACKER & COLONEL ROBERT HUGH WALLACE, *THE FORMATION OF THE ORANGE ORDER 1795–1798* (Cecil Kilpatrick ed., 1994); Jim Smyth, *The Men of No Popery: The Origins of the Orange Order*, 3 *HIST. IR.* 48 (1995); D.W. Miller, *The Origins of the Orange Order in County Armagh*, in *ARMAGH: HISTORY AND SOCIETY* (A.J. Hughes & William Nolan eds., 2001).

⁵² See Neil Maddox, “*A Melancholy Record*”: *The Story of the Nineteenth-Century Irish Party Processions Acts*, 39 *IRISH JURIST N.S.* 243, 248 (2004).

⁵³ Catholic Emancipation Act of 1829, 10 *Geo. 4 c. 7* (Eng.).

⁵⁴ See DAVID GEORGE BOYCE, *NINETEENTH CENTURY IRELAND: THE SEARCH FOR STABILITY* 62–64 (1990).

The British responded with new legislation. In 1831 the Tumultuous Risings (Ireland) Act was passed.⁵⁵ The Act gave the government several additional powers. Most notably, the Act imposed punishments on those “rising and assembling” and “unlawfully compel[ling]” persons to quit their dwellings, or breaking into such dwellings, or maliciously “injuring” or damaging property. The Act also imposed punishments on

any Person or Persons [who should] knowingly print, write, post, publish, circulate, send, or deliver, or cause or procure to be printed, written, posted, published, circulated, sent, or delivered, any Notice, Letter, or Message exciting or tending to excite any Riot, tumultuous or unlawful Meeting or Assembly, or unlawful Combination or Confederacy.⁵⁶

Those who should “assist, abet, or succor . . . or shall knowingly excite, encourage, or promote, or shall solicit, ask, or require . . . or shall endeavour to compel or induce any Person or Persons, to join in the Commission of any” of these offences were also punished.⁵⁷ The Tumultuous Risings (Ireland) Act also allowed the authorities to fine uncooperative witnesses.

In 1832, this legislation was complemented by passage of the Party Processions Act.⁵⁸ The Party Processions Act was most notable for its prohibition of “Banner[s], Emblem[s], Flag[s] or Symbol[s] . . . or . . . Music” calculated or tending to “provoke Animosity between His Majesty’s Subjects of different religious Persuasions.”⁵⁹ The standard of “calculation” or “tendency to provoke” was noteworthy because it in effect created a standard based on the effects of owning or displaying such accoutrements rather than the intent of the person. As Maddox notes, this “represented a major inroad on the common law right of procession” and was interpreted at the time as an absolute ban.⁶⁰

In 1833 the Party Processions Act was followed by the Suppression of Disturbances Act.⁶¹ The Act allowed the Lord Lieutenant to prohibit meetings he deemed dangerous to the public safety. The Act also made secret calls for any assemblies a misdemeanor, and required the owners of houses to present lists of all adult males residing therein to the authorities. The Lord Lieutenant was also

⁵⁵ Tumultuous Risings (Ireland) Act 1831, 1 & 2 Will. 4 c. 44 (Eng.). Officially, the Act was an amendment of the 1775 Tumultuous Risings Act, and hence like that act was also referred to as a ‘whiteboy’ act.

⁵⁶ *See id.* at § 3.

⁵⁷ *Id.* at § 6.

⁵⁸ Party Processions Act 1832, 2 & 3 Will. 4 c. 118 (Eng.).

⁵⁹ *Id.*

⁶⁰ Maddox, *supra* note 52, at 250.

⁶¹ Suppression of Disturbances Act 1833, 3 & 4 Will. 4 c. 40 (Eng.). Officially “An Act for the More Effectual Suppression of Local Disturbances and Dangerous Associations in Ireland.” Also known as the “Insurrection Act” as well as the “Coercion Act.”

empowered to proclaim counties disturbed, wherein no meetings for the purposes of petitioning Parliament would be allowed without prior authorization, and persons out after sunset would be guilty of a misdemeanor.⁶² Perhaps the most notorious measure of the law was its allowance of court martial proceedings in proclaimed districts; amongst other powers, the court martial magistrates were given the power to compel the attendance of witnesses.⁶³

Capping off these repressive measures was the establishment of the Irish Constabulary in 1836,⁶⁴ providing Ireland with a strongly centralized, armed police force (which would serve as a key model, as well as a source of trainers and personnel, for other police forces throughout the Empire in the years to come).⁶⁵ Echoing earlier legislation, the 1836 bill allowed for the deployment of increased numbers of police to troubled districts, normalizing a rule previously developed for emergency situations. The act also regularized the system of resident stipendiary magistrates, who would play an increasingly significant role in the delivery of local justice over time.

Like earlier measures, the 1833 Suppression of Disturbances Act⁶⁶ straddled the line between martial law and a more regular legality. At the same time, it went further in the latter direction than previous measures. In particular, the act focused specifically on assemblies and employed a regulatory approach in its emphasis on the production of lists of inhabitants, which was made possible by its relatively light penalties. Indeed, in shaping the applicable legal regime around the anticipatory issues of prohibitions on certain assemblies and the requirement of prior authorization, and by moving away from simply applying harsh penalties and

⁶² However, those abroad at night might escape penalty if they could demonstrate a lawful purpose. *See id.* at Art. 22.

⁶³ *See* 3 & 4 Will. 4 c. 40 (Eng.), *supra* note 61. As Townshend observes, the object of allowing for court martial proceedings was “to provide courts which would be proof against intimidation, and herein lay its proximity to outright martial law. It was an admission that the normal legal process has broken down, or perhaps one should rather say had become paralysed.” TOWNSHEND, *supra* note 34, at 57. It is also worth noting that article 7 of Suppression of Disturbances Act 1833 required local authorities to take measures to suppress insurrection and bring offenders to trial—highlighting the fact that the aim of the authorities in passing such legislation was in part to attempt to motivate local authorities to more rigorous action.

⁶⁴ Constabulary (Ireland) (No. 2) Act 1836, 6 & 7 Will. 4 c. 36 (Eng.). In addition to the new constabulary, a ‘Revenue Police’ had been established four years previously, by the 1831 the Illicit Distillation (Ireland) Act (1 & 2 Will. 4 c. 55) (which also consolidated the previous legal framework suppressing the illicit distillation of spirits). *See* HERLIHY, *supra* note 41, at 45.

⁶⁵ *Id.* For more, see TOWNSHEND, *supra* note 34, at 67–68; Henry A. Blake, *The Irish Police, in THE NINETEENTH CENTURY* 386–87 (James Knowles ed., vol. 9, 1881); Richard Hawkins, *The Irish Model and the Empire: A Case for Reassessment, in POLICING THE EMPIRE: GOVERNMENT, AUTHORITY AND CONTROL, 1830–1940* 25 (David Anderson & David Killingray eds., 1991).

⁶⁶ *See* Suppression of Disturbances Act, 3 & 4 Will. 4 c. 40 (Eng.), *supra* note 61.

authorizing forceful dispersal as a reactive measure, the act presaged much of contemporary repressive assembly governance.

The 1831 Tumultuous Risings (Ireland) Act was similarly focused on assemblies. Its major innovation was to broaden the scope of the activity it targeted, by seeking to punish anyone in one way or another helping to “excite” such riots, as well as anyone assisting them. While the language of the statute required that such excitement or assistance be knowing, the breadth of the rest of the language, and of the manners in which such excitement or assistance might be provided, gave the statute very broad reach. The 1832 Party Processions Act went further down this same road, by explicitly targeting anyone whose use of banners, emblems, flags, symbols, or music provoked animosity between religious communities, regardless of their subjective intent.⁶⁷

Finally, the 1836 Constabulary (Ireland) Act made permanent the innovations of 1814, which provided the new legal approaches of the period with the institutional tools necessary for their enforcement.⁶⁸ The quasi-military police model of what would come to be known as the Royal Irish Constabulary (RIC) that was thereby regularized in Ireland would become infamous. It would provide the wellspring of a British approach to colonial policing that would be exported around the world over the course of the following 125 years. That new force was all the more empowered thanks to their links to the new resident magistrate system, underscoring the one-sided nature of the legal system being constructed.

E. Combatting Crimes and Outrages

The outbreak of the Irish famine in 1845 stoked British fears of another Irish rebellion. In response, a group of Irish magistrates called for emergency powers to be granted to the Lord Lieutenant, writing

we wish to impress upon Her Majesty's Government the absolute necessity of placing in the hands of the Lord Lieutenant of Ireland such powers as may enable His Excellency to proclaim districts where savage acts are perpetrated, as it is quite manifest that the common law of the land is not sufficiently stringent to subdue the combination that has so long prevailed and which so

⁶⁷ In addition to the resonances of the Party Processions Act explored below, the Act was almost immediately emulated in Canada; for more, see Annie Tock Morrisette, *Preventing the Parade: The Party Processions Acts in Ireland and Canada*, 48 AM. REV. CAN. STUD. 110 (2018).

⁶⁸ As McMahon notes,

Over the course of the first fifty years of the nineteenth century the role and position of the police [in Ireland] were to change almost beyond recognition—moving from an essentially local force, made up of semi-professional baronial constables, to a centrally controlled and armed one consisting of over 11,000 men by the late 1840s.

Richard McMahon, *A Violent Society? Homicide Rates in Ireland, 1831–1850*, 36 IRISH ECON. & SOC. HIST. 1, 4 (2009).

constantly prevents the possibility of detecting and convicting the base miscreants who are guilty of crimes more atrocious than are to be heard of in the most uncivilised parts of the world.⁶⁹

Their plea was answered with the Crime and Outrage (Ireland) Act of 1847.⁷⁰ The Act followed the 1814 model, providing the Lord Lieutenant the ability to organize the island into districts and to bring extra police into those districts, at local expense, when he deemed that such was necessary “for the Prevention of Crime and Outrage.” The Act also took several further steps: it limited the ability of those within the districts in question to carry arms in public, and allowed the authorities to require that persons surrender any arms they owned; it authorized individual searches of those suspected of carrying arms, as well as district-wide searches; and, most coercive of all, it allowed the local authorities to require men between the ages of sixteen and sixty to assist them in apprehending murder suspects in proclaimed districts.⁷¹

The government had allowed the 1832 Party Processions Act to lapse in 1844, in large part in recognition of the effective efforts of the Repeal Union to police and control their own assemblies. Following clashes between Ribbonmen and Orangemen at the 1849 Battle of Dolly’s Brae, in which some thirty people were killed, the British introduced a new Party Processions Act drafted in similar terms to the previous act.⁷²

In general, both the 1847 Crime and Outrage Act and the new 1850 Party Processions Act manifested the repressive approach to public order legality already established. The 1847 Crime and Outrage Act was notable for its shift in

⁶⁹ TOWNSHEND, *supra* note 34, at 55 (citing Letter from Roscommon Co. Tipperary magistrates to Earl of Clarendon (Nov. 1847), in PRO HO 45 1793).

⁷⁰ Crime and Outrage (Ireland) Act 1847, 11 & 12 Vict. c. 2 (Eng.). It is officially “An Act for the better Prevention of Crime and Outrage in certain Parts of Ireland.” The Act was introduced into Parliament with a reading of a royal speech, which declared that “Her Majesty laments that in some Counties of Ireland atrocious Crimes have been committed, and a Spirit of Insubordination has manifested itself, leading to an Organised Resistance to legal Rights,” events which led her majesty to the sentiment that it was “her Duty to her peaceable and well-disposed Subjects to ask the Assistance of Parliament in taking further Precautions against the Perpetration of Crime in certain Counties and Districts in Ireland.” 95 Parl Deb HC (3d ser.) (1847) cols. 270–366 (Eng.). The Act’s general conception as one of ‘peace preservation’ was made clear in 1856, when an act was passed under the title of the Peace Preservation (Ireland) Act 1856, 19 & 20 Vict. c. 36 (Eng.), which had the function of extending the operation of the 1847 act, while also making a few amendments, including reducing the length of certain punishments.

⁷¹ See 11 & 12 Vict. c. 2 (Eng.), at §§ X-XVI. The Crime and Outrage (Ireland) Act also stipulated that the 1775 Tumultuous Risings Act, as amended by the 1831 Tumultuous Risings (Ireland) Act, would apply in any proclaimed district.

⁷² Party Processions Act 1850, 13 & 14 Vict. c. 2 (Eng.). After clashes in Derrymacash and at the Fermanagh assizes in 1860 the Act would be supplemented by the Party Emblems Act, which made the display of party emblems and the playing of party tunes illegal. For more, see Maddox, *supra* note 52, at 256–58 (2004).

the frame through which it addressed the harms in question, preferring to label them “crimes” or “outrages,” rather than treason or sedition.⁷³ This shift in framing suggested opposition to British rule should be understood as an offense against the broader public in Ireland, rather than simply as resistance to the British crown. This rhetorical shift, aimed at garnering wider public support for British imperial rule and at delegitimizing resistance thereto, would continue to develop in the years to come.

F. A Return to Outright Suppression

A new insurgent political movement, known as the Fenian movement, was founded in 1858. Tensions between the Fenians and the authorities increased rapidly over the following decade. In September 1865, the offices of the *Irish People*, the chief Fenian paper, were raided, after which the paper was suppressed; around the same time, multiple Fenian leaders were arrested and jailed.⁷⁴ *Habeas corpus* was suspended in February of 1866, and over a thousand more suspected Fenians were arrested in the months that followed.⁷⁵ In addition, in 1866, the government started deploying commissioners of the peace alongside the military in Cork, who were to “act as Magistrates with the Troops on any emergency when it may not be practicable to obtain the services of one of the ordinary magistrates.”⁷⁶ This deployment may have incorporated a certain check on the troops’ actions, but more forcefully suggested that the ultimate aim of having magistrates, or commissioners of the peace, was simply to cast a veil of legitimacy over such deployments of force as the military deemed necessary.

An attempted Fenian revolt in February and March of 1867 was quickly suppressed by the government. Much of the government campaign was led by Sir Hugh Rose, who was known for successfully defeating the “Indian Mutiny” nine years earlier. Rose adopted a series of aggressive tactics, including the use of “flying columns,” quick deployments of small military contingents to far-flung areas.⁷⁷ Rose considered the flying columns a great success, praising the manner in which their heightened powers of search and arrest in particular “overawed the

⁷³ See generally 11 & 12 Vict. c. 2 (Eng.).

⁷⁴ See Kerby Miller & Breandán Mac Suibhne, *Frank Roney and the Fenians: A Reappraisal of Irish Republicanism in 1860s Belfast and Ulster*, 51 ÉIRE-IRELAND 23, 29 (2016).

⁷⁵ See *id.*

⁷⁶ Letter from Chief Secretary to Commander in Chief, (Dec. 7, 1866), quoted in TOWNSHEND, *supra* note 34, at 91; see also & Letters from Under-Secretary to Major-General Bates, OC Cork Division (Dec. 5 and 11, 1866).

⁷⁷ See TOWNSHEND, *supra* note 34, at 94.

disaffected.”⁷⁸ In addition, Rose freely authorized the use of court martials to sentence suspected insurgents.⁷⁹ While the atmosphere would remain tense for several years after 1867,⁸⁰ the authorities’ use of heavy-handed tactics was ultimately effective, at least in the short term.

G. Protecting Life and Property

In 1870, another peace preservation act was passed,⁸¹ which continued and further developed the peace preservation tradition. Perhaps most significantly, the Peace Preservation (Ireland) Act 1870 allowed for summary proceedings to be used in certain proclaimed areas, relative to a number of offenses defined under the Act and its predecessors.⁸² The Act also allowed magistrates to summon persons believed to be capable of giving evidence, and to jail those who refuse to show up or answer questions. In addition, the Act allowed for the arrest of “any stranger sojourning or wandering in any district specially proclaimed” as well as of any person found outside their dwelling during the night, and not “upon some lawful occasion or business.”⁸³

Even more innovatively, the Peace Preservation (Ireland) Act 1870 also marked a new point of departure by providing for novel forms of control over the press. The Act allowed the Lord Lieutenant to halt publication of a paper where he determined that it contained “any treasonable or seditious engraving, matter, or expressions, or any incitements to the commission of any felony, or any engraving, matter, or expressions encouraging or propagating treason or sedition,

⁷⁸ In particular, Rose observed:

Th[e] sudden appearance [of the flying columns] in different parts of the country where Troops have rarely been seen; their patrols, by day and night, combined so as to surprise and surround bad districts often in the worst possible weathers; the search of houses, and arrest of suspected parties which the Police, without their aid, had been unable to effect, have produced the best possible impression in reassuring the loyal and overawing the disaffected.

TOWNSHEND, *supra* note 34, at 94 (quoting Letter from Commander in Chief to Secretary for War, (Apr. 12, 1867), in Kilmainham MSS 1060).

⁷⁹ See TOWNSHEND, *supra* note 34, at 89–90.

⁸⁰ As Friedrich Engels would observe in a letter to Karl Marx, following his trip to Ireland in 1869,

The state of war is . . . noticeable everywhere. There are squads of Royal Irish all over the place, with sheath-knives, and occasionally a revolver at their side and a police baton in their hand; in Dublin a horse-drawn battery drove right through the centre of town, a thing I have never seen in England, and there are soldiers literally everywhere.

Letter from Friedrich Engels to Karl Marx (Sept. 27, 1869).

⁸¹ Peace Preservation (Ireland) Act 1870, 33 Vict. c. 9 (Eng.).

⁸² *Id.* at § 26.

⁸³ *Id.* at §§ 23, 25.

or inciting to the commission of a felony,” as well as to seize any paper circulated in Ireland deemed to contain such content.⁸⁴ In addition, the Act allowed the authorities to search printing houses and to seize printing presses as well as any materials used for the suspected printing of treasonous or seditious materials.⁸⁵ These new provisions proved particularly potent as they penalized seditious printing. The passage of the Act immediately led to the arrest of a printer who sold an allegedly seditious pamphlet, titled the *Farmers’ Catechism*, in early September 1870.⁸⁶

In the 1870s, *habeas corpus* was once again suspended and military patrols were set up. The Protection of Life and Property Act 1871 was passed, which had the purpose of:

empowering the Lord Lieutenant or other Chief . . . Governors of Ireland to apprehend and detain for a limited time persons suspected of being members of the Ribbon Society in the County of Westmeath, or in certain adjoining portions of the County of Meath and the King’s County.⁸⁷

The Act allowed for arrest on reasonable suspicion, detention without trial, and the suspension of recognizing *habeas corpus* claims.⁸⁸

⁸⁴ *Id.* at § 30.

⁸⁵ The Peace Preservation (Ireland) Act 1870 also imposed a modest limit on this power by allowing tort suits to be brought where such seizure was deemed illegitimate. *Id.* at § 33.

⁸⁶ The pamphlet in question critiqued the oppression of landlords, opining for instance that

I . . . believe that I do not enjoy the fruits of my labour, for I am compelled to give it to men who reap where they do not sow, and gather where they have not strewn, who are better known in the banqueting-hall, the foreign club-house, or on the betting-field than in the school of industry or among their honest, care-worn tenantry, save when the corn is ripe . . . [they] live in ease and indolence, rolling about in purple and fine linen, and faring sumptuously every day on the toil and sweat of their fellow-creatures, and reveling on the bread of idleness . . . it is full time they should be brought to know and feel that the stalwart farmers are the bone and sinew of the land, and that they will no longer endure or submit to the burdens heaped on them by a class of extravagant landlords, who are the chief cause of the grievances of this country. I believe in the fall of rents and lowering of taxes, the suppression of crime, and the emancipation of all slaves.

The Peace Preservation Act in Ireland, TUAPEKA TIMES, Sept. 8, 1870, Vol. 3, Issue 135.

⁸⁷ Protection of Life and Property Act 1871, 34 Vict. c. 25 (Eng.).

⁸⁸ As Townshend has put it,

The reasoning behind the measure was that if a society was being terrorized, this was due to the activity of terrorists; if this small group could be removed, normality would reassert itself. This way of looking at the problem established an important pattern, which has been well characterized by Patrick O’Farrell as the English habit of ‘setting up a sharp division between the men of peace and the men of violence’: it had the effect of ‘isolating, in English minds, the men of violence from the real, majority Ireland, and of elevating violence and those who used it into the entirety of the Irish problem.’

Townshend, *supra* note 34, at 63–64 (quoting PATRICK O’FARRELL, ENGLAND AND IRELAND 157 (1975)).

The new legislation of this period indicated how far the authorities had come. The Protection of Life and Property Act was yet another new form of martial law-light, once again rebranded to attempt to legitimize the measures in question. While the resuscitation of the peace preservation framework the year before similarly recalled several features of martial law governance, the Peace Preservation (Ireland) Act 1870, as shown above, went further than the Protection of Life and Property Act in terms of incorporating repressive elements into a more normalized frame. On the most general level, this Peace Preservation Act reached this middle ground by simultaneously establishing a more regularized but also exceptional arena of summary legal proceedings. In more particular terms, it did so by accompanying one-sided measures with plausible yet hard to prove defenses—allowing, for instance, persons found abroad at night to escape detention should they be able to demonstrate that they were pursuing a lawful purpose, a standard so vague as to grant the authorities a lot of discretion in practice.

The restrictions on the press were similarly important, marking a new focus by the authorities on the root causes of rather than the manifestations of discontent. The broad discretion given to authorities to suppress publications under the Peace Preservation (Ireland) Act 1870, as well as its forceful language, testified to the importance the authorities placed on such publications—a testimony further confirmed by the rapidity with which the authorities enforced relevant components of the law.

H. Protecting Persons and Property

The 1870 Peace Preservation Act was allowed to lapse in 1875.⁸⁹ The effects of a global depression that began in 1873, discussed further below, became increasingly worse as the decade progressed, leading to tensions heating up and sparking a “land war,” which was exacerbated by an agricultural crisis in 1878 and

⁸⁹ As Winston Churchill would later put it,

[N]othing in the state of Ireland disclosed by every channel of official information, either in regard to agrarian discontent or secret associations, justified [the Peace Preservation Act of 1870] being allowed to lapse. The draft of the Bill for its renewal . . . confronted the new Minister on his arrival at [Dublin] Castle. Out of sixty-nine resident magistrates consulted, sixty-one had declared the re-enactment indispensable and eleven of these had asked for further powers . . . But . . . the Irish vote in the English boroughs [had recently moved over] solidly on to the Liberal side. Many sympathetic speeches and friendly offices had been exchanged between Liberal candidates and Irish politicians, many lofty sentiments about the rights of nationalities had been uttered, and all had proceeded together to the poll as the equal friends of freedom. It would have been awkward after this . . . to inaugurate the new era for Ireland by ‘exceptional legislation in abridgment of liberty.’

WINSTON CHURCHILL, LORD RANDOLPH CHURCHILL 139–180 (1906).

1879.⁹⁰ A huge rally of tenant farmers took place in County Mayo in 1879 in protest against agricultural tenant policy. The same year also saw the formation of the Land League, which pushed for agricultural reforms. Landlords refused to soften their position, continuing to evict tenants who could not pay their rents while relying on the support of the army-backed RIC. However, even the presence of such forces could not always protect the landlords. They could not avoid sporadic attacks carried out by evictees and other disgruntled people who killed a number of landlords, landlords' agents, and policemen.⁹¹

Against this background, the British once again suspended *habeas corpus* and reinstated a new Peace Preservation Act⁹² as well as a "Protection of Persons and Property" Act in 1881.⁹³ The new 1881 Peace Preservation Act was the most abbreviated yet, simply prohibiting persons in proclaimed districts from having or carrying arms. The Protection of Persons and Property Act meanwhile allowed the Lord Lieutenant to issue warrants declaring persons guilty of "treason, treason-felony . . . treasonable practices" or any other violent or intimidating crime committed within a prescribed district, after which they might be arrested and detained indefinitely as long as the law persisted.⁹⁴

It was not long before the new Protection of Persons and Property Act was used to arrest and charge Charles Stewart Parnell, the most prominent Irish nationalist politician, and several other leaders of the Land League, with "treasonable practices" as well as to ban the Land League itself.⁹⁵ Parnell and his lieutenants were sentenced to prison on October 13th, where they would remain for almost seven months, before a change of heart in the British government allowed for their release.⁹⁶

⁹⁰ For more on land rights agitation in Ireland the 1870s and 80s, see F.S.L. LYONS, IRELAND SINCE THE FAMINE 156–86 (1971); W.E. VAUGHAN, LANDLORDS AND TENANTS IN MID-VICTORIAN IRELAND (1994).

⁹¹ For more on violence in the context of land struggles in Ireland in the period, see W.E. VAUGHAN, LANDLORDS AND TENANTS IN MID-VICTORIAN IRELAND Chapter 6 (1994). The local community employed tactics other than direct violence as well, including shunning or ostracizing landlords and landlords' agents. One of the people that this tactic was adopted and used against was Charles Boycott, who thereby gained the dubious honor of lending his name to the tactic.

⁹² Peace Preservation Act 1881, 44 & 45 Vict. c. 5 (Eng.).

⁹³ Protection of Persons and Property Act 1881, 44 & 45 Vict. c. 4 (Eng.).

⁹⁴ See *id.* at § 1.

⁹⁵ Key in this context were attacks on government policy made by the newly established newspaper *United Ireland*, a paper with self-consciously radical aims, as indicated by its description by its editor, William O'Brien, as "a weekly insurrection in print". See WILLIAM O'BRIEN, EVENING MEMORIES 14 (1920); Patrick Fitzgerald, *An Insurrection in Print: The Freedom of the Press in Ireland Between 1880 and 1891*, 15 U.C. DUBLIN L. REV. 17, 20–21 (2015).

⁹⁶ See Fitzgerald, *supra* note 95, at 120; *id.* at 20.

Unlike many developments surveyed above, the new acts of the period were notable not for their novelty, but for their lack of it. While certain details may have changed, in general the measures of the early 1880s simply demonstrated the extent to which various constituent components of martial law had already been transformed into what were perceived by the authorities as unexceptional approaches, suitable for dissemination in whatever form might be deemed most appropriate in the moment.

I. Preventing Crimes, Controlling the Press

The situation became more tense still following the assassination of Chief Secretary for Ireland Frederick Cavendish and Permanent Under-Secretary Thomas Henry Burke on May 6, 1882 by the Irish National Invincibles, a breakaway faction of the Irish Republican Brotherhood. The assassinations led to passage of the Prevention of Crimes (Ireland) Act of 1882.⁹⁷ Among other things, the Act made it an offense to intimidate or incite others to use intimidation against someone engaging in a legal act. The Act also allowed the government to seize newspapers in advance of their publication.

In addition to passing this new Act, the government decided to bring in experienced personnel in order to form a new Irish secret service department dedicated to uncovering and fighting subversives, initially named the “Crime Special Branch.” The job would eventually be awarded to Edward Jenkinson, who had risen through the ranks of the colonial service in India. Jenkinson took to his task with relish, becoming an eager proponent of secretive methods and securing convictions by whatever means possible—including, for instance, the use of undercover agents and informers, who were widely and credibly rumored to function as *agents provocateurs*, that is, witnesses who provoked the crimes and conspiracies on which the Special Branch focused.⁹⁸

⁹⁷ Prevention of Crimes (Ireland) Act 1882, 45 & 46 Vict. c. 25 (Eng.).

⁹⁸ Thanks to his successes in Ireland, Jenkinson was soon brought over to England to help with the campaign against the Fenians there too. The move would lead to his undoing, however, as while he had had a great degree of leeway in Ireland, Jenkinson’s methods provoked tensions in England, leading to Jenkinson’s dismissal in 1887 following clashes with the new Metropolitan Police Commissioner James Monro. For more on both Jenkinson and the development of Special Branch, including its role as a precursor to the modern intelligence state, see THOMAS FERGUSSON, *BRITISH MILITARY INTELLIGENCE 1870–1914: THE DEVELOPMENT OF A MODERN INTELLIGENCE ORGANIZATION* 11, 13, 26–27 (1984); PETER GUDGIN, *MILITARY INTELLIGENCE: THE BRITISH STORY* 27 (1989); BERNARD PORTER, *THE ORIGINS OF THE VIGILANT STATE: THE LONDON METROPOLITAN POLICE SPECIAL BRANCH BEFORE THE FIRST WORLD WAR* (1987); HAIA SHPAYER-MAKOV, *THE ASCENT OF THE DETECTIVE: POLICE SLEUTHS IN EDWARDIAN AND VICTORIAN ENGLAND* (2011); Lindsay Clutterbuck, *Countering Irish Republican Terrorism in Britain: Its Origin as a Police Function*, 18 *TERRORISM & POL. VIOLENCE* 95 (2007).

The Criminal Law and Procedure (Ireland) Act of 1887⁹⁹ continued the trend of repressive legislation. Following long-established practice, the Act allowed the Lord-Lieutenant to declare “proclaimed areas” within which acts of agrarian violence could be tried as summary offenses. In addition, the Act allowed for the prohibition of associations, and broadened the offenses relative to which charges of incitement might be brought to include boycotts unlawful assembly, and riots.¹⁰⁰

The Act immediately sparked controversy when, after a crowd assembled to protest the conviction of two men under the Act, the RIC opened fire, killing three and wounding two, in what came to be known as the Mitchelstown Massacre. The act was also immediately used to ban the Irish National League, and to institute an aggressive campaign of press prosecutions.¹⁰¹

The years that followed were relatively peaceful so the Peace Preservation Act of 1881 was allowed to lapse in 1906.¹⁰² From the late 1900s on, tensions rose once again, as both the loyalist Ulster Volunteer Force and the nationalist Irish Volunteers successfully secured the possession of large quantities of arms, leading ultimately to the open conflict in the wake of the First World War that would lead to Ireland’s independence. This finally ended the long period in which Ireland served as the primary laboratory for the development of Britain’s repressive public order legal tools.

The new laws of the 1880s were innovative in several ways. First, the move to a criminal framing was key and represented a serious attempt to reframe the violence and disorder in order to downgrade and delegitimize resistance to British rule.¹⁰³ The Prevention of Crimes (Ireland) Act was also notable for its renewed

⁹⁹ Criminal Law and Procedure (Ireland) Act 1887, 50 & 51 Vict. c. 20 (Eng.). This Act is also known as “Balfour’s Crimes Act” and the “Jubilee Coercion Act.”

¹⁰⁰ *See id.*, at § 2.

¹⁰¹ While no prosecutions were undertaken between 1884 and 1886, fourteen took place in 1887, leading to eleven convictions. *See* Fitzgerald, *supra* note 95, at 38, 49. 1887 also saw an important decision in *Beatty v. Gillbanks* 331–14 (1882) 9 QB 308, in England, which narrowed the government’s ability to prosecute protestors. By contrast in *O’Kelly v. Harvey* 293–94 (1882) 10 ILR 265, 15 Cox CC 435 (CCA), the Irish Court of Appeal made clear that the authorities had broad discretion for suppressing protests in Ireland, including the use of violence.

¹⁰² *See* K.D. EWING & C.A. GEARTY, *THE STRUGGLE FOR CIVIL LIBERTIES: POLITICAL FREEDOM AND THE RULE OF LAW IN BRITAIN, 1914–1945* 333 (2000).

¹⁰³ In emphasizing control through criminality, authorities in Ireland were following recent developments in England. Much key penal legislation of the mid to late nineteenth century was pushed by the “Social Science Association,” a small but powerful group formed in 1857, which was closely connected to the Liberal party. Amongst other measures, the Social Science Association successfully pushed forward the 1864 Penal Servitude Act, the 1869 Habitual Criminals Act and the 1871 Prevention of Crimes Act, which collectively tightened police supervision of and power over released convicts. A new criminal department was created within the Home Office in 1870, meanwhile, which already by the 1880s was the biggest within the Home Office. *See* STEFAN

targeting of publications. Among the notable features of the Act's attack on the press were both its authorization of preventive seizures and its emphasis on intimidation. Previously, authorities would have to rely on seditious libel charges to make someone criminally liable for criticizing the government. The vague new category of "intimidation" however was easier to prove, helping to extend the Act's reach into a shadowy realm of indeterminate "supportive" activity.¹⁰⁴ Although seditious libel charges were retrospective, the new Act allowed for prospective seizures.

The Criminal Law and Procedure Act, in addition to once again carrying on something of both the martial law and peace preservation legacies, further entrenched the focus on incitement with specific reference to the promotion of assemblies. The Act also granted the authorities wide power to prohibit associations. Between them, therefore, these two acts were notable for the extent to which they completed the shift in focus from a martial law framework, to an alternative form of repressive legality focused on the suppression of expression, association and assembly. In doing so, they created a template for what, in relation to martial law-based suppression, was a comparatively sophisticated, legalistic form of state suppression of dissent.

Meanwhile, the Crime Special Branch, the forefather of all of Britain's modern intelligence agencies, represented yet another component of this modern approach. Just as the laws had developed to govern an ever-widening set of activities and to target diverse sources of unrest, so did the intelligence techniques of the Special Branch and its progeny progress in its ability to provide the modern state with yet more extensive and intrusive repressive powers.

J. Conclusion: The Evolution of Repressive Legality in Nineteenth Century Ireland

As surveyed above, nineteenth century Ireland saw one repressive law passed after another, as various components of the martial law legacy were introduced time after time in new formulas and combinations. Much of the nature of the approach being developed was clear to observers at the time. As one British observer, Cornewall Lewis, would put it: "[t]he statute-book has been loaded with the severest laws; the country has been covered with military and police; capital punishment has been unsparingly inflicted; Australia has been crowded with

PETROW, *POLICING MORALS: THE METROPOLITAN POLICE AND THE HOME OFFICE* 29, 50–51 (1994).

¹⁰⁴ See 45 & 46 Vict. c. 25 (Eng.), *supra* note 97, at §§ 7, 12.

transported convicts; and all to no purpose.”¹⁰⁵ Half a century later Isaac Butt, a progressive Irish lawyer, would similarly observe:

Our statute book is a melancholy record of arms acts! Insurrection acts! Acts for suspending the habeas corpus! For suppressing party processions! For prohibiting public meetings! As if brute force was the one expedient of Irish government and the highest object of Irish statesmanship was to crush down the spirit of the nation ...¹⁰⁶

Looking back, it is possible to gain further perspective on the legacy that was unfolding. The first thing to note is simply how extensive that legacy was. In addition to the changing shape and character of the laws being passed, much of the basic infrastructure of legality was altered as well. As we have seen, a new, more regularized—and of course, in the Irish context, armed—police force was put into place. By the century’s end, that police force had been supplemented by an intelligence service. Along with the new police, a new judicial system was also constructed, as the traditional magistrate model was gradually supplemented and replaced by a system of resident, stipendiary magistrates. While private prosecutions had been the order of the day at the start of the nineteenth century, by the century’s end they had largely been replaced by public prosecutions. Relative to all such institutions, Ireland would in fact provide not only a model for other colonies, but also for mainland Britain itself.¹⁰⁷ They developed first in Ireland, however, thanks to the unique challenges the authorities faced there in terms of governing a population that did not desire their governance.¹⁰⁸

¹⁰⁵ Townshend, *supra* note 34, at 67 (citing CORNEWALL LEWIS, LOCAL DISTURBANCES ix (1826)). As Lewis continued,

Anyone who knows the way in which Irish business that is done is transacted, will scarcely regret that so much of it is left undone. At the close of every session in the small hours of the morning a number of small bills are introduced ... and they generally pass through their stages when the grey dawn of morning is struggling of the Bude-light through the stained glass windows of the Commons Hall ... By bills passed in this manner, many of them unquestioned, powers have been clandestinely given which may have frittered away every free principle of Irish law.

Id.

¹⁰⁶ Maddox, *supra* note 60, at 250 (citing ISAAC BUTT, HOME GOVERNMENT FOR IRELAND: IRISH FEDERALISM! ITS MEANING, ITS OBJECTS, AND ITS HOPES 83–84 (1870)).

¹⁰⁷ On the development of public prosecutions over the course of the nineteenth century in Britain, see John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) (highlighting that trials with professional prosecutors and defense counsel only became the norm in the latter half of the century). The period was also notable for an increase in the prevalence and prominence of lawyers in general, and the development of a more regularized system of case reporting, which assist these new professionals in plying their trade. For more, see JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

¹⁰⁸ The introduction of Ireland’s fortified police, stipendiary magistrates and intelligence service have all been addressed above, and were all, clearly, responses to the population’s resistance to British government. Stipendiary magistrates in particular proved necessary given both the relative absence

These evolutions were complimented by dramatic evolutions in the law, motivated by British desire to quash the resistance of the Irish population. While the British were not above responding with martial or emergency law—as demonstrated on numerous occasions—they constantly strove to go further, attempting to find ways to suppress dissent by and through means of the law. The result was an increasingly thick set of laws designed to attempt to maintain and secure public order. While the legal frameworks developed may have avoided some of the worst excesses of martial law, they were in all likelihood more effective and powerful, in terms of the ultimate goal of maintaining control, as a result.

The changing nature of the laws adopted by the British may be seen clearly in the names of the measures adopted. A concern with insurrection and rebellion during the late eighteenth and early nineteenth century period gave way to an emphasis on unlawful oaths and societies, which gave way in turn to a concern with party processions and disturbances. In each step of this early evolution, the nature of the legislation adopted directly tracked the nature of the resistance faced. By the second half of the nineteenth century, however, the British were savvy. From then on, they worked harder to justify the forms of legality imposed. Thus, the idea of peace preservation was revived, and complemented with measures aimed at the protection of life, persons, and property, which were in turn supplemented and replaced with references to criminality—a reference that

a local magistrate class, and the fact that, where present, such individuals were often intimidated by the potential aggression they might face should they pursue their roles vigorously. Similarly, public prosecution developed in Ireland due to the unwillingness of the Irish to initiate prosecutions. As one former RIC officer would put it in 1881:

Not one in five hundred of the community, be he gentleman or peasant, looks upon the commission of crime as a matter affecting anybody but the government. It is entirely a matter for the police, and neither the desire for security nor the temptation of a large reward will induce any person to offer assistance.

Richard Hawkins, *The 'Irish Model' and the Empire: A Case for Reassessment*, in *POLICING THE EMPIRE: GOVERNMENT, AUTHORITY AND CONTROL, 1830–1940* 26 (David Anderson & David Killingray eds., 1991) (quoting Henry A. Blake, *The Irish Police*, in 9 *NINETEENTH CENTURY* 392 (James Knowles ed., 1881)). For more, see Ian Bridgeman, *The Constabulary and the Criminal Justice System in Nineteenth-Century Ireland*, in *CRIMINAL JUSTICE HISTORY: THEMES AND CONTROVERSIES FROM PRE-INDEPENDENCE IRELAND* (Ian O'Donnell & Finbarr McAuley eds., 2003); Niamh Howlin, *Nineteenth Century Criminal Justice: Uniquely Irish or Simply Not English?*, 3 *IRISH J. LEGAL STUD.* 67 (2013); John H. Langbein, *The Origins of Public Prosecution and Common Law*, 17 *AM. J. LEGAL HIST.* 313 (1973); R.B. McDowell, *The Irish Courts of Law, 1801–1914*, 10 *IRISH HIST. STUD.* 363 (1957); John McEldowney, *Crown Prosecutions in Nineteenth-Century Ireland*, in *POLICING AND PROSECUTION IN BRITAIN, 1750–1850* (Douglas Hay & Francis Snyder eds., 1989). Interestingly, the rise of public prosecutions occurred more or less at the same time in America as in Ireland, where it was also linked to the development of a modern police force, and to the general extension of state power and control. See Yue Ma, *Exploring the Origins of Public Prosecution*, 18 *INT'L CRIM. JUST. REV.* 190, 203 (2008).

suggested both the absolute illegitimacy of resistance, and that the authorities ultimately had the situation under control.

The manner in which the authorities went about their suppressive task gradually evolved as well. While the authorities continued to utilize more direct tools of suppression when called upon to do so—through the deployment of martial law courts, other special tribunals, curfews, extended powers of search and detention, and other restrictive measures—as time went on, the British also introduced a variety of more regularized and subtler forms of control. Most centrally, these measures aimed to control and limit expression, association, and assembly, not only *ex post* but also, where possible, *ex ante*. With time, the British developed legal frameworks governing, limiting and controlling speech, the press, assemblies, and associations in advance of their expression or formation, thereby averting potential crises, the need to deploy more draconian responses, and the potential backlash such confrontations might cause. Fundamental here was the attempt to extend liability outward from direct participants to those who could be claimed in one way or another to have encouraged unrest, a development encapsulated in the concept of incitement, under which the shadow of the law could be advanced into an ever-wider terrain.

Legal evolutions in Ireland over the course of the nineteenth century hence represented a very particular confluence of forces. While the institution of martial law always remained a possibility on the horizon, it was, in general, directly employed less and less. This did not represent an out-and-out rejection of martial law however. Rather, the legal framework in colonial Ireland evolved gradually from the martial law frame. In early phases, this typically involved either the more localized application of martial law, or the application of certain component features of martial law in a piecemeal manner. In later phases, it turned to the suppression of expression, the press, assembly, and association we have seen, combined with the evolution of a variety of institutions, including a quasi-military police service, a special judiciary, public prosecutors, and, eventually, a new intelligence service.

While the harshest abuses of martial law were avoided, the frame that replaced them employed a mode of repression that was all the more effective because it was advanced through relatively detailed and sophisticated laws, backed up by the development of supportive institutions. The fear that contemporary legal scholars have articulated that current modes of exceptional legality may bleed back in and infect the contemporary frame of legality, therefore, appears in the light of this history to imagine too sharp a dichotomy between normal and exceptional frames of law. In reality, the history of nineteenth century Ireland reveals that the development of the ‘rule of law’ did not so much involve a sharp break with martial law as a gradual recasting and reshaping of it in which many of its underlying aims and functionalities were preserved.

As long as such evolutions in the law were linked to Ireland alone, the model being developed remained limited, not least due to the fact that its historical trajectory and its origins in overt repression were still too clear. In order to become more accepted, and ultimately normalized, such a legal form would first have to be widely deployed. The British Empire provided fertile terrain for the necessary dissemination, and thereby the wider normalization, of such a model. While legal emulation, dissemination, and migration have always occurred, the late nineteenth century, known as a highpoint of globalization generally, was no less so in the province of law. As the following pages detail, this was true with regard to the legal model in question, which was exported to much of the rest of the empire during the turn of the century.

III. GLOBAL DISSEMINATION

In the British Empire as elsewhere, the turn of the nineteenth to the twentieth century ushered in dramatic changes. The late nineteenth and early twentieth centuries were a period of unprecedented globalization of trade, investment, and migration,¹⁰⁹ enabled by and leading to expansions in information, communications, and transportation technology.¹¹⁰ It was a period in which European standards and metrics were globally disseminated, and perceptions of space and time were reordered.¹¹¹ While international

¹⁰⁹ See generally Adam McKeown, *Global Migration, 1846–1940*, 15 J. WORLD HIST. 155 (2004); Michael Lang, *Globalization and Its History*, 78 J. MODERN HIST. 899 (2006); COMPETING VISIONS OF WORLD ORDER: GLOBAL MOMENTS AND MOVEMENTS, 1880S–1930S (Sebastian Conrad & Dominic Sachsenmaier eds., 2007); A WORLD CONNECTING, 1870–1945 (Emily Rosenberg ed., 2012); JURGEN OSTERHAMMEL, *THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY* (2014). The large-scale international migration characteristic of the period also led to the development of several modern technologies to manage such flows, including the passport and the fingerprint. For more, see Aristide Zolberg, *Global Movements, Global Walls: Responses to Migration, 1885–1925*, in GLOBAL HISTORY AND MIGRATIONS (Gungwu Wang ed., 1997); JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* (2000); JANE CAPLAN & JOHN TORPEY, *DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD* (2001).

¹¹⁰ See generally G.E.C. WEDLAKE, *S.O.S.: THE STORY OF RADIO COMMUNICATION* (1973); DANIEL HEADRICK, *THE TENTACLES OF PROGRESS: TECHNOLOGY TRANSFER IN THE AGE OF IMPERIALISM, 1850–1940* (1988); DANIEL HEADRICK, *THE TENTACLES OF PROGRESS: TECHNOLOGY TRANSFER IN THE AGE OF IMPERIALISM, 1850–1940* (1988); TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH-CENTURY ON-LINE PIONEERS* (1998); PETER HUGILL, *GLOBAL COMMUNICATIONS SINCE 1844: GEOPOLITICS AND TECHNOLOGY* (1999); ARMAND MATTELART, *NETWORKING THE WORLD, 1794–2000* (Liz Carey-Libracht & James Cohen trans., 2000).

¹¹¹ See generally STEPHEN KERN, *THE CULTURE OF TIME AND SPACE, 1880–1918* (1983); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1989); VANESSA OGLE, *THE GLOBAL TRANSFORMATION OF TIME: 1870–1950* (2015).

nongovernmental organizations and cultural movements did not originate in the period, they expanded rapidly in the new, more globalized environment.¹¹²

It was also a period of substantial unrest. A global depression, sparked by a financial collapse in Vienna, began in 1873.¹¹³ The global depression continued until 1879, while in Britain, the ‘long depression’ lasted until the late 1890s.¹¹⁴ Despite the depression, industrialization continued apace, while the population of both Britain and its colonies, and that of the empire’s cities in particular, continued to grow. Amongst the results was a dramatic growth in labor unrest across the British colonial world.

Despite or perhaps because of these economic challenges, Britain expanded its empire during the turn of the nineteenth to the twentieth century. That expansion was met in turn by increasing levels of resistance. The period saw the formation of new anti-colonial organizations, organized not only within the colonies but also in the metropole itself: the Indian National Congress, founded in 1885, was complimented by a British Committee in 1889,¹¹⁵ while the first Pan-African Conference took place in London in 1900.¹¹⁶ Across the imperial world, British rule was increasingly met with resistance of every sort, from peaceful protests and lawsuits, to strikes and demonstrations, to violent confrontation.

In the face of this heightened resistance, the British turned, naturally, to the tools they had been developing in Ireland over the course of the previous century. The Sections below explore the manner in which similar approaches were

¹¹² See, for example, FRANCIS LYONS, *INTERNATIONALISM IN EUROPE, 1815-1914* (1963); MICHELINE ISHAY, *INTERNATIONALISM AND ITS BETRAYAL* (1995); AKIRA IRIYE, *CULTURAL INTERNATIONALISM AND WORLD ORDER* (1997); *THE MECHANICS OF INTERNATIONALISM: CULTURE, SOCIETY, AND POLITICS FROM THE 1840S TO THE FIRST WORLD WAR* (Martin Geyer & Johannes Paulmann eds., 2001).

¹¹³ For more, see HANNAH CATHERINE DAVIES, *TRANSATLANTIC SPECULATIONS: GLOBALIZATION AND THE PANICS OF 1873* (2018).

¹¹⁴ See A.E. Musson, *The Great Depression in Britain, 1873-1896: A Reappraisal*, 19 J. ECON. HIST. 199 (1959). As Musson points out, the “depression” did not involve a decrease in production so much as a decline in prices; that said, it was certainly perceived as serious by many at the time, and was for many decades known as the “great depression,” before that label was reappropriated for the economic crisis of the 1930s.

¹¹⁵ On the early history of the Indian National Congress, see S.R. MEHROTRA, *THE EMERGENCE OF THE INDIAN NATIONAL CONGRESS* (1971); *NATIONALIST MOVEMENT IN INDIA: A READER* (Sekhar Bandyopadhyay ed., 2009); MITHI MUKHERJEE, *INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY, 1774–1950* (2010); AMALES TRIPATHI & AMITAVA TRIPATHI, *INDIAN NATIONAL CONGRESS AND THE STRUGGLE FOR FREEDOM: 1885-1947* (2014).

¹¹⁶ For more on the first Conference and the Pan-African Movement generally, see W.E.B. DU BOIS, *W.E.B. DU BOIS: A READER* 639 (David Levering Lewis ed., 1995); MARIKA SHERWOOD, *ORIGINS OF PAN-AFRICANISM: HENRY SYLVESTER WILLIAMS, AFRICA, AND THE AFRICAN DIASPORA* (2011); ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* (2019).

deployed in three colonies in particular: India, South Africa, and Nigeria. While these three colonies have been chosen as examples, they were not alone in receiving such laws—rather, similar trends could have been detected operating more or less universally across the empire.

A. India

India had a long history under East India Company rule even prior to the state's assumption of official control, and with it, its own history of the entrenchment of emergency legislation as well. The 1818 Bengal State Prisoners Regulation, which allowed for detention without trial in cases in which “the security of British dominion from foreign hostility and internal commotion” was at stake, was one particularly important precedent.¹¹⁷ With the 1857 revolt, a host of new legislative measures were passed that further advanced emergency governance, including the 1857 State Offences Act,¹¹⁸ which allowed local officials to proclaim states of rebellion; the 1857 Military and State Offences Act¹¹⁹ and Heinous Offences Act,¹²⁰ which allowed for trials by court martial; and the 1858 State Prisoners Act,¹²¹ which generalized the 1818 Bengali State Prisoners Regulation.¹²² Such measures represented the Indian analogue to the more direct encapsulations of emergency governance through law seen previously in Ireland in the turn of the eighteenth to the nineteenth century.

Following the establishment of crown rule in 1858, the strength of the British government in India gradually grew. Nationalist sentiment grew over the same period as well however. The British Indian Association, which had been founded in 1851, split into two factions in 1871, over the question of whether to push for Indian political representation immediately, or to adopt a more gradualist approach. In 1876 Surendranath Banerjee and Ananda Mohan Bose established the more overtly nationalist Indian National Association, which would soon be merged into the Indian National Congress, which had its first session at the end

¹¹⁷ Bengal Regulation III of 1818: A Regulation for the Confinement of State Prisoners 1818, 1 Burma Code 209, Art. 1. For more, see A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629, 637–9 (1996); REYNOLDS, *supra* note 19, at 84.

¹¹⁸ Act XI of 1857.

¹¹⁹ Act XIV of 1857.

¹²⁰ Act XVI of 1857.

¹²¹ Act III of 1858.

¹²² For more, see REYNOLDS, *supra* note 19, at 85–6.

of 1885 in Bombay, generally uniting India's nationalists in a single, powerful nationalist organization.¹²³

1. Controlling Communications

As nationalist sentiment grew, so did criticism of the government. Britain's launching of the Second Afghan War in 1878 sparked particular criticism. In response to that criticism, the British promulgated the Vernacular Press Act.¹²⁴ The act targeted newspapers written in "Oriental languages," which were required to submit their content to the police prior to publication. In addition, the act provided for censorship of objectionable articles, and allowed for editors to be jailed should they publish seditious materials. To cap such measures off, the act immunized itself from challenge in court. The act was, however, met with ongoing widespread protest, which led to its withdrawal in 1881.

In 1879 Banerjee founded the English language newspaper *The Bengali*, which became a major forum for Indian nationalist voices and the expression of dissent. After his publication of a particularly contentious article in the paper in 1883, Banerjee was arrested, once again sparking widespread protests. In response, the British developed a new suppressive press law, the Indian Telegraph Act, promulgated in 1885,¹²⁵ which prohibited obscene or subversive writings. The provisions of the act would be reiterated and entrenched by the Post Office Act in 1898.¹²⁶

A series of communal clashes in 1893 were seen as a serious concern by the British authorities, who dispatched armed police and soldiers to disperse them. Several were killed in the course of the resulting suppression. The response marked a shift on the part of the authorities towards a greater willingness to utilize strong and often lethal force as a means of crowd control.¹²⁷ Following the unrest, the number of police in Bombay nearly doubled, while the number of mounted police tripled. In 1894, the government of India issued an order prohibiting the use of blank ammunition, on a theory—advanced by the report put together in

¹²³ See generally JOGESH CHANDRA BAGAL, *HISTORY OF THE INDIAN ASSOCIATION, 1876-1951* (1953); NITISH K. SENGUPTA, *HISTORY OF THE BENGALI-SPEAKING PEOPLE* (2001).

¹²⁴ Act IX of 1878. For a contemporary account, see generally John Dacosta, *Remarks on the Vernacular Press Law of India, or Act IX of 1878*, in BRISTOL SELECTED PAMPHLETS (1878). For further commentary on the context in which the act was passed, see Uma Das Gupta, *The Indian Press 1870-1880: A Small World of Journalism*, 11 MOD. ASIAN STUD. 213, 222 (1977).

¹²⁵ Act XIII of 1885.

¹²⁶ Act VI of 1898.

¹²⁷ For more, see Prashant Kidambi, *'The ultimate masters of the city': police, public order and the poor in colonial Bombay, c. 1893–1914*, 8 CRIME, HIST. & SOCIETIES 27, 30 (2004); Mark Doyle, *Massacre by the Book: Amritsar and the Rules of Public-Order Policing in Britain and India*, 4 BRITAIN & THE WORLD 247, 255 (2011).

the wake of the contemporaneous Featherstone clashes in England—that the swift deployment of lethal force would suppress a riot more quickly, and hence would lead to fewer casualties when all was said and done.¹²⁸

While the perverse legal guidance of the Featherstone report applied to both the metropole and the colonies, the real determinant of the amount of force the authorities would feel free to use was political. Thus, in Britain, the authorities used lethal force less and less over the course of the nineteenth century out of fear of the public response. In India, however, the security forces did not have to pay the same heed to popular sentiment.¹²⁹ For instance, the authorities were quick to use live ammunition to suppress labor unrest in Calcutta, leading to eleven strikers being killed in one incident in 1897.¹³⁰

The increasing use of force in the cities had a more brutal analogue in disputed areas of the countryside as well. Following uprisings in what would soon thereafter be the Northwest Frontier Province in 1897 and 1898, the British organized a force of some 35,000 British and Indian soldiers, which set out on the Tirah Expedition. Local forces refused to engage the British soldiers directly, resorting instead to guerilla tactics. The British responded by razing villages to the ground, a policy of collective punishment they continued to employ until the rebels came to the bargaining table.¹³¹

As the above indicates, the British faced numerous different challenges in India as the nineteenth century came to a close, which they responded to with modulated approaches. In the more restive border regions, the British deployed a more direct, military approach, in which collective punishment was the norm. In the cities, such as Bombay and Calcutta, communal tensions and labor unrest were met with live fire.

¹²⁸ For more on Featherstone and its legacy, see Robert Neville, *The Yorkshire Miners and the 1893 Lockout: The Featherstone "Massacre,"* 21 INT'L REV. SOC. HIST. 337 (1976); V.A.C. Gatrell, *Crime, Authority and the Policeman-State*, in 3 THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN 1750-1950, 267 (F.M.L. Thompson ed., 1990); VOGLER, *supra* note 42, at 69–71. For the report of the Featherstone Committee, see HOUSE OF COMMONS, Report of the committee appointed to inquire into the circumstances connected with the disturbances at Featherstone on the 7th of September 1893, 1893–94, HC XVII, 396.

¹²⁹ See MARK DOYLE, COMMUNAL VIOLENCE IN THE BRITISH EMPIRE: DISTURBING THE PAX 140–1 (2016).

¹³⁰ For more, see Subho Basu, *Strikes and 'Communal' Riots in Calcutta in the 1890s: Industrial Workers, Bhadrakol Nationalist Leadership and the Colonial State*, 32 MOD. ASIAN STUD. 949, 954 (1998).

¹³¹ The deployment of collective punishment strategies was in fact already a well-established tool of the British response to restive populations; when not razing villages, they might deploy collective fines, blockades aimed at civilian starvation, or a military tactic known as 'butcher and bolt', a policy of committing lightning-strike massacres, then retreating before the enemy could respond. For more, see LALEH KHALILI, TIME IN THE SHADOWS: CONFINEMENT IN COUNTERINSURGENCIES 20 (2013).

Above and beyond such more direct approaches, the British attempted to find other, less brutal, more subtle, and hence more effective ways to enhance their control. Central here were the measures they took to expand their control over the press. While the Vernacular Press Act was effectively resisted, the relatively innocuously named Telegraph Act¹³² and Post Office Act¹³³ more effectively allowed the authorities to extend the reach of their suppressive powers. While the acts were primarily concerned with targeting subversive content, by targeting obscenity as well they cloaked these more overtly suppressive functions in a veil of morality, while furthering their primary purpose by implicitly suggesting the immorality of subversive content.

2. Preserving Order

The situation in India was tense during Lord Curzon's time as Viceroy, from 1899 to 1905, as his inflexible approach met sharp resistance from the Indian National Congress.¹³⁴ In response, much legislation of the period aimed to limit assemblies. Bombay's 1902 Police Act was particularly sophisticated.¹³⁵ The legislation required those planning assemblies to obtain prior permission, while allowing the police commissioner to prohibit them where he deemed such prohibition "necessary for the preservation of the public peace or public safety."¹³⁶ In addition, the act gave the authorities the power to "direct the conduct ... and behavior" of processions and assemblies, including by determining where they might, and might not, take place.¹³⁷ Recalling Ireland's Party Processions Act, the act gave the authorities the power to prohibit and penalize "the delivery of harangues, the use of gestures or mimetic representations, and the preparation, exhibition or dissemination of pictures, symbols, placards, or of any other object or thing" likely to "inflame religious animosity or hostility between different

¹³² Act XIII of 1885.

¹³³ Act VI of 1898.

¹³⁴ For more, see DAVID DILKS, 1–2 CURZON IN INDIA (1970); DAVID GILMOUR, CURZON: IMPERIAL STATESMAN (1994).

¹³⁵ The City of Bombay Police Act, Bombay Act IV of 1902 [hereinafter City of Bombay Police Act]. As Kidambi has put it,

Latent anxieties about the reliability of their local networks in the neighborhood, as well as the perception that a rapidly burgeoning city like Bombay had 'special' requirements, prompted colonial authorities to cast about for other means of securing public order. In a context in which the influence of the traditional neighborhood leaders was perceived to have been eroded and the newly emerging informal networks of patronage based on the street were not considered entirely reliable, colonial authorities sought to fortify themselves with new, more authoritarian methods of control 'from above'.

Kidambi, *supra* note 127, at 37.

¹³⁶ City of Bombay Police Act, at § 23(2).

¹³⁷ *Id.* at § 23.

classes, or incite to a commission of an offence, to a disturbance of the public peace or to resistance to or contempt of the law.”¹³⁸ Finally, as a catchall, the act gave the police the general authority to “keep order on and in all streets, quays, wharves, landing-places and all other public places or places of public resort.”¹³⁹

On October 16, 1905, the government put into effect a plan to partition Bengal into two states. In response, Banerjee, who had been elected president of the Indian National Congress in 1902, organized an extensive campaign of petitions and protests. For his efforts, Banerjee was imprisoned in 1906.¹⁴⁰ In response both to the protests themselves and the wider rise in nationalist sentiment and organizational strength they demonstrated, the British implemented a range of more assertively repressive measures. In 1907, the government of India prohibited entry of the *Indian Sociologist* as well as other “revolutionary” materials published abroad.¹⁴¹ The government also issued emergency ordinances in Punjab, East Bengal, and Assam, allowing for the prohibition of public meetings and strict controls on the publication of materials deemed seditious.¹⁴²

These measures were complemented by passage of what was known in brief as the 1907 Prevention of Seditious Meetings Act, and in full as “[a]n act to make better provision for the prevention of public meetings likely to promote sedition or to cause a disturbance of public tranquility.”¹⁴³ The act was to apply as and

¹³⁸ *Id.* at § 23(2).

¹³⁹ *See id.* at § 23. The law also gave the authorities a variety of more everyday powers, including to control public noise levels, to deport beggars and paupers from the city or to jail them, and to penalize obstruction of the streets, public nuisance, gambling, loitering, drunk and disorderly behavior, and commercial ventures without a license, all of which were soon put into effect. Meanwhile, the police continued to use live fire to suppress assemblies, not only in Bombay but throughout India, including in Bengal, Madras, the Punjab, and the United Provinces. For more, see Doyle, *supra* note 127, at 261–2 (2011).

¹⁴⁰ For more, see DANIEL BRÜCKENHAUS, *POLICING TRANSNATIONAL PROTEST: LIBERAL IMPERIALISM AND THE SURVEILLANCE OF ANTI-IMPERIALISTS IN EUROPE, 1905–1945*, 17–18 (2017). Ultimately the protests were successful, forcing the reversal of the partition decision in 1911.

¹⁴¹ Such as those materials which Bhikaiji Rustom Cama, a revolutionary nationalist writer and publisher living in Europe, attempted to send, as well as a book written by Vinayak Damodar Savarkar, another Indian revolutionary, on the 1857 uprising. *See* DHANANJAY KEER, *VEER SAVARKAR* (1966); TILAK RAJ SAREEN, *INDIAN REVOLUTIONARY MOVEMENT ABROAD 1905–1921* (1979); B.D. YADAV, *MADAME CAMA: A TRUE NATIONALIST* (1992); BRÜCKENHAUS, *supra* note 140, at 15–6. Upon returning to Britain from France in 1910, Savarkar was arrested and charged with giving antigovernment and seditious speeches, forming secret societies, and procuring weapons for shipment to India. He was sent back to India to face trial, and in 1911 sentenced to fifty years’ detention at the Cellular Jail in the Andaman and Nicobar Islands. He was finally released, after submitting a series of mercy pleas, in 1924. *See* BRÜCKENHAUS, *supra* note 140, at 30.

¹⁴² *See* JOHN RIDDICK, *THE HISTORY OF BRITISH INDIA: A CHRONOLOGY* 92 (2006).

¹⁴³ Act VI of 1907. In 1911, a new Prevention of Seditious Meetings Act (Act X of 1911) was passed, essentially recapitulating and entrenching the provisions of the 1907 act.

when the local government “proclaimed” a region. Where a region was proclaimed, written notice was required to hold a public meeting,¹⁴⁴ and the magistrates and police commissioners were given the power to prohibit such meetings where they deemed them “likely to promote sedition or disaffection or to cause a disturbance of the public tranquility.”¹⁴⁵ In addition, the law penalized those delivering “any lecture, address or speech on any subject likely to cause disturbance or public excitement or on any political subject” in public in a proclaimed area.¹⁴⁶

The measures of the early to mid-1900s once again demonstrated how, within India, a range of measures were adopted depending on the particulars of the situation faced. In the more restive Punjab, East Bengal, and Assam, emergency ordinances were passed to govern the situation. In Bombay, on the other hand, the challenge of protests was met by new legislation, which granted the authorities a more formalized, regularized power with which to challenge protesters and stamp out dissent.¹⁴⁷ The Prevention of Seditious Meetings Act, like much Irish legislation before it, split the difference, utilizing the time-tested proclaimed district approach, but this time primarily as authorization to limit the power of assemblies as such.

3. Controlling the Press

Having developed their tools for the suppression of assemblies, colonial authorities turned their attention back to the press. The 1908 Newspaper (Incitement to Offences) Act¹⁴⁸ stipulated that newspapers would forfeit their printing presses, where a magistrate deemed that they had printed a provision containing an incitement to violence. The Newspaper (Incitement to Offences) Act was immediately put to use to charge several papers and editors.¹⁴⁹

1908 also saw passage of the Criminal Law Amendment Act,¹⁵⁰ which had two major effects. First, it gave the government the power to ban associations that it understood to be engaging in seditious activities. In addition, it allowed crimes

¹⁴⁴ In addition to meetings in public, all meetings with more than twenty persons were deemed ‘public’, even when held in private spaces.

¹⁴⁵ Act VI of 1907, at § 5.

¹⁴⁶ Act VI of 1907, at § 7.

¹⁴⁷ For more on protests in Bombay in this period and the manner in which the authorities responded, see Kidambi, *supra* note 127, at 41–2; Doyle, *supra* note 127, at 261–2.

¹⁴⁸ Act VII of 1908.

¹⁴⁹ See, for example, *Girija Sundar Chakravarti v. Emperor*, 2 Ind. Cas. 2851908; *In Re: Dhondo Kashinath Phadke*, (1910) 12 BOMLR 120 (1909) (India).

¹⁵⁰ Officially “An Act to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace,” Act XIV of 1908. The original act was the Code of Criminal Procedure, Act V of 1898.

of nationalist violence to be tried before special, three-judge tribunals, to enable the authorities to more easily obtain convictions in such cases.

In 1909, Madal Lal Dhingra killed William Hutt Curzon Wylie, the aide-de-camp to the Secretary of State for India, in London. Amongst the effects of the murder was an increase in the surveillance of Indians in Britain, including through the formation of a new section of Special Branch, which eventually became the Indian Political Intelligence Service, supervised by John Wallinger.¹⁵¹ The previous prohibition of the importation of “dangerous publications” was replaced by a generalized ban, enforced by giving the Post Office wide discretionary powers to censor the transmission of telegrams and messages. The same year, Guy Aldred, the (British) printer of the *Indian Sociologist*, was put on trial for sedition.¹⁵²

In 1910, the India Press Act was passed.¹⁵³ The act required newspapers to submit securities to local governments, which could be confiscated, together with the papers themselves, if those papers were deemed to have published any of a range of statements. In particular, penalizable content included:

any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise –

- (a) to incite to murder . . . or any act of violence, or
- (b) to seduce any officer, soldier or sailor . . . from his allegiance or his duty, or
- (c) to bring into hatred or contempt His Majesty or Government . . . or
- (d) to put any person into fear or to cause annoyance to him and thereby to induce him to deliver to any person any property or valuable security, or to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, or
- (e) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or
- (f) to convey any threat of injury to a public servant, or to any person in whom that public servant is believed to be interested, with a view to inducing the public servant to do any act or to forbear or delay to do any act connected with the exercise of his public functions . . .¹⁵⁴

¹⁵¹ The enhanced response in Britain led Indian revolutionaries to move their European operations from Britain to other countries on the continent. In response, the Indian Political Intelligence Service broadened its operations as well. For more, see RICHARD POPPLEWELL, *INTELLIGENCE AND IMPERIAL DEFENCE: BRITISH INTELLIGENCE AND THE DEFENCE OF THE INDIAN EMPIRE, 1904–1924*, 135–41 (1995); BRÜCKENHAUS, *supra* note 140, at 21.

¹⁵² See GUY ALFRED ALDRED, *REX V. ALDRED*, LONDON TRIAL, 1909, INDIAN SEDITION; GLASGOW SEDITION TRIAL, 1921 (1948).

¹⁵³ Act I of 1910.

¹⁵⁴ *Id.* at § 4.

In short, a paper would have to be very careful if it hoped not to potentially infringe the broad and open-ended list of prohibited statements included in the act. In addition, the act gave the authorities broad powers to search and seize property where it was found that particular papers had published statements in violation of the law, as well as for increased controls over the mail.¹⁵⁵ In practice, the act led to the immediate shutdown of numerous papers, due to the papers' inability to provide the securities required for their existence. Many more were banned.¹⁵⁶

In the new, more globalized context of the twentieth century, British efforts to suppress Indian resistance, like that resistance itself, became increasingly transnational. In part thanks to the new complexity of the situation, in part simply in response to the growing strength of the resistance movement, a new intelligence service focused on India was created in the period, while the Post Office Act was used to suppress communications. Most fundamentally, however, the British in the 1900s and 1910s focused on the suppression of the press. The 1910 Press Act went even further than measures taken in Ireland in terms of extending the shadow of the law. Through the devilishly effective combination of the requirement that securities be paid, and by utilization of such broad and vague language to target expression that, in the end, few journalists or publishers could be sure of where they stood.

4. Conclusion: Attempting to Prevent the Assembling of a National Consciousness

British India was a massive and diverse territory. British approaches to governance hence naturally varied depending upon the nature of the local resistances and challenges faced. Outside those border regions where military confrontation, collective punishment and emergency ordinance were the norm, however, British governance in late nineteenth and early twentieth century India was taking a by-now familiar form. Over the course of the turn of the century, the British relied primarily, within the cities and in relation to the increasingly organized and capable nationalist movement, on three types of repression: suppression of expression, and of the rapidly growing press in particular; censorship, especially of transnational communications; and suppression of assemblies. Particularly impressive in this context were Bombay's Preservation of Order Act, with its granting of a comprehensive web of regulatory powers, and the India Press Act, with its suppression of papers by means of the combination of broad and vague prohibitions and financial penalties.

¹⁵⁵ See *id.* at §§ 7, 13-15.

¹⁵⁶ For more, see V. Venkat Raman, *The Indian Press Act of 1910: The Press and Public Opinion at Crossroads in the Madras Presidency 1910-1922*, 60 PROC. OF THE INDIAN HIST. CONG. 863, 865-6 (1999).

In many of these measures, the Irish influence could be directly felt. In the late 1800s and again with the 1908 Newspaper and 1910 Press Acts, a key focus in India was on control of the press—an emphasis already developed by Ireland’s 1870 Peace Preservation Act. Bombay’s Police Act, meanwhile, directly recalled Ireland’s Party Processions Act, while the Seditious Meetings Act, with its deployment of the potential of proclaiming unsettled areas, clearly drew from the peace preservation tradition. More broadly, the approach in India emulated that in Ireland both in its reliance on increasingly formalized and sophisticated approaches, and in its tendency to layer one repressive approach on top of another. Hence, in India as in Ireland, the evolution of the rule of law, and top-down government repression, were developments that went hand in hand.

B. South Africa

As of the 1870s, European-colonized South Africa comprised four major areas: the Cape of Good Hope and Natal, both British colonies, and the Orange Free State and the Republic of Transvaal, under the control of the Boers. De facto unification would come with the Boer War of 1899–1902, followed by official unification of the whole territory as the Union of South Africa in 1910.

The Boer War was a major event, with numerous local, imperial, and global ramifications.¹⁵⁷ While the concentration camp was not invented in South Africa,¹⁵⁸ the use of such camps in South Africa constituted an important step in the early dissemination and normalization of the camp model as a part of modern

¹⁵⁷ For more on tensions within the British government during the war, see KEITH SURRIDGE, *MANAGING THE SOUTH AFRICAN WAR, 1899–1902: POLITICIANS VERSUS GENERALS* (1998). For more on the significance of the war relative to political debates in Britain, see BERNARD SEMMEL, *IMPERIALISM AND SOCIAL REFORM: ENGLISH SOCIAL-IMPERIAL THOUGHT 1895–1914* (1968), especially Chapter III. For more on the war’s effects relative to the reform of the British military, see VOGLER, *supra* note 42, at 88). For more on the war’s generation of various efforts in Britain “to mould an ‘imperial race’”, see DANE KENNEDY, *BRITAIN AND EMPIRE, 1880–1945*, 30 (2002).

¹⁵⁸ They had been previously deployed in 1896 by the Spanish government in Cuba, leading to some 100,000 deaths, immediately after which they were deployed by the U.S. in the Philippines. For more on the latter, see BRIAN LINN, *THE UNITED STATES ARMY AND THE COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899–1902* (1989); GLENN MAY, *BATTLE FOR BATANGAS: A PHILIPPINE PROVINCE AT WAR* (1991).

warfare in general, and anti-guerilla warfare in particular.¹⁵⁹ Some 50,000 persons, mostly children, are estimated to have starved to death in South Africa's camps.¹⁶⁰

In addition, the Boer war served to introduce a new system of policing into South Africa. Following initial successes in the war, the British appointed 'military governors' over the newly conquered territories, supported by new police forces. Initial victories did not mark the end of the conflict so much as the beginning of its guerilla phase. In the first period of its existence, the newly created South African Constabulary played a military role, fighting back against the guerilla tactics adopted by Boer insurgents. When the fighting ended, it was perhaps too late to remodel the South African Constabulary along more civilian lines, and their semi-military character became entrenched.¹⁶¹ In fact, the authorities had little

¹⁵⁹ In 1904, similar camps were deployed by the German colonial regime in Southwest Africa, in which the camp inhabitants were even more actively exterminated by a combination of malnutrition and forced labor, as well as being subjected to race theory-motivated medical experimentation (by two 'doctors' who would later teach Joseph Mengele, amongst others). For more, see George Steinmetz, *The First Genocide of the 20th Century and Its Postcolonial Afterlives: Germany and the Namibian Ovaherero*, 12 J. INT'L INST. (2005); GEORGE STEINMETZ, *THE DEVIL'S HANDWRITING: PRECOLONIALITY AND THE GERMAN COLONIAL STATE IN QINGDAO, SAMOA, AND SOUTHWEST AFRICA* (2007); JURGEN ZIMMERER & JOACHIM ZELLER, *GENOCIDE IN SOUTH-WEST AFRICA: THE COLONIAL WAR OF 1904–1908 AND ITS AFTERMATH* (2008). For more on the history of concentration camps and genocide generally, see *ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871–1914* (Manfred Boemeke, et al., eds., 1999); JOEL KOTEK & PIERRE RIGOULOT, *LE SIECLE DES CAMPS: DETENTION, CONCENTRATION, EXTERMINATION: CENT ANS DE MAL RADICAL* (2000); BENJAMIN VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY* (2004); Klaus Muhlhahn, *The Concentration Camp in Global Historical Perspective*, 8 HIST. COMPASS 543 (2010); ANDREA PITZER, *ONE LONG NIGHT: A GLOBAL HISTORY OF CONCENTRATION CAMPS* (2017).

¹⁶⁰ For more, see EMILY HOBHOUSE, *THE BRUNT OF WAR AND WHERE IT FELL* (1902); S.B. SPIES, *METHODS OF BARBARISM? ROBERTS AND KITCHENER AND CIVILIANS IN THE BOER REPUBLICS, JANUARY 1900–MAY 1902* (1977); GREGORY FREMONT-BARNES, *THE BOER WAR 1899–1902* (2003); BIRGIT SUSANNE SEIBOLD, *EMILY HOBHOUSE AND THE REPORTS ON THE CONCENTRATION CAMPS DURING THE BOER WAR, 1899–1902* (2011); ELIZABETH VAN HEYNINGEN, *THE CONCENTRATION CAMPS OF THE ANGLO-BOER WAR: A SOCIAL HISTORY* (2013).

¹⁶¹ For more, see Albert Grundlingh, *'Protectors and friends of the people'? The South African Constabulary in the Transvaal and Orange River Colony, 1900–08*, in *POLICING THE EMPIRE: GOVERNMENT, AUTHORITY AND CONTROL, 1830–1940* 168–71 (David Anderson & David Killingray eds., 1991). The intention after the conflict was that the Constabulary would

[i]n true imperialist fashion be the standard-bearer of a new and better order, entrusted—as Kitchener interpreted it—with 'the great and noble task of embodying in the eyes of the burghers of the Transvaal and the O.R.C. the character and behavior of their British fellow-subjects, of whom they must be for some time the most conspicuous components'.

As Grundlingh concludes, however, "[v]ery little, if any, of this vision was ever successfully implemented." *Id.* at 170.

desire to reform the police, as a militarized constabulary was seen as best able to guard against the twin fears of black and/or Afrikaner rebellion.¹⁶²

1. Preserving the Peace

For present purposes, the greatest significance of the war was the legal order instituted in its wake. As Chanock has observed,

In the period from the 1890s onwards, the instability of the South African Republic, the war, the subsequent fragility of the new Union and the continued industrial strife all contributed to a vigorous development of the common law relating to offences against the state, and, especially as African opposition grew, to the development of statute law aimed at controlling and criminalising political opposition.¹⁶³

Key in this context was the Indemnity and Peace Preservation Act, promulgated in the Transvaal in 1902.¹⁶⁴ The ordinance replaced the martial law that had been applicable during the Boer War with a legalized frame not dissimilar to the martial law it was replacing; as the law put it, while it was “desirable to withdraw Martial Law,” it was also “desirable in view of the withdrawal of Martial Law to make special provision for the maintenance of good order and government and the public safety of this Colony.”¹⁶⁵ In the first place, the ordinance immunized from liability those officials who had committed questionable acts “in good faith” during the war, and confirmed those sentences that had been issued by court martials. The ordinance also took several more prospective measures. Persons suspected of seditious words or acts could be arrested without warrant. Buildings suspected to contain seditious or treasonable documents could be searched. Letters suspected of containing seditious or treasonable content could be stopped. Sedition as such was penalized.¹⁶⁶

¹⁶² See W.B. WORSFOLD, RECONSTRUCTION OF THE NEW COLONIES UNDER LORD MILNER 166 (1913); MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE, 1902–1936, 46 (2001).

¹⁶³ CHANOCK, *supra* note 162, at 133.

¹⁶⁴ Ordinance No. 38 of 1902.

¹⁶⁵ *Id.* at Preamble.

¹⁶⁶ Sedition was defined by the intent:

1. to bring His Majesty or the Governor or Lieutenant-Governor ... into hatred or contempt; or
2. to excite disaffection against His Majesty or the Governor or Lieutenant-Governor . . . or the Government and Constitution of the United Kingdom or of the Transvaal . . . or the administration of justice therein; or
3. to incite His Majesty’s subjects to attempt to procure otherwise than by lawful means the alteration of any matter . . . by law established; or
4. to incite any person to commit any crime in disturbance of the public peace; or
5. to raise discontent and disaffection amongst His Majesty’s subjects; or

In addition, the ordinance also imposed various limitations on freedom of movement. Individuals were required to have a permit in order to enter the Transvaal, and those without permits could be expelled.¹⁶⁷ The Lieutenant-Governor was given discretionary power, moreover, to order persons deemed “dangerous to the peace and good Government of the country” to leave.¹⁶⁸ Finally, the law allowed the Lieutenant-Governor to make regulations in order to “preven[t] the willful or reckless spreading of false intelligence calculated to create panic or alarm,” to “prohibi[t] the holding of meetings at which there is reasonable suspicion that seditious speeches will be made,” or to “prohibit the introduction into this Colony or circulation therein of any printed matter of a treasonable or seditious character.”¹⁶⁹

The Transvaal’s importation of the peace preservation model was hence even more of an omnibus piece of legislation than many of the original Irish peace preservation acts. The manner in which the law was explicitly introduced to replace martial law, with a still highly restrictive but nonetheless legalized scheme, provided a particularly concrete illustration of the sort of dynamic that has been observed throughout this Article. In terms of content, the act combined more directly emergency-like measures, in particular expanded powers of search and detention, with second-order approaches of the sort considered throughout, most prominently controls over the circulation of materials deemed seditious, as well as broader controls on speech and assembly. The controls on movement, finally, represented the most notably South African component of the legislation, forming one among many sources for, and articulations of, the tight regime of control over the movement of persons that would grow over time into the full-fledged apartheid system.

2. Establishing a Secure New Order

The postwar period in the Transvaal also saw passage of an amendment to the Law relating to the Registration of Newspapers, which required that papers register their names and addresses, as well as those of every “proprietor printer publisher manager and responsible editor,” with the Colonial Secretary.¹⁷⁰ The law also allowed for criminal proceedings to be taken against all those affiliated with such papers on the basis of libels printed within them.

6. to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects . . .

Id. at Art. 18.

¹⁶⁷ *Id.* at Arts. 19–21.

¹⁶⁸ *Id.* at Art. 24.

¹⁶⁹ *Id.* at Art. 25.

¹⁷⁰ Ordinance No. 49 of 1902.

The Union of South Africa came into being on May 31, 1910. Among the first laws adopted by the new state were the Defence Act¹⁷¹ and the National Police Act,¹⁷² both adopted in 1912, which essentially institutionalized the quasi-military police system bequeathed by the Boer War.¹⁷³

1913 and 1914 saw the outbreak of major strikes amongst white workers in the Transvaal, first in the form of a railway strike and then in the form of a general strike in Johannesburg. Soldiers were brought in to suppress the strikes, and some 2,500 reservists sworn in. In January 1914, Jan Smuts, who was overseeing the combined portfolios of Minister of Interior, Mines and Defence, declared martial law and ordered the arrest and deportation of the leaders of the strike.¹⁷⁴

The amendments to the Transvaal's Newspaper Registration law provided a subtle but nonetheless notable step towards more effective control over the press in South Africa. On its face, the new provision requiring that information be provided concerning all those in some way connected to the publication of papers seemed a reasonable requirement of transparency. Forcing transparency on such an issue provided a means, however, through which additional pressure could be exerted on publishers through the criminal penalization of libel advanced by the same law. In short, the extent of the transparency required, in such a context, served primarily to extend the threat of serious legal penalty, thus exerting a chilling effect on speech.

The new National Police Act¹⁷⁵ and Defence Act,¹⁷⁶ meanwhile, entrenched the quasi-military police within the South African order. If the quasi-military police represented one small step away from a martial law regime and towards a more regularized one, the use of martial law to repress the 1914 strikes indicated that martial law was only ever that one small step away. Perversely, this recourse to a more brutal and direct form of martial law if anything likely only served to legitimize the regularized forms of repression otherwise operative in South Africa by serving as a reminder that state was ever-ready to escalate its use of direct, violent force.

¹⁷¹ Officially, "Act to provide for the Defence of the Union and for matters incidental thereto," Act 13 of 1912 [hereinafter Act 13 of 1912].

¹⁷² Act 14 of 1912.

¹⁷³ The new police force established by the acts was explicitly imagined in quasi-military terms, as the "first line of defence, as is shown during disturbances and riots," by E.H. Louw, and as "a highly centralized little army," by J.X. Merriman (both Louw and Merriman were members of parliament). Meanwhile, the even more militarized South African Mounted Rifles, a strike force created to deal with emergencies, was also created, and in fact ended up slightly larger than the 'civilian' police force. See CHANOCK, *supra* note 162, at 49.

¹⁷⁴ For more, see *id.* at 137.

¹⁷⁵ Act 14 of 1912.

¹⁷⁶ Act 13 of 1912.

3. Controlling Labor Unrest

In July 1914, the Riotous Assemblies and Criminal Law Amendment Act,¹⁷⁷ prepared in the aftermath of the strikes, came into force. The act gave magistrates the power to prohibit public gatherings, to close public spaces, and to disperse unlawful gatherings by force, while also expanding the common law offense of incitement, to include any act or spoken word which it “might reasonably be expected” would lead as a “natural and probably [sic] consequenc[e]” to “the commission of public violence.”¹⁷⁸ The act also defined a series of new criminal labor-related offences, including intimidation, restraint, picketing, blacklisting, and the uttering of opprobrious epithets, as well as criminalizing the breaking of contracts by light, power, water, sanitary and transportation service employees, and incitement or conspiracy to commit any such offenses. Finally, the act set up special courts to try those cases brought under it.

While utilizing the emergency law approach of authorizing special courts, for the most part the Riotous Assemblies and Criminal Law Amendment Act targeted assemblies in a relatively legalized, sophisticated, and for that reason, all the more effective manner. In the first place, the law allowed for a variety of prior constraints and prohibitions designed to prevent assemblies before they might gather strength—measures through which the authorities could narrow the space for assemblies, minimizing the potential for more direct, violent confrontations. In addition, the law followed the model developed in Ireland by deploying the category of incitement, allowing convictions based on reasonably foreseeable effects rather than intentions, thereby widening the scope and range of the law’s dissuasive effects. Finally, the law utilized a criminal frame to target a broad range of activities potentially related to mass labor action, providing the authorities with an extensive range of tools through which to strike out at labor organizers, unionists and strikers, those it considered the source of the greatest threat.

4. Conclusion: Entrenching a Securitized Order

While, as we have seen, the repressive approaches to public order legality in both Ireland and India both drew upon martial law legacies, in South Africa the transition was the most direct of all. The 1902 Indemnity and Peace Preservation Act in the Transvaal provided a clear and explicit bridge from the emergency to the post-emergency order, in which numerous components of emergency legality were preserved. As elsewhere, recourse to martial law remained a possibility in South Africa in the years to come, as demonstrated by the deployment of martial law to suppress the Transvaal strikes in 1914.¹⁷⁹ Rather than undermining the

¹⁷⁷ Act 27 of 1914.

¹⁷⁸ *Id.* at 139.

¹⁷⁹ For more on the persistence of martial law within South African legal culture, see CHANOCK, *supra* note 162. Martial law would be declared again in 1915 and 1922. *See id.* at 140–1.

authorities, the potential for this more immediately violent form of control to be deployed likely helped to provide a perverse sort of legitimacy to the more regularized forms of repressive governance adopted in the South African context. They could only appear less directly harmful and violent by comparison.

As in the Indian context, the South African context indicates the clear influence of the sorts of approaches previously developed in Ireland. The Transvaal's Indemnity and Peace Preservation Act did not attempt to hide this, betraying its connection to the peace preservation tradition on its face. The South African police force, like those everywhere, was of course heavily influenced by the RIC, as well as by South Africa's own transition out of a more directly conflictual frame. The Riotous Assemblies and Criminal Law Amendment Act, meanwhile, followed much of the regulative approach to assemblies that had developed in Ireland, while also incorporating and relying strongly upon the productively repressive language of incitement. In general, moreover, the South African government paid particular attention both to the press and to assemblies, recognizing the virtues of attempting to suppress pressure for change before serious momentum could build. South Africa too, therefore, drew upon, helped to expand, and helped to normalize the developing model, while both magnifying and augmenting several of its more repressive components.

C. Nigeria

British rule in the area that would later be united to form Nigeria evolved gradually. Early policing was conducted in significant part under the auspices of the United African Company, later known as the Royal Niger Company, which was formed in the 1870s, and given a formal mandate from 1886 to 1899.¹⁸⁰ In 1890 George Annesley, the Acting Consul of the Oil Rivers Protectorate, organized a new police force, which he promptly used to attack Andemeno, the King of Enyong, who was resisting British encroachment. This led to numerous complaints to Clause MacDonald, the new Consul appointed in 1891, which led him to disband that force. MacDonald was shortly thereafter replaced by Ralph Moor, a former RIC Inspector, who established a new, quasi-military force, known as the Court Messengers, to police the territory, by that time known as the Niger Coast Protectorate. When the Court Messengers were not available, local military forces were relied on to conduct policing tasks, such as conducting arrests.

¹⁸⁰ See generally Ken Swindell, *The Commercial Development of the North: Company and Government Relations, 1900–1906*, 40 *PAIDEUMA* 149 (1994); PHILIP ATSU AFEADIE, *THE HIDDEN HAND OF OVERRULE: POLITICAL AGENTS AND THE ESTABLISHMENT OF BRITISH COLONIAL RULE IN NORTHERN NIGERIA, 1886–1914* (1996); Anietie A. Inyang & Manasseh Edidem Basse, *Imperial Treaties and the Origins of British Colonial Rule in Southern Nigeria, 1860–1890*, 5 *MEDITERRANEAN J. SOC. SCI.* 1946 (2014).

A formally civil police force was meanwhile established in Lagos in 1896, though its civil nature was rendered questionable by the fact that the policemen were armed, and by the fact that almost all the officers were former soldiers. This new force, which had responsibility not only for arrests and public order but also for conducting prosecutions and operating prisons, was also heavily influenced by the RIC model, utilizing RIC rifles and sending its officers to be trained in Ireland.¹⁸¹

In 1900 the Crown assumed control over all three of Nigeria's regions—Lagos, the Northern Protectorate, and the Southern Protectorate. The more restive north would see the establishment of the most aggressive police force, the quasi-military Northern Nigeria police force, which rapidly expanded from a force of fifty to over one thousand by 1903.¹⁸²

1. Clamping Down on the Press

The new era of a unified Nigeria saw increasing resistance to British rule, which was met, in accordance with the Irish model, with an increasingly extensive and restrictive array of repressive laws and regulations. As Bonny Ibhawoh notes, “as early as 1900, a vigorous and articulate class of educated Africans had established control of the local newspaper press.”¹⁸³ While the press had been at least partially sympathetic to the British early on, “by the 1900s . . . the placid mood of the late nineteenth century suddenly gave way to an eruption of scathing attacks.”¹⁸⁴

In response to this new climate, a Newspaper Ordinance was passed in 1903.¹⁸⁵ As the *Lagos Weekly Record* put it, the ordinance was “a measure calculated to militate in no small degree against the people's interest and rights,” in its defense, Acting Chief Justice E.A. Smith stated that “it is rare to find an absolutely free press anywhere in the world.”¹⁸⁶ Amongst other things, the ordinance required that every paper submit a £250 libel bond, effectively pricing out smaller periodicals.¹⁸⁷

¹⁸¹ See TEKENA TAMUNO, *THE POLICE IN MODERN NIGERIA, 1861–1965: ORIGINS, DEVELOPMENT AND ROLE* 1–10, 27–40 (1970).

¹⁸² See *id.* at 50–54.

¹⁸³ BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* 70 (2007).

¹⁸⁴ *Id.* at 71–72.

¹⁸⁵ Ordinance No. 10 of 1903.

¹⁸⁶ Bonny Ibhawoh, *Stronger than the Maxim Gun Law, Human Rights and British Colonial Hegemony in Nigeria*, 72 AFR.: J. INT'L AFR. INST. 55, 73 (2002) (quoting Feb. 14, 1903 & CSO 7/1/14, Legislative Council Debates (June 8, 1903)).

¹⁸⁷ This is equivalent to approximately £20,000 in today's terms, adjusted for purchasing power parity, using the “currency converter” available at: www.nationalarchives.gov.uk/currency-converter/.

In 1908, a pamphlet titled “Governor Egerton and the Railway,” written by Herbert Macaulay, known as the “father of Nigerian nationalism,” was distributed, criticizing the colonial government’s corruption.¹⁸⁸ In response to this, as well as to broader attacks on the government’s land acquisition and water rate policies, Egerton looked to the precedent developed in India, and on September 22, 1909, the Seditious Offences Ordinance was passed into law in Nigeria.¹⁸⁹ The law penalized anyone who brought or attempted to bring “into hatred or contempt . . . the government” of Southern Nigeria, as well as punishing anyone who might have made, published, or circulated “any statement, rumour or report, with intent to cause, or which is likely to cause any officer of the Government of Southern Nigeria or any person otherwise in the service of His Majesty to disregard or fail in his duty.”¹⁹⁰

Control by law in early twentieth century Nigeria was hence marked, as in India and South Africa, by an emphasis on control of the press. Nigeria’s Newspaper Ordinance employed the same approach that would later be employed by the India Press Act, suppressing the press by effectively pricing newspapers out of existence before they could even get started. The Seditious Offences Ordinance meanwhile was notable *inter alia* for its emphasis on “statements,” “rumors,” or “reports” which were simply “likely to cause” some failing of duty on the part of the government—a standard that neither required intent, nor in fact any actual negative outcome. Between them,, the two laws dramatically extended the power of the authorities to punish those voicing oppositional sentiments.

2. Legalizing Collective Punishment

In addition to the measures taken against the newly assertive nationalist press, forceful measures were taken against the broader population as well. Collective punishment had long been a feature of British governance in Nigeria, taking the form for instance of the burning down of houses when members of a village were deemed not sufficiently cooperative in assisting the authorities’ pursuit of a suspected criminal.¹⁹¹ Such collective punishment was not a feature of the law as such; that was changed, however, by passage of the Collective

¹⁸⁸ See FRED OMU, *PRESS AND POLITICS IN NIGERIA, 1880–1937*, 182 (1978).

¹⁸⁹ Ordinance No. 10 of 1909.

¹⁹⁰ The law remains applicable today; see generally OMU, *supra* note 188; Chris Ogbondah & Emmanuel Onyedike, *Origins and Interpretation of Nigerian Press Laws*, 5 *AFR. MEDIA REV.* 59 (1991); ADEMOLA YAKUBU, *PRESS LAW IN NIGERIA* (1999); Peter Nwokolo, *The Nigerian Press and the Law of Sedition: A Progressive Interpretation*, 23 *REV. EDUC.* 210 (2012); and LINUS NNABUIKE MALU, *MEDIA LAW AND POLICY IN NIGERIA* (2016), many of which criticize the perpetuation of the law.

¹⁹¹ For more, see Ibhawoh, *supra* note 186, at 63–64; IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS*, *supra* note 183, at 64–66; TOYIN FALOLA, *COLONIALISM AND VIOLENCE IN NIGERIA 27–29* (2009).

Punishment Ordinance in 1912,¹⁹² making legal and official collective fines and penalties of forced labor, where the guilty party could not be identified.¹⁹³ As if that were not bad enough, demonstrating an awareness of the shocking nature of such a measure, the law also stipulated that no legal challenges might be brought against it, nor against those orders issued under it, ousting the jurisdiction of both colonial and local courts.

1912 also saw passage of the Unsettled District Ordinance, by which the government granted itself the power to arrest and punish persons of “undesirable character and reputation” within any district declared “unsettled.”¹⁹⁴ The ordinance was aimed “at getting rid of ‘objectionable persons trading in the unsettled districts of the interior,’” while “Gov. Walter Egerton specifically made it clear that the ordinance was desired to prohibit from all unsettled districts such ‘aliens’ as the ‘black lawyer’ and the ‘Lagos agitator.’”¹⁹⁵

Finally, the Peace Preservation Ordinance of the same year¹⁹⁶ allowed the governor to declare portions of Nigeria disturbed, allowing for arbitrary search and preventive detention for up to a year, arrest for possession of arms and ammunition, and the imposition of heavy fines on those found to be involved in civil disturbance. The costs of such measures were to be borne by the local population. The ordinance also rendered officials involved in such actions immune from liability.¹⁹⁷

As is clear by now, all such measures conformed to a well-established practice of quasi-martial law. The Collective Punishment Ordinance was the most unusual and extreme example of such a phenomenon however. It entrenched as law several features deeply inimical to even a minimalist commitment to a normative idea of the rule of law—not only immunizing itself from review, in a metastasization of the typical declaration of immunity that might be passed in the wake of a period of martial law, but also severing the link between individual action and punishment. The Unsettled Districts Ordinance, meanwhile, was

¹⁹² Ordinance No. 67 of 1912. A similar law was passed in the East Africa Protectorate (encompassing Kenya, Tanzania, and Uganda) as Ordinance No. 1 of 1909. That law only authorized fines, not collective labor. For more, see David Anderson, *Stock Theft and Moral Economy in Colonial Kenya*, 56 AFR.: J. INT'L AFR. INST. 399, 404-5 (1986).

¹⁹³ Colonial officials attempted to justify the law by suggesting it was based on local traditions of collective as opposed to individual rights and responsibilities. See IBHAWOH, *supra* note 183, at 65. For more on Governor Lugard's support for collective punishment in Nigeria, see I.F. NICOLSON, *THE ADMINISTRATION OF NIGERIA, 1900-1960: MEN, METHODS AND MYTHS* 148-49 (1969).

¹⁹⁴ Ibhawoh, *supra* note 186, at 65 (citing Ordinance No. 15 of 1912).

¹⁹⁵ IBHAWOH, *supra* note 183, at 66.

¹⁹⁶ Ordinance No. 14 of 1912.

¹⁹⁷ *See id.*

notable for its specific limitations on movement, reminiscent of the limitations put in place in South Africa.

3. Conclusion: Suppressing the Press, Punishing the People

As with India, Nigeria was marked by a confluence of different legal orders, applicable in different regions and contexts. This process took a step in Nigeria never taken in India, however, as collective punishment was rendered into law through the Collective Punishment Ordinance, presenting one of the bleakest, most direct incorporations of the use of force into legal form imaginable.¹⁹⁸ The presence of such a potential within the law itself, together with its accompanying declaration of immunity in advance, bequeathed Nigeria a particularly troubling legal legacy with which it would have to grapple in the decades to come.

The Newspaper and Seditious Offences Ordinances, on the other hand, applied the more sophisticated approach to repression that has been traced in the pages above.¹⁹⁹ The Newspaper Ordinance employed the effective, relatively subtle strategy of requiring securities, while the Seditious Offences Ordinance helped to extend fear and uncertainty by threatening prosecutions of any statements offending the government. While the force of all such measures was diminished by the government's relatively weak institutional tools of enforcement, on paper Nigeria came to possess the same layered system of repressive legal measures we have seen elsewhere.

As with India and South Africa, the approach that developed in Nigeria revealed the clear influence of the Irish model—in terms, for instance, of the Nigerian administration's reliance on the 1912 Unsettled District and Peace Preservation Ordinances, as well as of the authorities' heavy focus on attempting to ensure the press, as well as other oppositional agents, might be silenced before they could become effective. Nigeria also helped to expand those standards. In particular, the 1909 Seditious Offences Ordinance's punishment of those making, publishing or circulating “statement[s], rumour[s] or report[s]” the authorities deemed troublesome constituted a new manner of advancing the authorities' traditional concerns with adversarial statements—and set a model that would be widely followed in the years to come. Finally, the Nigerian authorities also

¹⁹⁸ The ordinance would stay on the books and continue to be used for decades, earning the critique of George Padmore, for instance, for its application in the 1930s; see GEORGE PADMORE, *THE LIFE AND STRUGGLES OF NEGRO TOILERS* 90 (1931); see also MARC MATERA, MISTY L. BASTIAN & SUSAN KINGSLEY KENT, *THE WOMEN'S WAR OF 1929: GENDER AND VIOLENCE IN COLONIAL NIGERIA* (2012).

¹⁹⁹ In addition, 1912 saw passage of the Theater and Public Performance Regulation Ordinance 1912, Ordinance No. 26 of 1912, which complimented the careful suppression of the press with a similarly demanding regime relative to cultural performances and artwork. For more, see Paul Ugor, *Censorship and the Content of Nigerian Home Video Films*, 3 *POSTCOLONIAL TEXT* 1 (2007).

managed to go further than most by incorporating a preexisting policy of collective punishment into the frame of law. While that incorporation would not prove quite so broadly influential, it certainly entrenched a particularly grave mode of legal practice within Nigeria itself, the influence of which continues to be felt.²⁰⁰ Moreover, in incorporating such an overtly repressive type of approach into the law, the Nigerian colonial government also helped to show how far repressive modes of legality could go.

IV. CONCLUSION

Tracing origins is always dangerous. Wherever one begins, an important and influential prehistory is left out. Nonetheless, some moments are more significant than others. British rule over nineteenth century Ireland, this Article argues, was fundamental to the development of the sorts of repressive public order laws and institutions that are still to be found in operation across the world today. Throughout the century, the British experimented with and developed innovative new approaches to repression, not by the outright use of force as such—though recourse to outright force was always a potential called upon when needed—but rather through an increasingly thick, detailed, and extensive web of legality, in which the repressive aims of the state were increasingly embedded.

Equally fundamental was the dissemination of the law developed in that period to other regions of the British Empire. The previous Section explored such dissemination in the context of India, South Africa, and Nigeria in particular. While all three were particular important colonies in their own right, they have also been presented here as examples, as the same phenomenon could also have been tracked in many of Britain's other colonies as well. The process of dissemination helped to normalize the new approach for the simple reason that what is normal is most essentially defined by what is common—hence, the more colonies in which a particular approach was employed, the more it would seem normal and thereby reasonable.

The manner in which repressive legislation developed in the period had several notable features. As documented above, time and again the issuance and development of repressive laws were not the product of active forethought, nor were such laws implemented proactively. Rather, repressive measures were hastily assembled in the moment, almost always as a reactive measure in the face of new forms of resistance and growing nationalist sentiment. The form they took therefore often had far more to do with the types of political advocacy and organization they were designed to suppress than with any underlying theory of the art of suppression.

²⁰⁰ On such a point see, for example, The Fourth Republic, *The Nigerian Future: Conflict*, MEDIUM, <http://perma.cc/6K3Y-KCAB>.

The repressive measures adopted took a great diversity of forms. Prior to more direct confrontations, late eighteenth century laws in Ireland tended to target assemblies, though more by targeting their manifestations, than by attempting to develop the means to stop them from occurring or causing problems in the first place. More direct confrontation around the turn of the century led to martial law and other acts complimentary to martial law, such as the Suppression of Rebellion Act. In addition, the period saw the passage of measures designed to bring martial law slightly more seriously into regularized form. Most prominent here was the Peace Preservation Act of 1814, which set an example followed time and again over the century to come.

At the same time, a variety of other measures were used as well. Measures specifically targeting associations—of which the Unlawful Associations Act of 1825 was the most pristine early example—as well as laws employing new methods to control assemblies, such as the Party Processions Acts and the Suppression of Disturbances Act of 1833, allowed for a degree of control extending beyond the declaration of certain districts as proclaimed, and the admission of a lack of control that entailed. The 1882 Prevention of Crimes Act was meanwhile innovative both in its emphasis on the crime of intimidation, and in its emphasis on the importance of controlling the press.

As the nineteenth century gave way to the twentieth, it is not so much that British attention to Ireland diminished, as that its attention to the rest of its empire increased. As the British increased the strength of their control and the extent of their involvement, however, the strength of national resistance forces increased in turn, leading to the cycle of resistance, institution of repressive laws, and further resistance that would characterize colonial rule through to its end. As they turned their attention to other areas, the British continued to employ the quasi-martial law peace preservation model, with laws explicitly named as such in South Africa and Nigeria, and the similar-in-substance Prevention of Seditious Meetings Act in India. These laws generally partook more directly of one or another component of the martial law legacy discussed above, be it the ability to declare certain districts proclaimed, authorization of detentions and searches, the imposition of curfews and other controls on movements, or allowance for special judicial proceedings.

As time went on, the British also increasingly employed a more differentiated, subtle, prospective, and intrusive range of legal measures as well. These included laws aimed at limiting criticism generally, such as the Telegraph and Post Office Acts in India and the Seditious Offences Ordinance in Nigeria; at the press in particular, such as the Law relating to the Registration of Newspapers in the Transvaal, the Newspaper Ordinance in Nigeria and the Newspaper and Press Acts in India; and at assemblies, such as the Preservation of Order Act in Bombay and the Riotous Assemblies and Criminal Law Amendment Act in South Africa.

The move from quasi-martial law governance to rule of law repression was marked above all by a shift to the targeting of the core civil and political rights—freedom of expression, association, and assembly. Amongst other features, this helped to reveal how close all of those rights are—with the targeting of any one likely to impact the other two, and with the targeting of each an attempt ultimately to target the same underlying phenomenon: the existence of a populace with its own points of view, a desire for democratic political expression and self-governance, and a resistance to British rule.

This emphasis on targeting expression, association, and assembly also demonstrated one of the most important features of the gradually evolving regime: its emphasis on attempting to suppress and control dissent before it reached more directly troubling levels. The authorities did this by extending the reach of the law whenever and however possible, through such means as the use of broad and vague standards, an emphasis on effect rather than intent, and the imposition of various unnecessary restrictions and limitations on the rights in question. In addition to the various vague provisions of the law, the law's uncertainty was also advanced by the existence of multiple overlapping regimes, generated by the haphazard deployment of repressive measures. Together, these various features served to extend the shadow of the law, rendering individuals uncertain of exactly when and how the law might be deployed, certain only of the need to avoid provoking the authorities' ire.

Also noteworthy is a feature this Article did not dwell on, but which deserves substantial exploration in its own right: the rising targeting, particularly from the late nineteenth century on, not only of general unrest and independence struggles, but also of labor movements. This concern was clearly discernable in the Criminal Law and Procedure Act of 1887 in Ireland,²⁰¹ as well as in the Riotous Assemblies and Criminal Law Amendment Act of 1914 in South Africa.²⁰² A number of the frameworks examined, moreover—including the Peace Preservation Act of 1870 in Ireland, the Indemnity and Peace Preservation Act of 1902 in the Transvaal, and the Unsettled District Ordinance of 1912 in Nigeria—targeted the figure of the “wandering troublemaker,” a figure standing alternatively for the nationalist or labor agitator, the non-worker, and the troublesome native, by allowing the authorities to remove or prohibit the entry of certain persons from or into restive areas.²⁰³

A limited set of rhetorical framings were relied upon time and again to justify the repressive measures surveyed. Several, as we have seen, were classified as peace

²⁰¹ Criminal Law and Procedure Act of 1887 (Eng.), *supra* note 99.

²⁰² Act 27 of 1914.

²⁰³ *See* Peace Preservation Act of 1870, at c. 9, arts. 23 & 25; Indemnity and Peace Preservation Act, Transvaal Ordinance No. 38 of 1902, at art. 24; Unsettled District Ordinance, Ordinance No. 15 of 1912; IBHAWOH, IMPERIALISM AND HUMAN RIGHTS, *supra* note 183, at 66.

preservation laws or ordinances. The reference to peace suggested the alternative was war, serving both to justify the imposition of more forceful measures, and to present those against whom such measures were taken as a form of enemy combatant. Others relied on another old frame, presenting challenges to British rule as a form of sedition or treason—powerful words that likely already seemed archaic at the time, but which were perhaps less ideologically effective insofar as they acknowledged the true nature of the struggle in question as one between the will of the sovereign and that of his or her subjects. References to public order took the next step, however, suggesting that the population at large, rather than the sovereign at such, constituted the party injured by political dissent. Recourse to the criminal frame, meanwhile, went a step further, suggesting those presenting oppositional views were not enemies to the authorities, but rather a threat to their neighbors, and that hence action by the authorities against them was a public service.

It is also worth observing the volume of repressive legal content that was generated over the course of the nineteenth century imperial venture. The laws referenced herein are reproduced in a table attached as an appendix below. While a substantial portion of the more overt repressive measures advanced through legislation within the colonies and periods in question have been surveyed here, they represent only one part of the bigger picture, in terms of the repressive legal tools available to the authorities. The extent of the legal regimes in question served multiple purposes. The existence of an extensive, detailed, carefully composed legislative regime helped to promote the appearance of such regimes as legal as such. At the same time, the extensiveness of such regimes helped to render those subject to them uncertain as to the standards governing their conduct, just as the efforts made within the context of particular pieces of legislation to capture every form of prohibited conduct imaginable served not the purpose of clarity, but rather of giving the laws in question their broad, vague, and flexible character.

Finally, it is possible to return to the broadest theme. As observed in the introduction, lawyers have typically imagined states of emergency as one thing, ‘normalized’ law another. This mode of classification has been produced by a relatively narrow attention to states of emergency and martial law, which jurists have attempted to quarantine and cabin off, in order to prevent their contamination of the everyday legal frame.

This history suggests, therefore, the need to move away from an understanding of the exceptional and the normal as governed by a strong binary division, and towards an understanding of the extent to which everyday legality has *already* been infected by exceptional repressive measures. Such a perspective is particularly urgent in light of the simple fact that, as highlighted in the introduction, the repressive legal approaches examined above are not simply a matter of historical curiosity. Rather, it is possible to discern in the period studied the roots of innumerable patterns and modes of rights violation still widespread

in former colonies, as well as in Britain itself. Recognizing both the exceptional and colonial roots of these practices and modes of legality, therefore, should serve as a forceful reminder of the extent to which contemporary legal orders are in need of reform.

Appendix: Table of Repressive Laws Highlighted

| Act | Year | Country | Effect |
|---------------------------------|-------------|----------------|---|
| Tumultuous Risings Act | 1775 | Ireland | Penalized those engaged in assemblies leading “to the terror of his Majesty’s subjects”, allowed magistrates to compel persons to appear before them to provide evidence |
| Riot Act | 1787 | Ireland | Extended Riot Act to Ireland, sentenced to transportation those administering or taking oaths, allowed capital punishment of those engaged in/encouraging riots |
| Convention Act | 1793 | Ireland | Made political assemblies illegal, required their dispersal |
| Insurrection Act | 1796 | Ireland | Imposed death penalty on those administering illegal oaths, allowed for proclamation of disturbed districts, allowed curfews, allowed suspension of jury trials, expanded powers of search and detention |
| Suppression of Rebellion Act | 1799 | Ireland | Authorized trials by court martial |
| Peace Preservation Act | 1814 | Ireland | Created a new constabulary force, allowed for the proclamation of disturbed districts where magistrates and additional forces could be deployed |
| Insurrection Act | 1822 | Ireland | Introduced a curfew, allowed for summary justice procedures |
| Unlawful Oaths Act | 1823 | Ireland | Declared associations using oaths unlawful |
| Unlawful Societies Act | 1825 | Ireland | Outlawed advocacy associations and associations founded on a discriminatory religious basis |
| Tumultuous Risings Act | 1831 | Ireland | Imposed new criminal penalties on certain protestors and those encouraging protesting, and fines on uncooperative witnesses |
| Party Processions Act | 1832 | Ireland | Prohibited the use of certain symbols in assemblies |
| Suppression of Disturbances Act | 1833 | Ireland | Allowed for prohibitions of assemblies generally, and allowed proclamation of disturbed districts, where assemblies could be banned even more extensively, curfews imposed, and court martial were authorized |
| Crime and Outrage Act | 1847 | Ireland | Allowed for the proclamation of districts, in which additional police might be brought, wider powers of |

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| | | | search were granted, and the authorities gained the power to compel persons to assist them in apprehending murder suspects |
| Party Processions Act | 1850 | Ireland | Prohibited the use of certain symbols in assemblies |
| Peace Preservation Act | 1870 | Ireland | Extended the 1847/1856 measures, allowed summary proceedings to be used in proclaimed areas, granted magistrates the power to summon persons before them, allowed for the arrest of strangers or those out at night without a lawful purpose |
| Protection of Life and Property Act | 1871 | Ireland | Allowed broad powers of arrest and detention, suspended <i>habeas corpus</i> |
| Peace Preservation Act | 1881 | Ireland | Prohibited the possession or carrying of arms |
| Protection of Persons and Property Act | 1881 | Ireland | Allowed indefinite detention of individuals suspected of treasonous practices in prescribed districts |
| Prevention of Crimes Act | 1882 | Ireland | Penalized intimidation, allowed seizure/censorship of newspapers |
| Criminal Law and Procedure Act | 1887 | Ireland | Allowed for proclamation of disturbed areas in which summary procedures could be used, prohibited certain associations, penalized boycotts and assemblies more broadly |
| Vernacular Press Act | 1878 | India | Allowed censorship, penalized papers for seditious publications |
| Telegraph Act | 1885 | India | Prohibited obscene or subversive writings |
| Post Office Act | 1898 | India | Reiterated and entrenched the Telegraph Act |
| Preservation of Order Act | 1902 | Bombay (India) | Provided extensive powers of control over assemblies |
| Prevention of Seditious Meetings Act | 1907 | India | Allowed disturbed areas to be proclaimed, restricting assemblies and public speech in such areas |
| Newspaper (Incitement to Offences) Act | 1908 | India | Stipulated that printing presses would be forfeited where papers incited violence |
| Press Act | 1910 | India | Required a large deposit be made for newspapers to be registered |

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| Prevention of Seditious Meetings Act | 1911 | India | Reiterated the 1907 Seditious Meetings Act |
| Indemnity and Peace Preservation Act | 1902 | Transvaal (South Africa) | Instituted retroactive immunity; allowed for expanded powers of arrest and search; punished sedition; required permits; authorized expulsions; and penalized the spreading of 'false intelligence', seditious meetings, and censorship of treasonous materials |
| Law relating to the Registration of Newspapers | 1902 | Transvaal (South Africa) | Required extra press transparency, facilitated libel proceedings |
| Riotous Assemblies and Criminal Law Amendment Act | 1914 | South Africa | Allowed for the prohibition and dispersal of public gatherings, expanded the definition of incitement, criminalized several labor organizing-related offences, set up special courts |
| Newspaper Ordinance | 1903 | Nigeria | Required newspapers to deposit securities |
| Seditious Offences Ordinance | 1909 | Nigeria | Penalized those criticizing the government |
| Collective Punishment Ordinance | 1912 | Nigeria | Legalized collective fines and forced labor, ousted the jurisdiction of the courts to hear challenges to its application |
| Unsettled District Ordinance | 1912 | Nigeria | Provided extended powers of arrest |
| Peace Preservation Ordinance | 1912 | Nigeria | Allowed for the proclamation of disturbed districts, extended powers of search and detention, immunized those carrying out such policies |