Chapter 1

Introduction: The Historical and Theoretical Background

In 1955, the Supreme Court of Pakistan (then called the Federal Court) found itself, in the words of the chief justice, "at the brink of a chasm."[1] The question before the Court was whether the governor-general had acted illegally in his recent decision to dissolve the constituent assembly and rule, in effect, by decree. The story is a long and unhappy one, and I will do no more here than briefly sketch its outlines. Pakistan was granted dominion status by the departing British colonists through the Indian Independence Act of 1947. The act provided a provisional constitutional framework until a new one could be effected, with the governor-general representing the Crown, and a constituent assembly responsible for legislative work, including the making of a new constitution. Seven years later, with no new constitution enacted, the governor-general, caught in a bitter test of wills with the legislature, dissolved the assembly and promulgated ordinances for the holding of fresh elections. A *Special Reference* was directed to the Supreme Court in its advisory jurisdiction, asking for a ruling on the legality of these actions.

There is an impression of sad inevitability in the opening of the Court's opinion. Would the governor-general even abide by an adverse ruling? Would restoring the constituent assembly, and thus the intractable gridlock between executive and legislature, threaten the very stability of the state? The Court chooses to affirm the actions of the governor-general, "to cross the gap by a legal bridge." Such a crossing, and such an affirmation of actions, is effected by resort not to the authorization of any regular law but to the rationale of supreme necessity. "I have come to the conclusion," the chief justice informs us, "that the situation presented by the *Reference* is governed by rules which every

written constitution of a civilized people takes for granted. This branch of the law is, in the words of Lord Mansfield, the law of civil or state necessity."[2] With the niceties of constitutional authorization exhausted, with the claims of legal propriety spent, someone has to be able to act, the Court insists, if the state is to survive. The maxim of *Salus populi suprema lex* (safety of the people is the supreme law) is invoked by the Court as sufficient and long-standing authority for the actions of necessity not covered by regular law. The governor-general as representative of the Crown would thus be exercising the plenitude of prerogative for the public good. Once the Court finds a justification for the actions of the governor-general in the law of necessity, it can move to its conclusion with an axiomatic force, citing an impressive list of authorities from Bracton to Locke, Mansfield to Dicey. The Court's ruling, however, turned out to be only a temporary solution to the political crisis of the country: the following year a new constitution was enacted, only to be suspended by the same governor-general, now the president, who in turn was removed from office by an Army General under a declaration of martial law. At each turn of events, the law of state necessity was claimed as justification.

I begin, and end, with this case, because it neatly captures and conveys the principal themes and, indeed, the texture of what this book is about. On a narrative level, this study tells the story of how the vocabulary and the sources of authority that constitute the Court's opinion came to pass. What, after all, is a Pakistani chief justice in 1955 doing citing not only the technical provisions of British statutes but also the subtleties of Bracton on sovereignty, and Maitland on the Convention Parliament and James II? In short, I tell the story of the extension of English law and constitutionality to the colonies: the haphazard introduction of a rule of law, its colonial mutations, and its enduring consequences. On a more analytic level, however, this study engages with the precise issue before the Supreme Court in 1955: the discourses of modern law that form the potential conflict between state power and legal authority, between what the state perceives as a necessary power for survival at certain moments and what the law makes available—a tension between, as the title of this study indicates, the requirements of sovereign emergency and the constraints of a rule of law.

This book examines the history of British colonialism in India from the late eighteenth to the early twentieth century, drawing out and delineating how questions of law and emergency shaped the conceptualization and practice of colonial rule, and how these concepts in turn affected the development of Western legality. In doing so, it develops notions in legal theory of the meaning of a rule of law, the function of the legal exception, and the range and features of emergency powers, from the suspension of habeas corpus to the declarations of martial law.

The chief justice in his opinion for the Court in the *Special Reference* takes us back to the provisions for emergency action within the British constitution, to those instances of English seventeenth-century history where the requirements of sovereignty did not match the provisions of the law.[3] But, of course, he need not have gone searching quite so far back, as the more immediate past of colonial India would have furnished ample precedent of a negotiation between political exigencies and rule-based law. Indeed, the history of the British colonial state in India, from the very beginning, was shaped by these persistent questions of power and legitimacy.

Indeed, by the time of the impeachment of colonial India's first governor-general, Warren Hastings, in the 1780s, government by law was already becoming the privileged basis for the conceptualization of the "moral legitimacy" of British colonialism. The ideological justification for the British presence in India drew heavily on a much-vaunted tradition of ancient English liberty and lawfulness. In some ways this should come as no surprise, for to the late-eighteenth-century English political imagination, the virtue of a rule of law was as settled a fact as its Englishness. As John Brewer and John Styles, the editors of *An Ungovernable People*, have shown,

> seventeenth and eighteenth century Englishmen's conceptions of government were intimately bound up with their actual experience of the law. This sense of the political nature of the law (and the legal nature of politics) was in part a direct consequence of the state's use of the courts as the chief means of exercising authority . . . good governance was equated with justice and the fair dispensation of the law with good government: in this sense the "rule of law" was no empty phrase.[4]

The phrase was filled out, as the case studies in the collection show, through specific instances of challenges to authority, schisms between statute law and "popular justice," and recognition by officials of the legal and procedural limits on the scope of their authority. These specific conditions not only contributed to the general, ideological meaning of the rule of law as the preeminent form of a modern political rationality, but also as the central and distinguishing feature of *English* politics, morality, and civilization. As Brewer and Styles note: "It was a shibboleth of English politics that English law was the birth right of every citizen who, unlike many of his European counterparts, was subject not to the whim of a capricious individual but to a set of prescriptions which bound all members of the polity."[5] With Britain's increasing imperial fortunes, this "shibboleth" became the frame of the discourse of politics, the defining boundary within which various ideologies of rule confronted each other. Government by rules became the basis for the conceptualization of the "moral legitimacy" of British colonial rule. The applicability of rules to all was understood as the distinguishing feature of British rule, and counterpoint to the "personal discretion" found in a theory of precolonial sovereignty known as Oriental Despotism. As Britain established its supremacy over areas of the globe with nonwhite populations, setting up racialized political systems in which there was for the British no question of signifying consent through an electoral process, legality became the preeminent signifier of state legitimacy and of "civilization," the term that united politics and morality. Thus James Fitzjames Stephen, the political philosopher who also served as law member in India in the 1870s, insisted:

> The establishment of a system of law which regulates the most important parts of the daily life of the people, constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which renders it possible . . . Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.[6]

"Dissent" and "disobedience," however, remained a perceived and actual fact of colonial governance even before the arrival of nationalism. Thus, concurrent with an emphasis on the rule of law and legal protections, there was a strong insistence on the needs of a regime of conquest, particularly the discretionary authority of the central executive. The claimants of such an executive power, whether they argued for it in terms of monarchical prerogative, as they did till the end of the eighteenth century, or in terms of the supremacy of the legislature (itself part of the executive in the colonies), refused to concede that the exercise of such power abrogated the rule of law. Even the most seemingly arbitrary acts were to ensure the safety and stability of the colonial regime and were thus part of the legal sovereignty of the state itself. Others remained less convinced. There would have to be a fundamental law that would bind those in power if Britain wished to claim that it ruled its colonies by law. Thus, in Jamaica in 1865, when Governor Eyre utilized a local law authorizing wide emergency powers in order to crush a nascent rebellion, the question of whether such action could be lawful became an immense controversy in England. When Fitzjames Stephen, by no means a liberal in either his jurisprudence or his politics, asked the Court, in his prosecution of officials charged with an abuse of authority in Jamaica, "whether law was to be paramount within the British Empire, or whether officers could set aside the law and establish a military despotism with power of life and death," he was only repeating a constitutive question for colonial discourse.[7]

This study examines one aspect of that discourse: the ways in which law enables the extension of colonial power and the consolidation of the colonial state. There is, of course, by now a rich and diverse literature on the subject of law and colonialism in general, much of it focusing on the daily practices and ideas of law in the colonies.[8] Particularly in the field of anthropology, scholars have turned a critical eye upon the construction and operation of colonial law, showing how, for example, the category of customary law, so ubiquitous in colonial discourse, far from being a received form of indigenous law, was in fact the constructed product of colonial knowledge and of specific historical transactions between colonizers, local elites, and subject groups.[9] This is a literature to which I am generally intellectually indebted, although this work is less anthropological and more a history of ideas.

This book also attempts to develop an insight into the deep and critical place of colonialism in the construction of modern law. It asks, What do the instances of colonial emergency have to teach us about the

possibilities and predicaments of modern law in general? This book takes its place in a larger movement of intellectual inquiry that attends to the complex of power/knowledge in discourses about the colony, and it views the colonies not as passive recipients but rather as productive forces in the conceptualization and delineation of Western ideas and practices. This intellectual movement—let us roughly label it a postcolonial criticism—starting with the pioneering work of Edward Said's *Orientalism* has been under way for some time now.[10] *Orientalism* itself drew on the ideas of Michel Foucault, who along with Said has become a ubiquitous reference in colonial studies.[11] This is not without merit. In developing his notion of Orientalism, Said found inspiration in Foucault's ideas of genealogy, complexes of power/knowledge, and the discursive construction of regimes, ideas that have proven particularly useful to critics of colonial ideas and regimes.

While such a survey introduces the theoretical terrain that this book is written upon, and the particular ideas and insights to which it is indebted, the focus of this work is on the problematic of a rule of law and emergency as it played out in the colonial realm. If a rule of law was the settled theoretical standard of colonial politics, the institutional practices of the colonial state constantly fell short of such a standard. When much was said and done, British India was a regime of conquest, not incapable of creating certain levels of political legitimacy, but consistently dependent upon the discretionary authority of its executive and the force of its army. As such, the state would register the effects of conflicting impulses: for example, while the British in India developed an elaborate and relatively strong judiciary, they equally insisted that certain "acts of state" would be beyond judicial inquiry. Thus Regulation III of 1818—"A Regulation for the Confinement of State Prisoners"—placed suspects beyond the reach of the courts. The preamble of Regulation III is telling: "Whereas reasons of state . . . occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding."[12] And it is this precise ambivalence, this combination of contrary impulses, which this study focuses upon. I want to emphasize that this study neither concludes that contrary to their protestations the British failed to establish a rule of law in India nor that they were entirely successful in doing so. Rather, it is my consistent effort to draw

attention to the tension between political exigencies and legal rule—to examine the rhetoric of both an illimitable sovereignty and a rule of law and the corresponding effects upon the structure of both the colonial and ultimately the postcolonial state. Indeed, the regulation that I refer to in the previous discussion is equally a good example of how such measures are not confined to India, but become precedents not only for similar measures elsewhere in the empire but for thinking about emergency in general. Thus the mode of emergency rule embodied in the Bengal Regulation is transferred in the latter half of the nineteenth century to Ireland.[13]

The tension that I shall attempt to trace out in colonial India between competing visions of rule by sovereign decree and rule by law represents a more stark and better documented example of what has been perceived by many as a central conflict in Western legal systems: the conflict between the operation of law as universal, formal, and rational and the absolute sovereignty of the state—between reason and will, *ratio* and *voluntas*.[14] For example, Franz Neumann organized his important and exhaustive study *The Rule of Law: Political Theory and Legal System in Modern Society* around the "antagonism" of these two concepts.

> Both sovereignty and the Rule of Law are constitutive elements of the modern state. Both, however, are irreconcilable with each other, for highest might and highest right cannot be at one and the same time realized in a common sphere. So far as sovereignty of the state extends there is no place for the Rule of Law. Wherever an attempt at reconciliation is made we come up against insoluble contradictions.[15]

Neumann's understanding of the persistence of sovereignty even in the normative universe of the rule of law goes a long way to help us set up the problematic of emergency. Its shortcoming, however, is that it remains too dualistic in its approach, leaving the opening terms of a rule of law and sovereignty relatively intact. What we must ask is not just how these terms are cross-pollinating in the colonies, but to what extent we are to read the colonial as an iteration of the modern. To do so requires setting out the terms of the title of this book in greater detail. I must stress, however, that while what follows does introduce the

existing literature on the topics, its main task is not bibliographic; rather, I selectively draw on specific writers in order to delineate the overall vision of the book.

Rule of Law

A term that Edmund Morgan once called "that potent fiction," thus conjuring its amorphous and talismanic qualities, "the rule of law" is a phrase that is notoriously difficult to pin down. At a minimum, it means a government bound by fixed rules applicable to all, but its connotative qualities are more expansive, covering everything from a sense of equality under the law to the political ideals of justice and individual dignity.[16] Strictly speaking, the term is a modern one, but its genealogy in the West is longer, and more complicated. In England, the term that precedes the rule of law, particularly in the Elizabethan age, is the borrowed Greek notion of *Isonomia*.[17] This concept, as Hayek shows us, is not to be confused with either specific contents of the law or even early analogies to democracy. Rather, it is meant to convey the more narrow sense of rules "applicable to all manner of persons."[18] From the very beginning *Isonomia* designates a polity of rules in counterpoint to one of personal discretion. By the seventeenth century, usage of the classical term is gradually displaced by the phrases "government by law" or "rule of law."[19] In English jurisprudence, the term is most readily associated with the work of the nineteenth-century constitutionalist Albert Venn Dicey. His monumental *Introduction to the Study of the Law of the Constitution* formalized the concept of a rule of law and offered three key definitions or constitutive features: first, as opposed to the application of discretionary judgment, individuals were only punished for a breach of the law through the courts; second, "every man was subject to ordinary law administered by ordinary tribunals"; and finally, in a more specifically English mode, the general principles that governed rule and rights were themselves the result of specific court decisions and their value as precedent.[20]

We shall return shortly to Dicey, but let us note here that what is striking about this formulation is that the emphasis is less on content and more on institutions and procedures. Indeed, the rule of law figures in Dicey's work as both a political ideal and a more strictly institutional arrangement. And so it is with a rule of law, which increasingly

appears as a conceptual frame to be variously filled in. In the twentieth century, the putative contents of the term have thus widely differed. According to Joseph Raz, matters have gotten so out of hand with the "promiscuous use" of the expression that "we have reached the stage in which no purist can claim truth on his side."[21] Raz's lament, however, does point to a critical dimension of the notion of a rule of law, which I will argue is better understood as a historical ideal and not just a set of fixed propositions.

Even so, it could be argued that in the racially segregated and socially stratified arena of the colony, to criticize a rule of law may seem not unlike pushing at an open door. Indeed, if the rule of law is at the very least about the old law-school dictum of treating like cases alike, it would seem that no such claim can be made for the colonies. In British India, for example, a whole range of special exemptions and statuses divided the legal domain, not only by race (Europeans and natives) but also by religion (Muslims and Hindus subject to their own personal law). Earlier, law under the East India Company State had divided the population into classes of juridical subjects and divided itself into public law and personal law. There was, however, an additional division, as there were two types of courts—Crown and Company courts—each with a separate jurisdiction. While the Company court claimed jurisdiction over natives in the *mofussil* (countryside) and provided higher courts of appeal in the form of the Sadr Adalats, the Crown's jurisdiction was held over all residents of the presidency town and only over British subjects residing in the mofussil (see appendix A). Not only did the British feel compelled by social pressures to administer an increasingly static religious law to their subject communities, a move largely of their own devising, but they used this division of personal law to justify special privileges on racial grounds. In the later nineteenth century when Western-educated natives and liberals in government joined in their demand for the removal of racial bars to the covenanted civil service, including the judiciary, Fitzjames Stephen could insist that "personal as opposed to territorial laws prevail here on all sorts of subjects. I think there is no country in the world from whom a claim for absolute identity of law for all persons of all races and habits comes with as bad a grace as from the natives of this country."[22]

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ment to an oriental despotism of rule. Stephen would insist that all authority including the need for discretionary power be allotted by and fixed in regular law. Are we to read these insistences as so many examples of bad faith? Or would it be more productive if we took Stephen at his word and tried to understand what is meant by *rule of law* as a mode of governing in the colonies? Here we see Stephen as the interlocutor of modern law in its essence—a form of self-referential authorization elastic enough to cover all exigencies. In his *Minute on the Administration of Justice in British India*, for example, Stephen considered the question of whether rules and codes were suitable to the rough and rugged colonial frontier. Emphatically insisting that the question was really about—indeed, *had to be about*—different kinds of legal administration, and not about "government by law and government without law," Stephen called for an effort "to unite by law all authority in one hand, to give by law wide individual discretion."[23] Stephen's confidence in the elasticity of law would prove overly optimistic when faced by insurgency and emergency. But for us that only again poses the question of what the claim of a rule of law contains; whether it is not, in fact, better understood as a specific form of rule. The latter effort would commit us to understanding the rule of law beyond its contemporary association with democratic freedom and just rule, forcing us instead to consider the historical construction of such a category in the articulation of a modern political rationality. Again, let me stress for the sake of clarity that such a historicist critique does not in itself amount to a challenge, much less a denial of the value and justice of certain ideas that we now associate with the rule of law. We can agree with, for example, the proposition that political power must be accountable, but such an agreement has limited value in increasing our understanding of the historical emergence of a rule of law, the conditions of its operation and limits.

One historical study that is by now a justly famous reference for any study of the rule of law and its limitations is E. P. Thompson's *Whigs and Hunters: The Origins of the Black Act*. The book, as the preface informs us, begins with Thompson's casual commitment to an article on the draconian "Black Act" of 1723, passed in response to increasing poaching and deer killing in the royal forest of Windsor. But general questions of the form and function of law seem to muddle, with some regularity, any specific subject and conclusion, and convert Thompson's informative article into an expansive "experiment in historiography."[24] The results of that experiment have received much attention, particularly the conclusion where the Marxist historian, after hundreds of pages of passionate criticism, concedes that the law, while partly the vehicle of a mystifying ideology and of class interests, cannot be reduced to those terms. It is a conclusion we shall consider shortly.

First, it is worth dwelling briefly on some of the methodological substance of the text itself, which offers valuable lessons on studying law and emergency. The paramount lesson is a critical stance on the normative presumptions that structure both emergency and subsequent historical readings. Here it is the figure of tautology that rushes in and threatens to foreclose critique. Emergency offers its justification under this figure: for the question of why the law required such large powers to establish order, the answer—indeed, the only answer—can be the level of disorder that confronted authorities. Thompson notes that this tautology, although that is not his vocabulary, absorbs all historical understanding: "Successive historians have scarcely advanced upon this: since the Act was passed, it may be assumed that it was necessary to pass it."[25] Indeed, it is the singular insight of Thompson's work to reveal the historical construction of the normative itself. As Thompson himself conceded, it may have been "wise to end here," but the rule of law as a standard seems to demand some more general conclusion. Thus appears Thompson's concluding, somewhat begrudging, concession that the law of a ruling class does indeed from time to time go against its interests.

> Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust then it will mask nothing, contribute nothing to any class' hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity, indeed, on occasion, of actually being just.[26]

This is actually a rather anodyne conclusion, and unless one heatedly argues over specific terms such as *interest* or *justice*—an argument I shall not enter here—there is really little to disagree with. What is for

me both more curious and more poignant is a moment of autobiographical presentation in the conclusion. Here we find Thompson worried not so much about the specific merits of his work but more generally with the issue of writing a *history* of the rule of law in our *historical time* of staggering exploitation and atrocity. What, he wonders, is "the contest over interior rights . . . when set beside the exterior record of slave trading . . . or of the East India Company"?[27]

But, of course, when one moves from the historical narrative to a historiographic questioning, as Thompson does in his conclusion, colonialism and fascism, Europe's Other and its own limit, can and must enter the story. For it is this other history that shapes the present from which one even begins to consider the possibilities and predicaments of modern law. But I think the inclusion of colonialism and fascism in this larger story are more deeply indicative, for they point to the necessity of considering the question of sovereignty in any account of the rule of law. Here at least a provisional definition of modern law is clearly required, but settling on some central characteristic out of the array of theories that emphasize law as natural or positivist, formal-institutional or sociological, and so on, is no easy matter. If there is a point of agreement, it is that the content and character of modern law are essentially normative. That is not only to say that law consists of rules stipulating expected behavior but also that such rules are themselves validated out of a theory of power that is itself normative, that inscribes itself deep into social life and seeks its legitimacy and validity by regulating that life in an expectant and improving direction.

In such a normative universe of law, then, to raise the question of sovereign power is to invoke the figure of the archaic. A theory of sovereignty may help us understand the prerogatives of kings or the ritualistic majesty of emperors and "despots," but it seems to have no bearing on understanding modern law and power. And this is equally true of those who would celebrate the normative rule-bound universe of modern power, as it is of those who would subject such modern normativity to a skeptical critique. Let us identify the first position with the work of H. L. A. Hart and the latter position, much more equivocally, with the work of Michel Foucault.

Hart's book *The Concept of Law* is an effort to refashion legal positivism, precisely moving it away from a preoccupation with sovereignty, from John Austin's notion of law as the "command of the sovereign," and toward a theory of rules. Particularly relevant for our purposes here is the way in which sovereignty in Hart's schema is reduced entirely to a framework of rules. These rules, Hart contends, are not just descriptive of the sovereign and those who obey him but are fundamental and constitutive.

In a significant passage in *The Concept of Law*, Hart attempts to show how the notion of sovereign orders virtually disappears in the rule-bound format of a modern electoral democracy. Framing the explanation in the vocabulary of a developmental schema, which subtends much of the text, Hart argues that in the case where the sovereign is identifiable with a single person, it may be possible to concede that the rules of governance (for instance, that orders must be declared and signed by the monarch) exist in a descriptive mode. But in the more disseminated form of the electorate—indeed, in the case of procedures that members of a society must follow in order to function as an electorate in the first place—rules "cannot themselves have the status of orders issued by the sovereign, for nothing can count as orders issued by the sovereign unless the rules already exist and have been followed."[28] Such a circularity of logic and process effectively occludes the possibility of action outside the circle.

For Foucault the normative force of modern life and the power relations it exhibits are best understood not in the interdictory mechanisms of law but in the disciplinary functions of the social. This form of biopower, as we are shown in the now famous last chapter of the *History of Sexuality*, appears at the site of a historical disjunction, as it "supplants" older juridical modes and models of power.[29] It is important to be specific here: for Foucault what is supplanted is not law but a form of sovereignty that he calls the juridical. In the new regime, law in its modern sense as a functioning of norms is pervasive.[30] Rules are now required across an entire terrain of life, and legislation proliferates, as do the institutions of bureaucratic government.

Two years after the initial publication of the *History of Sexuality*, Foucault returned to this threshold shift in his lecture "Governmentality," delivered in 1978 at the Collège de France.[31] This time around, Foucault cast the movement in more subtle, indeed, even more equivocal terms. Accordingly, he asks us not to think of this movement from a society of sovereignty to one of discipline and then government in terms of "replacement," but rather to conceptualize the modern as a "triangle"

of "sovereignty-discipline-government, which has as its primary target the population and as its essential mechanism the apparatus of security."[32]

The concept of the norm occupies a central organizing function within this schema. It refers both to normativity as a conception of standards and to a process of normalization, which appraises, regulates, and relates diverse activities. In addition, as François Ewald correctly notes, "Foucault also compels us to reconsider what we mean by norm, which he places among the arts of judgment. Undoubtedly, the norm is related to power, but it is characterized less by the use of force and violence than by an implicit logic that allows power to reflect on its own strategies and clearly define its objects."[33] This astute assessment of Foucault's work also perhaps unwittingly points to its omissions. Foucault does not dwell on the relation between this normative conception of power and the decidedly antinormative enactments of sovereign might. Nor does he demarcate the social field from which this norm is generated and that it seeks to regulate. Is this terrain, for example, the recognizable unit of the nation-state, or is it a more politico-philosophical space of the "West"?

Here the limits of Foucault's work for a history of emergency, particularly colonial emergency, begin to reveal themselves. Indeed, postcolonial critics who have embraced and been energized by Foucault's work have nonetheless noted the particular omissions of colony and empire from the epistemic shifts he so assiduously sought to document. This is not to be merely tendentious—no critic, after all, can be expected to cover everything—rather it is merely to note that despite Foucault's interest in the development of spaces of confinement, he never thoroughly investigated the construction of the epistemic space of the West itself as putatively self-contained and self-generative. The implications of this insight are various, for as we shall see it helps us to isolate the particular function of race in the colony, but here we may confine ourselves to the neglect of sovereign will and violence.

It is not, of course, as if Foucault neglects the issue of security in the modern state. In fact, he places the apparatus of security, along with the new target of population and the new operational knowledge of political economy, in his central definition of modern power. But by confining his attention to the interior developments of the European state, Foucault is perhaps unsurprisingly led to formulate this apparatus in terms of surveillance and the police.[34] He thus has little to say about the relation between the sovereignty of the state and the new forms of law, or the limits to the functioning of the normative itself.

One theorist who has questioned this relation in decidedly antinormative terms is Carl Schmitt. This is a controversial choice, for Schmitt was to follow up his work as a jurist in the Weimar regime with a shift in allegiance to National Socialism. For this reason, the connection between Schmitt's work in the Weimar regime and his career between 1933 and 1936 is a source of much historical debate. The reading of Schmitt that I propose here moves along a particular biographical and intellectual trajectory, distinguishing his earlier work from his views in the 1930s. This would not be an isolated endeavor. Joseph Bendersky, for example, has argued for a reading of Schmitt's work that does not reduce all of Schmitt's ideas to his Nazi career from 1933 to 1936.[35] Others, Martin Jay among them, have maintained that Schmitt's notions of the structural friend-foe distinction in politics and the decisionist role of the sovereign in states of emergency may be traced to the Nazi demonization of Jews and the use of Article 48 of the Weimar constitution to subvert the fledgling democracy.[36] Recently, Agostino Carrino has further fractured this biography, delineating "three Schmitt's" by insisting on the disjunction between not only the Schmitt of the early twenties and the Nazi era but also between the Schmitt of 1936 and 1943.[37] Schmitt's *Political Theology* (1922), the main text of interest to us, belongs to the earlier period and opens with a succinct definition of sovereignty: "sovereign is he who decides on the exception."[38] This definition contains Schmitt's interest in the personal element of the decision and in the agonistic and borderline relation of exception and norm. We will consider Schmitt's ideas more fully in the following section, but here let us note that this decision as the expression of will is what is disavowed in the norm-bound realm of a rule of law, and it is this object and the process of its disavowal that we must attend to.

In order to do so, let us explore some of the connotations associated with the expression *a rule of law* through a grammatological gesture: by focusing on the choice of preposition that constructs the phrase—a rule *of* law not a rule *by* law. Of course, one could say that the original and longer version of the expression was *a rule of law and not by men*, but the shorthand we are left with—rule and law joined by a preposition in the genitive case—is still telling. For unlike the use of *by*, which, as the

Oxford English Dictionary tells us, must be coupled with nouns of agents and action, the use of the genitive preposition links one part to another as both source and possessor. Eclipsing agents and action, the rule of law evokes a hermeneutic insularity, a ghostlike landscape where law rules and rules are law. In fact, it is only because of the critical labor performed by the preposition that an inversion of the phrase can still generate an adequate meaning, such as when Antonin Scalia instructs us to understand a rule of law as a law of rules.[39] Indeed, the ghostlike landscape I invoke here is not inappropriate. It certainly catches the sense in which a rule of law reflects the high postulates of Western civilization: the victory of reason over will, the universal over the contingent, and idea over matter.[40] If the ethereal images of distance, mediation, and universality are embedded in the expression *the rule of law*, they are entirely opposite of the images associated with emergency: direct force, singular cases, final judgments, and so on.

Emergency

Approaching the concept of emergency, one encounters a similar definitional quandary as with the rule of law but for the opposite reason: if a rule of law has been overtheorized, made to stand in for a range of ideas, the concept of emergency and its relation to the norm seems comparatively undertheorized. Such neglect is curious indeed, given the constitutive role emergency plays alongside the rule of law in the conception of modern sovereignty. The notion that a situation of factual danger, whereby the existence of the state is threatened, allows for the suspension of the normative universe of a rule of law is provided for in almost every account of modern lawful rule. These moments invoke what one could call the "but for" clause, by which the supremacy of regular law is continuous but for the requirements of state sovereignty. An allowance for such moments is written into nearly all conceptions of lawful and legitimate government: one finds its shadowy presence as much in Locke's *Second Treatise*, in the section on "prerogative" that Locke defines as the "power to act according to discretion, for the publick good, without the prescription of the law and sometimes even against it,"[41] as in the famed book 11 of *The Spirit of the Laws*, where Montesquieu qualifies the conditions of "Political Liberty and the Constitution"—the absence of discretion, and the separation of execution

from judgment—with an exception: "but if the legislative power believed itself endangered by some secret conspiracy against the state," and so on.[42] Indeed, one can find such an allowance in most modern constitutions, and even in the United Nations International Covenant on Civil and Political Rights, in the form of "derogation provisions."

It is remarkable how a closer scrutiny of most major texts of political theory and constitutional jurisprudence reveals emergency as a constant third term in discussions of law and state. In our century, most historians and scholars are familiar with the statutory forms of emergency rule such as the Defense of the Realm Acts. But the notion of a provision for the state to have recourse to exceptional powers is a deeper one in the history of law. In the struggle against absolutism in the West, it represents the division between law and the ruler's will. Emergency is an elastic category, stretching over political disturbances such as riots, the situation of sovereign war, and even constitutional crises within the sphere of the state. The texts of jurisprudence and political theory are unanimous in their recognition of these moments of exception. Here the law knows that it will not be sufficient, that something else will be required. Indeed, legal systems in their theoretical and practical formulation are curious in the way they deliberate upon the conditions of their own failure.

One is tempted to say that there has been a general neglect of the whole issue of emergency, but that is not quite accurate. There is, in fact, a decent size literature on the topic of emergency powers, on the issue as it is often framed of "civil liberties during wartime."[43] Rather, what has received less attention is the indicative function of emergency as a constitutive relation between modern law and sovereignty, and thus as a formative kernel in the overall understanding of modern power. Let us attempt to draw out this important distinction.

Particularly following World War II, there was a burst of intellectual activity, prompted by not only the fate of Weimar Germany and the question of law under fascism, but also by the wartime actions and excesses of the Western democracies. To consider one prominent example, in 1948 C. L. Rossiter published his extensive study of emergency powers in France, Germany, Britain, and the United States, under the trenchant and by his own admission "disturbing" title of *Constitutional Dictatorship*.[44] This was, of course, Rossiter's shorthand term both for the principle that during times of crisis no constitutional regime can

function constitutionally and for the actual range of powers that such regimes utilized. Certainly, for Rossiter, if a close examination of such a principle was ideologically distasteful, the ubiquity of the subject was nonetheless undeniable.

> No person professing the democratic faith can take much delight in a study of constitutional dictatorship; the fact remains that it has been with us exactly as long as constitutional government, and has been used at all times, in all free countries, and by all free men.[45]

If the last clause, with its emphasis on free men, leads us to think that Rossiter's text has little relevance for the decidedly unfree rule of colonialism, it is important to recall that *Constitutional Dictatorship* is largely preoccupied by the space of "emergency" in a modern form of normative rule. The labor of Rossiter's text, then, is dedicated to demonstrating the necessity of emergency powers and the need for their vigorous containment. Accordingly, the cases in which such powers may be invoked and the forms that they may assume must be delineated upfront and with precision. Rossiter tells us that there are really only three types of crisis—war, rebellion, and economic depression—that justify invoking emergency powers.[46] The form of emergency powers is more difficult to bracket, but may generally be identified as the assumption of martial rule, the delegation of legislative powers to the executive, and the large-scale intervention in economic and/or political liberties.[47]

For our purposes, these efforts at containment are particularly telling, for ultimately, I think, they prevent Rossiter from confronting the constitutive paradox of the norm itself, forcing him to view emergency as an unfortunate but periodic lapse. The goal of constitutional dictatorship then is "simply this and nothing more: to end the crisis and restore normal times." One cannot help but wonder, however, if this return of the normal is so unaffected by the crises that periodically interrupt it. What happens to the qualities of certainty and finality, if they can and must operate under the presumption of their suspension? Given that *Constitutional Dictatorship* is an erudite and subtle book, one can only imagine the strong and unspoken ideological pressures that prevented its author from considering the full implications of his own thesis. Not that such a consideration is entirely absent; it appears

through a couple of ciphers. First, Rossiter admits that no democracy underwent a period of emergency rule "without some permanent and often unfavorable alteration in its governmental scheme,"[48] although he is at pains to confine this alteration to the formal distribution of power (so, for example, wartime powers generally leave the executive with more control); second, Rossiter does draw on what he calls the "trailblazing" work of Carl Schmitt and his more constitutive level of questioning the relation between norm and exception, but confines himself largely to Schmitt's examination of sanctioned autocratic power in his 1921 study, *Die Diktatur*.[49]

Let us then move ahead of Rossiter and consider the question of emergency as not just a regulative problem of periodic crisis, but a jurisprudential problem in the understanding of modern law and state. To do so let us reiterate Schmitt's intriguing definition of sovereignty: "sovereign *is he who decides on the exception.*" Schmitt's understanding of the exception is related to a state of emergency, a situation of economic and political crisis that imperils the state and that would require the suspension of regular law and rules to resolve. But as Schmitt repeatedly emphasizes, *this situation of danger can never be exhaustively anticipated or codified in advance,* and thus the suspension of the law would have to be the result of a conscious decision.

Schmitt's formula of the sovereign decision does indeed involve a conceptual paradox in the relation between norm and exception, but it is also first and foremost a highly decisionist and personalistic formula. One way to gauge this is to take yet another look at *Political Theology* and notice how much the decision on the exception, which cannot be codified in advance, and normatively "seems to emerge out of nothingness," is nonetheless linked to very specific and actual conditions. Internal or external threats to the state, severe economic conditions, all provide possible examples of the conditions for the decision on the exception. The key word here would seem to be *possible*—but we must remember that simply because the conditions cannot be listed in advance does not mean that the decision does not respond to an empirical reality. Simply because the decision cannot be circumscribed factually does not mean that it itself is not factual. The inability to anticipate or to legislate the conditions that would require the decision means that it cannot be subsumed into the normative. A lack of normativity is not the same as a lack of materiality or particularity. Indeed, it is the

unequal exchange between the general and the particular in the normative—"the necessity of judging a concrete fact concretely even though what is given as a standard for judgment is only a legal principle in its general universality"[50]—that provides for Schmitt the legal interest in the concept of the decision even before we arrive at a decision on the exception.

Interestingly the decision on the exception appears to be as much a decision on normal conditions as it is on those abnormal conditions that would require a suspension of legal order. Thus Schmitt declares, "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides that such a normal situation actually exists."[51] This is a moment in Schmitt's text that is worth dwelling on—the normal is as much a result of a personalistic decision as is the exceptional, but it is thus crucial to the overall understanding of sovereign power. Norm and exception, as I hope to show in the following chapters, function in juxtaposition, in an arrhythmic register of sorts.

Schmitt's concept of the exception then offers more theoretical value than the specific historical exigencies to which it was posed as an answer. This decision and the space of exception that it brings forth take us to a "borderline concept" that contains the "whole question of sovereignty."[52] In this antinormative decision, Schmitt insists, there "resides the essence of the state's sovereignty, which must be juridically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide."[53] At its core, we may read it *as an alternative conception of power*, one that is decisionist and antinormative. It cannot, of course, survive without the concept of norm that it subtends and is parasitical upon, but that only leaves the matter more relational, more foundational, and ultimately more urgent.

I would argue then that it would be an error to consider the state of emergency as categorically outside the rule of law. After all, even in legal systems with a constitutional provision for the exception, such as the German case of *Notrecht*, we should not move too quickly over the peculiar way in which law contemplates and provides for its own failure. Indeed, whether one considers the word *emergency* and the way it contains within itself the interior sense of the emergent or one considers the exception (*ex capere* [taken outside]) that attempts to spatialize the situation of danger as outside the rule, there is always a question of relation. Giorgio Agamben has recently caught this relational peculiarity with astute precision: "The particular 'force' of law consists in this capacity of law to maintain itself in relation to an exteriority. We shall give the name *relation of exception* to the extreme form of relation by which something is included solely through its exclusion."[54]

In the case of English jurisprudence, there is an additional and historical reason for not placing emergency outside of regular law. One of the more consistent historical strains in English jurisprudence was the disavowal of any prior authority or category for emergency measures. No one is more emphatic about this than the great constitutional authority of the nineteenth century, Albert Venn Dicey: "We have nothing equivalent to what is called in France the 'Declaration of a state of siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army (*autorité militaire*). This is unmistakable proof of the permanent supremacy of the law under our constitution." The twin emphases of the *Introduction to the Study of the Law of the Constitution* are the theoretically unlimited power of Parliament and the restraint of a rule of law. The potential contradiction between these two facts was noted and critiqued from the initial appearance of Dicey's work. If the supremacy of Parliament was itself a legal principle, it was pointed out, then there could be no opposition between governmental power and "regular law." Thus Sir Ivor Jennings felt that Dicey's emphasis on the rule of law was more a "principle of political action" and not a "juridical principle"—it was more about a Whiggish distrust of large governmental powers.[55]

Dicey, of course, was himself well aware of the potential for contradiction. Thus in the somewhat tortuous chapter 13 of the *Law of the Constitution*, he argued that the constitutional solution of the sovereignty of Parliament was not "a merely formal one, or at best only a substitution of the despotism of Parliament for the prerogative of the Crown."[56] An act of Parliament was subject to the interpretation of the judges, who in turn were independent of political influence. The limitation of judicial interpretation, however, did not constitute a prior bar to the power of Parliament to enact whatever it wished—to make, as Sir Leslie Stephen had speculated, blue-eyed babies illegal. Dicey's ultimate answer to skeptics like Stephen was purely conventional: such an abuse of power had no particular check upon it, but would never really happen in Britain. Through an irony of history, however, it turned out that even in

his own lifetime Dicey was faced with the effects of the power he had ascribed to Parliament. The issue, appropriately enough, was a colonial one: an unthinkable prospect to an ardent Unionist such as Dicey of the Home Rule Bill in 1913 (legislating home rule for Ireland). R. F. V. Heuston summarizes what followed: "At first Dicey sought for some means within the boundaries of the constitution for preventing Parliament from exercising the powers he ascribed to it in his Liberal days, and made some very ill-advised suggestions about the power of the monarch to force a dissolution or refuse his assent to the Bill; but eventually in desperation he jettisoned the constitution and pledged himself to armed resistance to lawful authority: he signed the Ulster Covenant."[57]

It could be argued here that Dicey's disagreement with the Home Rule Bill was precisely a political and not a juridical issue, but such a response would, I think, miss the particular ambiguity of the situation. To the extent that the sovereignty of the state (which we must remember is not only about the legal authority of the state to exercise its power but more primarily about the state's obligation to maintain its territorial and institutional integrity) is unlimited, and is figured as logically prior to the law that the state submits to and uses to articulate its legitimacy, the potential for conflict between the two concepts is both enduring and real. To insist, then, that sovereignty is only a legal relation is to overlook the exercises of power that states resort to in certain conditions that are explicitly recognized as "beyond ordinary law." *Emergency* is the name we shall give to the sign of a certain relation between modern law and state, one that appears in dramatic relief in the historical instance of colonialism.

Colonialism

The third and final term that makes up my title serves, of course, as the historical object of analysis and also as a theoretical copula: the term whose function it is to connect the problematic of emergency with the theory of a rule of law. And as with my caveats about the difficulty in definitionally bracketing those terms, this third term in no exception. As Nicholas Thomas has argued in *Colonialism's Culture*, the word *colonialism* conjures up a repertoire of cultural images—"Lindt's melancholy aboriginal, the White Man's burden, darkest Africa"—but lacks

any stable and totalized referent.[58] Colonialism is both place and process, a world-historical system that registers in different modes at different times. In the modern period, therefore, one can speak of seventeenth-century discovery and trade, or settler colonialism, or concepts of conquest, but in all of these there is a temporal bracketing that crucially coincides with fundamental politico-legal changes in the West itself.

The period from the early seventeenth to the late eighteenth century marks England's increasing presence in the world, through the extension of trade and the acquisition of colonies, from the consolidation and eventual loss of the first empire primarily to the west, to the firm beginnings of the second imperial project in the east. This period, of course, also witnesses England's own profound political crises and constitutional changes: revolutions, civil war, restoration and acts of union, and a comprehensive revision of the forms of sovereignty, from the absolutist aspirations of the Stuarts to the "King in Parliament" solution. Explicating the interconnected effects between these two coincident historical processes, much less their causal relation, is no easy matter. And yet, it is worth reiterating the basic coincidence between colonial expansion and domestic constitutional change, because it highlights the complex interconnections that mark these discourses.

From the very beginning of the modern period, in a complex genealogy itself proleptic of a later colonial discourse on emergency power and legitimate rule, expansion and conquest are inscribed into the specific historical struggles in the West against an absolutist sovereign power. Conquest only added to the claims of an absolutist monarch and thus had to be addressed as part of the effort to curb such power through the invocation of long-standing law and rights. Of all the topologies brought to bear upon the arguments of law and colonialism, conquest was perhaps the one most multifarious and resonant in an English political imagination. Conquest was a construct of political theory, a specific legal category, and, perhaps most important, a term of considerable historiographical contention. For the early-seventeenth-century common lawyers Coke, Hampden, and Pym, the argument against the increasing scope of a sovereign monarchy was an insistence on the rights of Englishmen derived from immemorial custom, and the laws derived from an "ancient constitution."[59] The need for such a rhetorical maneuver also arose because it was generally conceded by

jurists at this time that a legitimate and absolute sovereign power accrued to a conqueror. Conquest was not a new legal category of learned Europe: medieval scholarship had already elaborated the concept during the European expansions into the Baltic and Levant.[60] And then, of course, there was that other law and other empire, which the British were so acutely aware of as their antecedent, if not their model—Rome. Within Roman law, the learned law of Europe after the twelfth century, a conqueror gained a lawful power of life and death over his vanquished—*vitae et necis potestatem.* The fusion of medieval and Roman legal thought had thus produced by the Renaissance a coherent body of work on the legal implications of conquest. Two separate schools of thought began to emerge based on the question of contact between Christians and non-Christians: the tradition of Innocent IV, which accepted the property rights of nonbelievers, and the school of Hostiensis, which accorded no property privileges to heathens and was crucial to the ideological construction of Spain's work in the New World.[61] A connection that Pocock tends to overlook is that the early-seventeenth-century English common lawyers' denial of William's status as conqueror was equal to their theoretical acceptance of the absolute power of a conqueror. Indeed, in England the very first judicial formula for the powers accrued by a conquest appear in the famous opinion of Lord Coke against the claims of James I in *Calvin's Case or the Case Postnati* (1608).[62]

Into the eighteenth century, the more important British judicial decisions that shape the scope of the constitution—Lord Mansfield's decisions in *Campbell v. Hall* and *Mostyn v. Fabrigas* in particular—are on cases that arise out of colonial situations.[63] These cases, which involve efforts to curtail the use of a wide monarchical prerogative in the colonies, force one to ask why discussions of prerogative and restraint are taking place a full century after the putative resolution of those issues in the seventeenth-century revolutions. *The colonies here become the site for both the manifestations of contradictions embedded in the British constitution and the alternative locale for elaborating on these questions of power and restraint.* Edmund Burke with his usual acuity noted the truth of this entanglement even before it was fully evident. "I am certain," he insisted, "that every means effectual to preserve India from oppression is a guard to preserve the British constitution from its worst corruption."[64]

The example of this study is drawn from British India, but the Indian enterprise itself represents a particular process that begins in the late eighteenth century. Historians often refer to this British Empire, focused primarily eastward after the loss of the American colonies, as the second empire. P. J. Marshall identifies its main features for us.

> The British Empire of the later eighteenth century ceased to be an empire largely composed of communities of free peoples of British origin tied to Britain by trade regulations and naval power. It was now an empire including numerous peoples who were not British in origin and who had been incorporated into the empire by conquest and who were ruled without representation. It was an empire sustained not just by the Royal Navy but by the deployment of British troops across the world in a way that was to last until the 1960s.[65]

This is a largely accurate picture, although one painted in broad strokes. Of course, if one recalls the West Indian and Southern plantations, conquest and race were hardly absent from the first empire. But the key difference was that in these colonies the race question was firmly tied to slavery. The nineteenth-century empire, covering India, and later Africa and the Middle East, consisted of people who were not slaves but, because deemed utterly incapable of participating in their rule, were not quite free subjects either. *This empire required a new conception of sovereignty, one that was neither despotic nor democratic.* And for such a historically specific reason, it was in this empire that law in general, and the problematic of a rule of law and emergency in particular, assumed a greater ideological weight.

Of course, these transformations of rhetoric and ideas are inextricably taking place within a transformation of economic and political forms of trade and governance. Moreover, by the nineteenth century these forms are global in dimension. Thus Roberts and Mann, in surveying law in colonial Africa, stress the ways in which "early nineteenth century transformations in the balance of legal power between Africans and Europeans was not unique to Africa, but rather formed a part of a world wide process of the establishment of consular jurisdictions."[66] They point out that missionaries, officials, traders, all are increasingly unanimous in their belief that the spread of "western legal arrangement was necessary to the growth of trade and civilization."[67]

These latter two terms, however, remain far from static. Not only does the concept of trade move away from a discourse of mercantilism to one of "free trade" but also enters a new symbiotic relationship with a now more evolutionary concept of civilization. This means nothing short of the fact that from the eighteenth century onward, the "colonial" operates in a new field of power and with new and privileged sites for its application. If, as Foucault emphasized in his lecture on governmentality, "the essential issue in the establishment of the art of government [was the] introduction of economy into political practice," the colonial discourses of the eighteenth and nineteenth century bear out his claim in explicit ways. The old monopoly charters of the East India Company, for example, are challenged in an idiom that echoes the challenge to absolutist power. The East India Company, in its peculiar guise of merchant-as-sovereign, brought together questions of monopoly trade and of colonial governance. The periodic renewal of the Company's charter would consistently open up a floodgate of pamphlets, petitions, and inquiries, right up to the Charter of 1813 by which the Company lost its trading monopoly and finally the Charter of 1833 by which act it ceased to be a trading corporation altogether.

This story of Britain's increasing connection with India in the eighteenth century is a complicated, indeed, labyrinthine one, and here I will do no more than introduce it in summary fashion. In 1612, Thomas Roe had received imperial permission from the Mughal court at Delhi to establish a trading factory, and the British had established trading posts on all coasts: Bombay on the west coast, Madras and Cuddalore on the Coromandel or east coast, and from 1690, Calcutta in Bengal. During its early years, the East India Company's organization reflected its origin and continuation as a primarily commercial venture: civil servants constituted the ascending ranks of writer, factor, junior, and senior merchant. But even at this early stage, the Company was often the target of a pamphlet literature that attacked both the Company's economic monopoly and its political activities.[68] It is, however, in the latter half of the nineteenth century that criticisms of the Company increased in scope and intensity. This, of course, had much to do with the East India Company's increasing political fortunes in India. Toward the middle of the eighteenth century, against a backdrop of changing political arrangements, the rise of new local states, and Anglo-French rivalries, the Company found itself increasingly involved in political

and military affairs, and by 1765 was operating under the Diwani (the Mughal imperial sanction to collect revenues). By the third quarter of the eighteenth century then, we have a monopoly trading company ruling large areas in an absolutist manner.

No one is clearer on this than Adam Smith. Among the growing number of critics of the East India Company, Adam Smith emerged at this time as one of the more vocal and influential voices. The spread and influence of Smith's arguments on this topic may be gauged by the concentrated reaction against him. Not only were the arguments of *The Wealth of Nations* answered by critics in the form of popular pamphlets, but they were also identified in the private papers of the East India Company as a singular target to be attacked.[69] *The Wealth of Nations*, first published in 1776, focused on the East India monopoly as a singular example of bad economics and politics. A monopoly in Smith's vocabulary is by definition similar to despotism, as it too is a concentration of power without any checks and balances. But a direct consequence of such concentrated power in colonial government is the inability to further local economic interests and thereby foster local loyalties. Such a merchant government then, Smith insists, can "command obedience only by military force, and is therefore necessarily military and despotical."[70] By the time the dissolution of the East India Company monopoly is set in motion, the critique of economic and political power has indistinguishably coalesced. Moreover, the sale of products in the nineteenth century also invokes new sites of application. Anyone even superficially familiar with the evangelical flavor of colonial trade practices knows that selling soap to the natives is never simply just that; it is nothing short of attending to their entire normative conduct and to their very souls, placing them, as the old proverb of "cleanliness is next to godliness" goes, proximate to god. Colonial law operates then in a particular field of power, one that posits new guiding norms and new institutional arrangements.

A more difficult answer to pinpoint is how far these conditions of colonial law illustrate the conditions and operations of modern power in general. Certainly, such an answer would be part of an effort that has been exerted by much recent postcolonial critique, which has disassembled the neat divisions between the West and the rest, explicating the productive role of the colonies in the history of the West, in its self-imaginings and identifications. This effort is shared by legal critics,

who have recently turned their attention to the influence of theories of primitivism and racial difference, particularly in the Enlightenment, on theories of law and government. Notable in this regard is the work of Peter Fitzpatrick, who focuses on one particular purpose of the colonial world: to provide modern law with its constitutive negative—to posit law, nation, and civilization in contrast to custom, tribe, and savagery.

In Fitzpatrick's work we receive the most sustained and erudite demonstration of the role of colonialism and the racial difference it posits as crucial to the condition of *our* modern law. After all, as the title indicates, *The Mythology of Modern Law* is not about colonialism but law and modernity. Colonialism, however, becomes the foundation on which the project of modernity is initiated. In Fitzpatrick's account, the break from a theological transcendence to a secular grounding creates a particular contradiction. The modernity of law is at once the exclusive domain of the West and at the same time universal in its aspirational claims. Such a contradiction is, for Fitzpatrick, resolved through myth.

While Fitzpatrick's work is comprehensive in its demonstration of the foundational role of this racial splitting, his text does less with the continuing effects of this difference on modes of colonial governmentality, and the further reflective effect of those quotidian governmental actions on Western conceptions of rules and law.

Partha Chatterjee's work on the colonial state, on the other hand, poses the question of what is distinctive about colonial power up front. "I will begin," Chatterjee writes, "by asking the following question: Does it serve any useful analytical purpose to make a distinction between the colonial state and the forms of the modern state?"[71] Chatterjee's answer is an emphatic affirmation of the distinction, of what he calls the "rule of colonial difference."[72] The paramount marker of this difference is, of course, race—a factor that constrains the particular development of the colonial state and colonial power.

As one example of this rule and the constant limit it posed to a consolidation of a modern regime of power, Chatterjee turns to a reading of the infamous case, well known to scholars of colonial India, of the Ilbert Bill. That piece of legislation, introduced in 1883 and named for the law member at the time, sought to correct an "anomaly" in the bureaucracy whereby native judicial officers unlike their British counterparts were prevented from trying cases that involved Europeans. The government of Bengal, with which the viceroy and council were at first to agree, decided that there was no "sufficient reason" why

covenanted civil servants could not exercise this power. More than sufficient reason soon appeared, however, in the form of vociferous and protracted protest on the part of the nonofficial European community. Loath to relinquish its racial privileges, the residents organized protests, boycotts, and even a rebelliously ominous defense league. Ripon, the liberal viceroy at the time, soon backed down, and provisions of the bill were qualified to the point of nonexistence. Here is an example, then of a distinctly modern project of bureaucratic rationalization thwarted by the racialist requirements of colonial state and society. What Chatterjee wants to draw our attention to, however, is the fact that this example is not an isolated instance of the viceroy's lack of resolve or of the particular exigency of the protest. Rather, this example vividly demonstrates "the inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule."[73] That is, to the extent that racial hierarchy was the *raison* of colonial rule, any rationalist effort to remove such distinctions would go toward removing what made such a government "colonial" in the first place. Thus Chatterjee notes that "the more the logic of a modern regime of power pushed the processes of government in the direction of rationalization of administration and the normalization of the objects of rule, the more insistently did the issue of race come up to emphasize the specifically colonial character of British dominance in India."[74]

Chatterjee's reminder of the force of colonial difference is both useful and timely. Indeed, without foregrounding the issue of race, with its attendant moral projects, much of this book's analysis of the form of emergency would lose its critical edge. But Chatterjee's insistence on colonial difference does require a caveat: when Chatterjee speaks of race in the colonial realm, he is in fact utilizing a shorthand for a range of differences that runs from eighteenth-century conceptions of cultural difference to nineteenth- and twentieth-century racial conceptions based on blood. Thus for Montesquieu in *The Spirit of the Laws*, the source of difference is due more to environmental factors and is not particularly racial, or at least not the sort of Manichaean racialism of a later Victorian sensibility. Thus, the heat and humidity of India, we are told, is the principal cause of the timidity and torpor of the inhabitants, *both* native and European: "Indians are by nature without courage; even the children of Europeans born in the Indies lose the courage of the European climate."[75]

Moreover, the pressure of Chatterjee's rule of difference is exerted in

dissonant forms. Thus in contrast to Chatterjee's example of the Ilbert Bill, one can turn to an earlier piece of legislation that also involved the question of racial distinctions and state structures. Act XI of 1836, labeled the Black Act, rescinded the earlier right of British subjects to appeal to Crown courts, obliging them to appeal to the highest civil court of the East India Company, the Sadr Diwani Adalat.[76] British subjects in Calcutta introduced a memorial (petition) to the government, claiming that their rights as British subjects were being eroded. The East India Company, however, persevered, and after 1836 all civil litigation could only end in its adalats. In order to locate the discursive pressure within the idea of legality, we must ask why the Company held its position so tenaciously. The law member at the time, Lord Macaulay, offered a predictable rhetoric of equal justice, of a single procedure that promised justice to all its subjects. Considering the demand for separate appeals, Macaulay argued that "the distinction seems to indicate a notion that the natives of India may well put up with something less than justice or that Englishmen in India have a title to something more than justice."[77] Later in a more revealing Minute (memo), Macaulay was to insist that the real issue was the consolidation of the state itself. While the petitioners, Macaulay argued, would like to convert the issue into one of rival traders, the actual concern was one of state power. In his Minute of 3 October 1836, Macaulay insisted that the Company must intervene. Moreover, this intervention was "not the jealousy of a merchant afraid of being undersold, but the jealousy of a ruler."[78]

To be fair, however, I think that these reminders, important as they are, that race cannot be thought of as a conceptual constant, or that the colonizers cannot be considered a homogenous and undivided entity, do more to qualify than to contradict Chatterjee's argument. After all, what is key to his argument is that in the end race would consistently function within the colonial state as a limit to its modern completion. Thus he insists upon "the inherent impossibility of completing the project of the modern state without superseding the conditions of colonial rule."[79] The dialectical language of "superseding" would seem to place Chatterjee's analysis if not firmly in a Marxist historiography then at least, as Stuart Hall used to say of his work, "within a shouting distance of Marxism." Moreover, Chatterjee's understanding of what marks the colonial is quite close to that of his colleague in the Subaltern Studies

movement, Ranajit Guha. In a similar move, Guha identifies the essence of what makes a colonial state with a structural inability to complete the project of modern power. Thus in *Dominance without Hegemony*, he notes that "colonialism could continue as a relation of power in the subcontinent only on the condition that the colonizing bourgeoisie should fail to live up to its own universalist project."[80] Guha's argument is principally addressed to members of the so-called Cambridge School of Indian History, who place the emergence of the colonial state in an intimate relation with indigenous forces, thereby hoping to revise the understanding of colonialism as rupture. Nonetheless Guha's position does succinctly capture a definitional understanding of colonialism as a condition where the modern project reaches its strained limit. For both Chatterjee and Guha remind us that in terms of an emergent modernity, the colonial condition, to the extent that it may remain colonial, must work as a limit.

How then are we to utilize both Fitzpatrick and Chatterjee in articulating a specific place of the colonial in relation to the modern? While with the former we have a reading of the colonial as a source of differentiation crucial to the initiation of the modern project of law, with the latter we encounter an insistence that the colonial must be read as the limit case of that project. What is key, however, is that these discourses consistently tie together forms of difference with forms of rule. For this reason, they are not just foundational to conceptions of modern law (Fitzpatrick), or limits to the normalization of modern power (Chatterjee), but are crucially both cause and limit. It is in this sense that colonialism as a specific historical formation facilitates our theoretical critique of both the creation of the rule and the exception. That is to say, colonialism is the best historical example for any theoretical study of norm and exception, rule of law and emergency.

Let me suggest that a colonial rule of law is articulated within the tension and polarity of two key Enlightenment concepts: primitivism and Oriental Despotism. These concepts from Locke to Montesquieu onward couple cultural and racial difference with forms of state and government. Where primitivism is criticized for an absence of state rule, despotism is marked by nothing but rule, nothing but the all-choking "will of the one." (The fact that these concepts do not correspond to an observed situation on the ground should by now go without saying.) Within primitivism and despotism, the construct of a

colonial lawful rule emerges as a median category. It is a form of sovereignty and governmentality: a rule that is lawful, as it lays claim to legitimacy through law, but also one that is literally full of law, full of rules that hierarchicalize, bureaucratize, mediate, and channel power. This insight into the genealogy of colonial legality means that the force of its critique cannot be either simply affirmative or oppositional—cannot celebrate the extension of a rule of law, or decry that the Enlightenment values of rules and rights were an unkept promise in the colonies. Rather the critique must focus on the constitutive role of the colonial in the articulation of the modern. Colonialism makes explicit the connection between racial and cultural conditions and forms of rule in general—and in doing so, as we shall see, also makes explicit the relation between a rule of law and emergency, a relation that is as intimate as it is anxious.

The main body of this text is divided into three chapters, which are arranged chronologically and theoretically, albeit in sometimes overlapping and discontinuous ways. Chapter 2, "The Colonial Concept of Law," which examines the way the sources and limits of legal authority were conceptualized, that is to say examines the rule of law itself, covers the period from the eighteenth to the nineteenth century. Chapter 3, "The 'Writ of Liberty' in a Regime of Conquest: Habeas Corpus and the Colonial Judiciary," focuses largely on the nineteenth century and the way in which general notions of emergency, quite apart from specific occasions that call for extraordinary powers, are imbricated into the legal reasoning and legal institutions of the colonial state. Chapter 4, "Martial Law and Massacre: Violence and the Limit," looks at emergency powers particularly as they are deployed in the nineteenth century in Jamaica, and in the twentieth-century incident of the Amritsar massacre. Thus while chapters 2 and 4 are explicitly about the conception of a rule of law and emergency respectively, chapter 3 acts as a hinge of sorts. Tracing habeas corpus from its introduction to its ultimate suspension in colonial India allows me to substantiate the arguments for a rule of law—habeas after all was and is one of the more elementary markers of a liberal legality—and to anticipate the workings of emergency. Chapter 3 is also the one that concentrates on the more daily and institutional operations of law in the courts. Indeed, it could be said of all three of the chapters that they employ different historical sources in order to examine the operations of law in different registers: while chapter 2 is primarily concerned with the writings of philosophers, jurists, and colonial administrators, and chapter 3 is more case based, chapter 4 concentrates on the operations of the army and executive.

Each of these chapters bears out the assertion that this is neither a work of colonial history nor of legal theory but in a deeply symbiotic and continuous way of both. This is not a narrative history or a monograph on, for example, the legal question of rights. Each chapter hopes to create a dialogue by turning to historical archives and to some particular aspect of contemporary theory. In chapter 2, the historical ideology of the despotism of Eastern societies and the codification efforts of the modern colonial state are placed within the theoretical issue of law's relation to society, of law variously understood as sociological or positivist. In chapter 3, current arguments in legal theory that view rights not as ahistorical entities but rather as contingent modes in the modern operation of power are used to elucidate the reading of rights in a colonial regime, particularly the disjunctive doctrinal history of habeas corpus in colonial India. Finally, analyses of law's relation to violence from Robert Cover to Walter Benjamin are vital to answer the question, What is martial law?

While the substance of these exchanges will hopefully emerge in the course of each chapter, the point to emphasize here is that throughout there is a process of selection that applies to the choice of both the historical and theoretical materials that are put into dialogue with each other. Throughout the book there are guiding chronological narratives, both more general, such as the story of the British arrival and expansion in India, and more specific, such as the legal history of habeas corpus and of the concept of martial law. The analysis, however, proceeds by closing in on a few instances and texts that are, in my judgment, the best examples of the larger argument. Such a symptomatic reading allows me to cover a wide terrain while still keeping the argument and, indeed, the overall book, focused and concise.

Notes

Chapter 1

1. *Special Reference* P.L.D. 1955 F.C. 435. The transcript of the case used here is available in Sir Ivor Jennings, *Constitutional Problems in Pakistan* (Cambridge: Cambridge University Press, 1957), 249.

2. *Special Reference*, 298.

3. A word right away on the denotative use of *British* and *English*. Although in cultural terms what we are concerned with here is very much an English tradition of law and constitutionality, particularly to its advocates (no one claims that Welsh law is the source of a civilizing mission), there is technically no such thing as the English constitution by the eighteenth century and after the Acts of Union. Therefore, when I refer to institutional structures of government and constitution, I denote them as British but use the word *English* to distinguish cultural and historical meaning.

4. John Brewer and John Styles, eds., *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (New Brunswick, N.J.: Rutgers University Press, 1980), 13–14.

5. Ibid.

6. James Fitzjames Stephen, in W. W. Hunter, *Life of the Earl of Mayo*, vol. 2 (London, 1875), 168–69.

7. James Fitzjames Stephen, in the prosecution of *Regina v. Nelson and Brand*, quoted in Geoffrey Dutton, *The Hero as Murderer: The Life of Edward John Eyre, Australian Explorer and Governor of Jamaica, 1815–1901* (London: William Collins, 1967), 365.

8. For a comprehensive review of some of the major works in the field, see Sally Engle Merry, "Review Essay: Law and Colonialism," *Law and Society Review* 25, no. 6 (1991): 889–992.

9. For the colonial construction of "custom," see Martin Chanock, *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985). For a work in a similar vein but more evocative of indigenous understandings and local events, see Sally Falk

Moore, *Social Facts and Fabrications: "Customary Law" on Kilimanjaro, 1880–1980* (Cambridge: Cambridge University Press, 1986).

10. Edward W. Said, *Orientalism* (New York: Vintage, 1979).

11. This is a very broad literature, and one can do no more here than highlight some important contributions. For development of Said and the arguments of *Orientalism*, see Lisa Lowe, *Critical Terrains: French and British Orientalisms* (Ithaca: Cornell University Press, 1991); Timothy Mitchell, *Colonizing Egypt* (Berkeley: University of California Press, 1991); Ronald Inden, *Imagining India* (Cambridge: Basil Blackwell, 1990); and Carol Breckenridge and Peter van der Veer, eds., *Orientalism and the Postcolonial Predicament: Perspectives on South Asia* (Philadelphia: University of Pennsylvania Press, 1993). There have been more direct applications and considerations of Foucauldian theory in colonial discourse, such as Ronald Hyam, *Empire and Sexuality: The British Experience* (Manchester: Manchester University Press, 1990). For one of the most subtle and insightful engagements with Foucault through the prism of colonial sexuality, see Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham and London: Duke University Press, 1995).

12. Regulation III, April 7, 1818. India Office Records. V/8/19.

13. A. W. B. Simpson traces the effects of the Bengal regulation to late-nineteenth-century emergency law in Ireland. See his "Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights," *Loyola Law Review* 41 (1996): 629–711, esp. 639.

14. See, for example, Fitzpatrick's argument that such a division can be traced back "to the middle ages, to take it no further back," and that in modern law there remains "a persistent contradiction between law as avatar of the god of order and law as avatar of the god of illimitable sovereignty." Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 58–59.

15. Franz Neumann, *The Rule of Law: Political Theory and Legal System in Modern Society* (Leamington Spa, U.K: Berg, 1986), 4.

16. For example, Joseph Raz points out that the rule of law is made to cover an entire spectrum of political ideals, such as when in 1959 the International Congress of Jurists meeting in New Delhi maintained that the purpose of "a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual." See Joseph Raz, "The Rule of Law and Its Virtue," in *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 210–11.

17. For details of this inheritance, see Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: Gateway Edition, 1972), 164–65.

18. Ibid.

19. Ibid.

20. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed. (1855; reprint, London: Macmillan and Company, 1897), 179–87.

21. Raz, "Rule of Law," 211.

22. Quoted in Thomas Metcalf, *Colonial Ideologies* (Cambridge: Cambridge University Press, 1998), 206.

23. J. F. Stephen, *Minute on the Administration of Justice in British India* (1872). IOR V/23/19 Index 115.

24. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 16.

25. Ibid., 23.

26. Ibid., 263.

27. Ibid., 259.

28. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 74–75.

29. Michel Foucault, "An Introduction," in *The History of Sexuality*, vol. 1, trans. Robert Hurley (New York: Vintage, 1990).

30. This point is emphasized in François Ewald, "Norms, Discipline, and the Law," *Representations* 30 (spring 1990): 138–61.

31. Michel Foucault, "Governmentality," in *The Foucault Effect*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991). Also see Colin Gordon, "Governmental Rationality: An Introduction," in the same volume.

32. Foucault, "Governmentality," 102.

33. Ewald, "Norms, Discipline, and the Law," 139.

34. Foucault, "Governmentality," 104.

35. Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983).

36. Martin Jay, "Carl Schmitt: Theorist of the Reich," *Journal of Modern History* 56 (September 1984): 558–61.

37. Agostino Carrino, "Carl Schmitt and European Juridical Science," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (New York and London: Verso, 1999). This collection is one that tries to consider the deep challenges Schmitt's thought poses to liberal theory.

38. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2d ed., trans. George Schwab (1932; reprint, Cambridge: MIT Press, 1985), 5.

39. Antonin Scalia, "The Rule of Law as Law of Rules," *University of Chicago Law Review* 55, no. 4 (fall 1989): 1175–88.

40. Fred Dallmayr, "Hermeneutics and the Rule of Law," in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (New York and London: Routledge, 1992), 284.

41. John Locke, *Two Treatises of Government*, ed. Peter Laslett (1690; reprint, Cambridge: Cambridge University Press, 1988), 375.

42. Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws*, ed. and trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (1748; reprint, Cambridge: Cambridge University Press, 1989), book 11, chap. 6, 159.

43. The phrase is taken from the title of Chief Justice Rehnquist's work on emergency powers in the U.S. system; see William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Knopf, 1988). For a more critical indictment of wartime powers and excesses in Britain, see A. W. B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992).

44. Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948).

45. Ibid., vii.

46. Ibid., 6.

47. Ibid., 7–8.

48. Ibid., 13.

49. Ibid., 14.

50. Schmitt, *Political Theology*, 31.

51. Ibid.

52. Ibid., 6.

53. Ibid., 13.

54. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 18.

55. Dicey, *Law of the Constitution*, 270; Sir Ivor Jennings, *The Law and the Constitution* (1933; reprint, London: University of London Press, 1959). Also see Holdsworth's disagreement with Jennings's reading of a rule of law, and his insistence that the concept has to be understood in a wider sense, with a long genealogy dating back to medieval times. W. S. Holdsworth, "Review of *Introduction to the Study of the Law of the Constitution*, 9th ed.," *Law Quarterly Review* 220 (October 1939): 585–88.

56. Dicey, *Law of the Constitution*, 413.

57. R. F. V. Heuston, *Essays in Constitutional Law* (London: Stevens and Sons, 1964), 2–3.

58. Nicholas Thomas, *Colonialism's Culture: Anthropology, Travel, and Government* (Princeton: Princeton University Press, 1994).

59. This, of course, refers to the seminal work on the subject: J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with a Retrospect* (Cambridge: Cambridge University Press, 1987).

60. For a discussion of the work of early civil and canon lawyers on conquest, see Hans Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985).

61. Ibid.

62. *Calvin's Case*, 77 E.R. 377 (Exchequer, 1608). For an engaged and comprehensive reading of the case, see James H. Kettner, *The Development of American Citizenship, 1608–1870* (Chapel Hill: University of North Carolina Press, 1978), 16–25.

63. *Campbell v. Hall*, 98 E.R. 1045 (K.B., 1774); *Mostyn v. Fabrigas*, 98 E.R. 1021 (K.B., 1774).

64. Edmund Burke, *The Complete Works of the Right Honourable Edmund Burke*, rev. ed., vol. 2 (Boston: Little, Brown, 1866), 446.

65. P. J. Marshall, "Empire and Authority in the Later Eighteenth Century," *Journal of Imperial and Commonwealth History* 25, no. 2 (1987): 115.

66. Richard Roberts and Kristin Mann, "Law in Colonial Africa," in *Law in Colonial Africa*, ed. Mann and Roberts (London: Heinemann, 1991), 11.

67. Ibid.

68. *Reasons Against Establishing an East India Company with a Joynt-Stock Exclusive to all Others* (London, n.d.—probably 1693). There are numerous other pamphlets similar in scope and argument: *Reasons humbly Offered against Establishing the Present East India Company by Act of Parliament, exclusive of others, and confirming their Charters* (London, 1696); and *Extract of divers Passages relating to Exclusive Joint Stock Companies, taken from Monsieur Dewitt's Treatise of the True Interest and Political maxims of Holland and West-Friedland* (London, 1702).

69. Anonymous, *A Candid Examination of the Reasons for Depriving the East-India Company of its Charter, Together With Strictures On Some of the* SELF-CONTRADICTIONS *and* HISTORICAL ERRORS *of* DR ADAM SMITH *in his Reasons for the Abolition of said Company* (London, 1779), emphasis in original. For the Company's Private Papers: I.O.R. A/2/9.

70. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776; reprint, Oxford: Oxford University Press, 1993), 369.

71. Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993), 14.

72. Ibid., 16.

73. Ibid., 21.

74. Ibid., 19.

75. Montesquieu, *Spirit of the Laws*, book 14, 234.

76. Macaulay's views on the Black Act may be found in series of Minutes in the collection edited by C. D. Dharker, *Lord Macaulay's Legislative Minutes* (Madras: Oxford University Press, 1946), 192–93. Hereafter cited by Minute number with page numbers following.

77. Minute no. 10, 177.

78. Minute no. 12, 196.

79. Chatterjee, *Nation and Its Fragments*, 21.

80. Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge: Harvard University Press, 1997), 64.