

## *Chapter 4*

# Martial Law and Massacre: Violence and the Limit

In Amritsar, 13 April 1919 was a day marked by the heat and dust characteristic of the Punjab at that time of the year. General Dyer, who had been in the city since 11 April, spent the morning marching round the city, reading a proclamation forbidding the residents from leaving the city or gathering in processions or assemblies. By 1:00 P.M., however, finding the weather too hot, he returned to his headquarters. Soon after, he received reports that an alternative procession during the morning was announcing a gathering at Jallianwala Bagh at 4:30 P.M. The city was observing the fourth consecutive day of Hartal or general strike, and there were funerals being held for people shot by the military on 10 April. Adding to this tension was the fact that many people had come into the city from out of town, as it was the day of the Baisakhi festival—the Hindu New Year. It is estimated that by the afternoon some twenty thousand people had assembled in the bagh, some in open defiance of General Dyer's proclamation, but others merely in the spirit of the festival, as the bagh was adjacent to the holy Golden Temple. By 4:00 P.M. General Dyer received information that the meeting was being held and immediately set out with his troops and armored vehicles.<sup>1</sup>

Jallianwala Bagh was actually not a park or garden at all, but an unused ground in the shape of an irregular rectangle about 250 yards long and 200 yards wide. Houses built with their back walls to the area had effectively enclosed it on three sides. The fourth side had a boundary wall of around 5 feet, with a few narrow lanes serving as exits.<sup>2</sup> Unable to get his armored cars through these lanes, General Dyer approached the ground on foot and stationed his troops, twenty-five on either side of him. Then without any warning he opened fire. In the

panic that followed, some people lay on the ground to avoid the bullets but were trampled as others rushed toward the exits. As the crowd thickened around such points, General Dyer directed the fire at them. The firing lasted for ten to fifteen minutes, and a total of 1,650 rounds of ammunition were used. Only after nearly running out of ammunition did General Dyer cease firing and withdraw, without determining the casualties or providing for any medical assistance. The official estimate later on was that 379 people had been killed, with thousands more seriously injured.<sup>3</sup>

This was the infamous Jallianwala Bagh massacre, an incident that was neither the beginning nor the end of martial law, but that came to dominate the debate around the “disturbances in the Punjab.”<sup>4</sup> “Amritsar” became a signal event with the years, and one that was seen as contributing to the end of British rule in India, or worse, as Alfred Draper’s book *Amritsar: The Massacre That Ended the Raj* suggests.<sup>5</sup> The official view was to stress the exceptionality of the event, to concentrate on Dyer’s “bad judgement” as his alone. Winston Churchill during the Commons debate on Dyer’s actions somewhat unbelievably declared it to be “without precedent or parallel in the modern history of the British Empire . . . an extraordinary event, a monstrous event, an event which stands in singular and sinister isolation.”<sup>6</sup>

The official view, which stressed the singularity of the event, insisted that what made it without parallel was not only the large number of people killed—and in this they were right—but also the flawed logic with which Dyer explained his actions. At the center of this charge was a much quoted statement from the report General Dyer made to his division command on 25 August 1919.

I fired and continued to fire until the crowd dispersed, and I consider this is the least amount of firing which would produce the necessary moral and widespread effect it was my duty to produce if I was to justify my action. If more troops had been at hand, the casualties would have been greater in proportion. It was no longer a question of merely dispersing the crowd, but one of producing a sufficient moral effect from a military point of view not only on those present, but more especially throughout the Punjab. There could be no question of undue severity.<sup>7</sup>

It is a remarkable and revealing statement that we shall explicate at some length later on. To the Majority of the Hunter Committee, however, such an explanation represented a “mistaken conception of duty.” It may have been necessary, they argued, to fire upon the crowd to get it to disperse, “but continued firing upon that crowd cannot be justified because of the effect such firing may have upon people in other places.”<sup>8</sup> In short, much of the immediate reaction to Dyer’s violent response was to insist that it had gone beyond the province and purpose of martial law. To follow such an insistence, however, is only to push the issue back one stage, where one encounters the question, What, after all, is martial law?

In this chapter, I shall attempt to answer this question in various ways. In the first part, I examine the issue from a more historicist perspective, tracking the origins and change in the meaning of this legal category, from riots in eighteenth-century Britain to nineteenth-century invocations of martial law in the colonies. Later, however, I try to extrapolate the deeper relation between law and violence that martial law demonstrates by returning to the exemplary instance of the Amritsar massacre through a reading of Walter Benjamin.

The purpose of such a broad approach, particularly the comparison of colonial martial law to responses to domestic disturbances in Britain, is twofold. First, it allows us to consider the contradictions in a colonial martial law as examples of the problematic relation between law and violence in Western legal theory. The problem of placing martial law into a contained definition—and I hope to show that this is truly a problem—does not exist outside the problematic of the moment of exception within a liberal-constitutional system. Second, such a comparative approach allows us to specify the effects of racial difference on legal constructs. Thus, as treated here, emergency covers the general situation of jurisprudential doubt that exists on a continuum from military aid to civil power to the more intensified manifestation of martial law. This is not to suggest that a martial law response to emergency is identical to a response to a riot—indeed, many commentators on incidents of colonial martial law charged that the situation was misunderstood because it was compared to a “mere” riot—but it is to argue that the connections must be substantiated in order that the differences and their ideological consequences can be specified with some accuracy.

Thus, for example, the significance of twentieth-century justifications for colonial martial law that emphasize local statutes can only be realized if they are read as a movement away from earlier justifications by unwritten prerogative.

### *From Domestic Riots to Colonial Rebellions*

As we approach the definition of martial law, it may be noted at the outset that the category of martial law occupies a profoundly ambiguous place in jurisprudential writing. It is considered to be both a properly legal question and a marker of the law's absence. On the one hand, there is recognition of the inevitability of martial law in certain situations. Here it represents the force of the state at its purest, the necessary condition if both law and state are to survive. On the other hand, we find an insistence on rules that determine the moment of emergency—an insistence that the law shall appear at its own vanishing point to determine the rules of its own failure. Martial law, like other responses to emergency, simply rested not on the authorization of ordinary law but on the legal maxim *Salus populi suprema est lex* (safety of the people is the supreme law). Notice how in such a formulation martial law is the manifestation of both the highest law and of no law at all. But while martial law is based on necessity, there are rules that can govern the perception of what constitutes necessity, and these rules are historically variable. It becomes possible, thus, to approach martial law as a changing cognitive question. This is why the legal *history* of martial law matters.

Within English legal history, it is even more difficult to fix the role of martial law. Although the issue of military intervention in civil politics—specifically the aid of the army to civil power in riots and rebellions—repeatedly arose from the late eighteenth century onward, the category of martial law was not applied to Great Britain. This should not lead one to conclude, as Leon Radzinowicz does, “that the expression martial law is not known to English law.”<sup>9</sup> Rather, both military and martial law as names and jurisdictions derived from the old institution of the Court of Constable and Marshall, itself an archaism by the late eighteenth century. Indeed, for Holdsworth, this common genealogy helped explain the persistent confusions over what differentiated martial law from the rules of the army.<sup>10</sup> Within English jurisprudence, martial law could refer both to the Crown's right to ordain articles of

war for army discipline (a prerogative wholly absorbed later by statutory Mutiny Acts) and to the suspension of ordinary law by a military commander in moments of necessity. Indeed, the notion of necessity provides the main anchor in this entire juristic questioning. The maxim of *Salus populi suprema est lex* is the one “unbroken sequence of authority from the earliest Year Books.”<sup>11</sup> Vigorously debated under the Stuarts and limited to wartime emergencies by the Petition of Right,<sup>12</sup> martial law as the concession of civil power to military authorities over civilians, however, fell into domestic disuse from the Restoration onward. Yet the questions that arose upon its return in the colonies in the mid-nineteenth century were largely familiar, similar as they were to the earlier debates over the proper relation of military to civil power in moments of unrest.

Despite the place of martial law in English history, and the legal affinity between martial law and responses to domestic riots, there was a persistent tendency in English jurisprudence to banish martial law from the confines of law proper. Thus we have the Duke of Wellington’s famous definition of martial law as “neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all.”<sup>13</sup> If throughout the nineteenth century the maxim of *Salus populi suprema est lex* provided a rationale for acts of necessity and emergency, then another maxim, *inter arma silent leges*, explained the lack of a judicial or constitutional authority for those acts—explained, in other words, why in war the law was simply silent. Acts of emergency may happen, but there could be no room for a *prior* legal authority to military adjudication in an ideology of a rule of law. As I mentioned in the introduction, no one is more emphatic about this than Dicey, who insisted that the British Constitution was distinguished by the fact that it did not cover any sense of a state of siege.<sup>14</sup> Dicey distinguishes between two senses in which martial law is used in English jurisprudence: as what is “employed as a name for the common law right of the Crown and its servants to repel force by force in the case of an invasion, insurrection, riot or generally of any violent resistance to the law”<sup>15</sup> and as what is used to label the condition where military tribunals supersede the civil judicature.<sup>16</sup> It is only the first definition, Dicey insists, that is acceptable to English law. The military may be responsible for a whole area under martial law but still does not possess the right to capital punishment. Citing Wolf Tone’s case (1798),

Dicey points out that the power of execution can only rest in the civil courts.<sup>17</sup> Even, however, as he effectively banishes a form of martial law that had been used in the colonies in his own lifetime, Dicey provides us with a valuable clue: in order to understand the ideological and jurisprudential significance of martial law, we must read it within the general prerogative of the Crown to resort to violence to check a challenge to its authority—read it, in other words, in connection with the form of response to domestic riots and rebellions.

With regard to the response to domestic riots, in addition to the accepted prerogative of the Crown to repel force by force, there existed the common law responsibility of all to protect and prevent the property of His Majesty's subjects from destruction. This responsibility traced back to the institution of the *posse comitatus*. Indeed, for Blackstone, the institution of the *posse* revealed that "our antient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace."<sup>18</sup> Failure to join the *posse comitatus* when required was itself an offense against the king's prerogative. While the *posse comitatus* was invoked into the nineteenth century,<sup>19</sup> increasingly the need for disciplined force and the blatant lack of neutrality of those who came out against the rioters (in the agricultural uprisings, for example, it was most often landlords) led to a more exclusive utilization of the army as an aid to civil power.<sup>20</sup> The specific legal questions that arose out of such interventions are remarkably similar to those later on concerning the conduct of authorities under martial law: essentially such questions came down to the correct amount of force that could and should be employed in moments of unrest. In England, trying to determine this quantum produced some signal instances in which magistrates and military were blamed for doing too little or too much.

The Act of 1 Geo. I, c. 5, commonly known as the Riot Act, was the official and statutory response to unlawful assemblies.<sup>21</sup> But as Brackley Kennet, the Lord Mayor of London during the Gordon riots of 1781, discovered, its particular provisions and requirements were far from clear. In *Rex v. Kennet*, Lord Mansfield stated that a failure such as Kennet's to read the Riot Act and to call out the military, no matter how pure the intention to shield innocent people from accidental death, was *prima facie* a criminal neglect of duty. Moreover, the hour window provided for in the act did not prevent the instant use of force if so

required.<sup>22</sup> How much force would be appropriate, however, was left an open and vexing question. Half a century later, the courts attempted to formulate an answer in the case against another magistrate, Charles Pinney, the mayor of Bristol during the riots of 1831. In *Rex v. Pinney*, Justice Littledale set down a chilling exactitude as the correct response:

Now a person, whether a magistrate, or peace officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if, by his acts, he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect; he is, therefore, bound to *hit the precise line* of his duty.<sup>23</sup>

This call for a precision of force was to be repeated and used as a standard not only in the instances of other riots but also as the extant law in the infamous case of Governor Eyre and martial law in Jamaica.<sup>24</sup>

The military, in fact, fared no better than the magistrates, caught between protecting the state's interest through the use of violence, on the one hand, and protecting the state's legitimacy and legality by not using too much force, on the other. In 1812, Lord Mansfield ruled that the soldier during a moment of unrest was legally no different than an ordinary citizen, subject to no special exemption.<sup>25</sup> The soldier was, however, subject to court-martial for disobeying orders. Nonetheless, it remained a tacit assumption in English law that an order if illegal was no defense later on. No one objected to this situation more vehemently than Sir Charles Napier, who insisted that it in effect left the soldier thinking "shall I be shot for forbearance by a Court-Martial, or hanged for over-zeal by a jury."<sup>26</sup> For Napier, part of the problem lay in the ease with which magistrates called out the army and then refused to let them take action. Somewhat excitedly, he suggested that the army only be called out when firing had become inevitable and not for a relatively minor unrest. "I would rather," he declared in an interesting moment the significance of which will emerge later, "see a few mischievous men make a slight breach in the law . . . than myself break the law to pieces by firing on the people."<sup>27</sup> He charged the ministers with leaving things undefined so as to have an officer to "sacrifice" should circumstances require it.<sup>28</sup>

It had been hoped that Sir Robert Peel's 1829 bill to establish a met-

ropolitan police would eventually relieve the army from intervening in civil disorders. As the nineteenth century drew to a close, however, the army was called in to aid the civil authorities in Yorkshire in 1893, where riots in the coalfields “revealed that substantial disorders could still exhaust the resources of the police with alarming speed [and] that the dependence of the authorities on the army had diminished but had not disappeared.”<sup>29</sup> Constitutional theory as a discourse was much slower to respond to these instances than the army, which speedily answered further “invitations” from the civil authorities in Belfast in 1907 and Dublin in 1914. Throughout these instances, the notion that the military had to “hit the precise line” between too little and too much force proved to be less than handy in the exigencies of the moment. A Parliamentary Select Committee was constituted after Belfast in 1908 in order to create some ground rules for future situations. Only then was it fully realized that in terms of legal theory, tabulating the conditions of emergency intervention was an even more anxious task. In an answer particularly telling for later discussions of martial law, Richard Haldane, the Liberal secretary of state for war, insisted that “the judges have laid down, over and over again, that a man is on the verge of two precipices, and has to get along, and he does get along.” When asked if it was possible to draw up specific regulations that would prevent the soldier from falling, Haldane replied, “If you do you will make the law go over the precipices.”<sup>30</sup>

It is this anxiety, this notion that a state of emergency not only requires a special law but threatens something fundamental about law in general that we must try to explicate. Even though there is a difference between a colonial martial law and responses to domestic unrest, as the former suspends the entire operation of ordinary law in a given territory while the latter still works within ordinary law (although it must be noted that even this difference was not agreed upon), the legal mode is quite similar.<sup>31</sup> In both cases a state of necessity is the initial justification, a post facto indemnification is often the result, and an impossible demand for a precision of force regulates the authority. This is, of course, why judges attempting to determine an abuse of authority under a colonial martial law could turn to domestic cases following riots as a legal guide. But beyond these specific connections, the responses to domestic unrest and martial law show a commonality in their discursive revelation of the law’s ambivalent relation to vio-



lence—both the specific act of violence and the general effect produced by it.

Because a given act of violence contains no integral difference whether executed by those under legal authority or by those set against it, the law in resorting to violence, a material act of killing, produces an intensified need for the external signature of legality in order to distinguish the two. Indeed, it is this identity between the force within law and that without that produces a situation whereby the greater the need for an immediate use of force outside the ordinary protocols of legal procedure, the greater the need for that very regulative procedure. The effect of a generalized situation of violence thus becomes a threat not to this or that property or individual right but to the law itself. As Walter Benjamin once noted, the law's fear of such violence is different from its fear of crime. Crime is a transgression against the law that may be checked by it. A more general unrest threatens not so much to transgress the law as to set up an alternative logic and authority to it.<sup>32</sup> I will later return to this issue of generalized violence and emergency, but here should point out that such a perception is not limited to a more abstract level of theorizing. Here is Lord C. J. Tindal during the Bristol charge:

Each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more especial manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place.<sup>33</sup>

Thus, in the British case martial law must not be seen as an issue only in colonial territories, nor as one that did not disturb the liberal arrangements of the metropole. While it is true that martial law was proclaimed only in colonial areas, its source remained the common law of England. And it is not entirely axiomatic that the jurisprudential reticence surrounding emergency had to do with the English social and political animus toward state power. In any case, recent scholarship has shown that that animus may have been seriously misunderstood by historians.<sup>34</sup> While Charles Townshend, whose comprehensive work on civil emergency provides much of the historiography on the subject,

is correct in noticing that “in Britain . . . unlike the German *Notrecht*, the claim of necessity has always had to struggle to be accepted,” he may be too hasty in ascribing the motive for that to resistance toward a large state.<sup>35</sup> As John Brewer has argued, the hesitation over wide executive powers produced an ideology of legitimacy that in fact produced a “military-fiscal juggernaut” of a state. Additionally, the claim of necessity and the legal condition of emergency itself prove historically variable, and it is an attention to this variability that may loosen the unchanging postures of state.

In the colonies martial law was frequently resorted to throughout the nineteenth century: Barbados in 1805 and 1816; Demerera in 1823; Jamaica in 1831–32 and 1865; Canada in 1837–38; Ceylon in 1817 and 1848; Cephalonia in 1848; Cape of Good Hope in 1834 and 1849–51; and the Island of St. Vincent in 1863.<sup>36</sup> All of these instances, particularly those of Demerera in 1823, Ceylon in 1848, and Jamaica in 1865, produced debate, controversy, and an effort at justification. Thus we find no shortage of documentary material with which to answer our question of what is martial law. The approach by which such an answer may be achieved, however, is more problematic. As we have already noted with regard to domestic unrest, the logic of necessity is deeply embedded in the rhetorical structure of a liberal-constitutional system’s response to emergency. This axiomatic condition is so massive that to question martial law frontally, to ask directly why it is needed, is to produce tautologies. Martial law, after all, is the last resort when all order has broken down. Under the imminent threat of collapse and chaos, the normative structure of the constitution is obviously suspended. Indeed, this rhetorical armor is what has precisely precluded a proper critique of martial law, for its origins are always already as contingent as they are axiomatic. The English constitutional authority before Dicey, Henry Hallam, conceded as much and was quoted by Eyre’s supporters in the Jamaica case: “there may indeed be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few.”<sup>37</sup>

To discover the full significance of martial law, then, we have to follow through on the question asked of it in English constitutional theory itself: When is the moment of necessity? More useful for disclosing the ambivalent connections between law, violence, and the state, in short, for disclosing the constitutive conditions of legality itself, is to ask,

Where does martial law come from? When does it become necessary, and what does it hope to achieve? We can clarify this question further by noting two separate but related issues that will map our inquiry. First, the legal issue relates to the introduction of martial law and involves the changing rules for defining “necessity,” the move between justifications by prerogative or statute, the relation between colonial legislatures and the imperial Parliament, and so on. Second, there is what may be called the cognitive-political issue, which involves general questions of the law’s relation to violence, and the object of martial law and its use of force.

Indeed, the rhetorical structure of martial law begins to crumble the moment one asks for some exactness to the description of “pressing danger.” The category “necessity” is itself a temporal condition. That is, it must be represented as an interruption in the otherwise smooth functioning of lawful politics. Only its minute by minute narrative, its always so closely anticipated ending, can make legitimate the exercise of violence. Thus Lord Brougham during the Demerera debate in 1823 severely qualified the explanation of necessity: “It would be the worst of all conceivable grievances—it would be a calamity unspeakable—if the whole law and constitution of England were suspended one hour longer than the most imperious necessity demanded.”<sup>38</sup> And Sir James Mackintosh, in that same debate, somewhat unwittingly revealed the ideological stakes involved in such a calamity: “if it survives the necessity on which alone it rests for a single minute, it becomes a mere exercise of lawless violence.”<sup>39</sup> What keeps the line between very similar acts of violence intact here is a correct cognition of necessity. And it is the particular burden placed on this category of necessity that allows us to make a specific distinction between the domestic situation and the colonies. In those colonies where a social situation of racial difference existed, the legal definition of necessity would prove more varied and vexing. Here the ideological stakes in emergency would be more explicit. This was the singular lesson of the controversy over Governor Eyre and the events in Morant Bay, Jamaica, in 1865. The narrative of those events and their aftereffects in England is by now familiar and somewhat settled.<sup>40</sup> We may briefly reconstruct the story, highlighting the legal issues.

Prior to October 1865, the situation in Jamaica had been tense, with increasing disputes between blacks and whites over rent. The situation

was at least partly exacerbated by the revolutionary promptings of Paul Bogle, a black landowner in St. Thomas in the east, and George William Gordon, a prominent mulatto, and a member of the Jamaica House of Assembly. On 12 October a protest outside the courthouse in Morant Bay turned violent, and a number of people were killed. Governor Eyre, himself suspicious of black intentions, and responding to white fears of a black conspiracy to expel all whites from the island, summoned the Council of War to declare martial law.<sup>41</sup> By the provisions of a recent local act (9 Vict., c. 35), martial law could only be declared "by the opinion and advice of a Council of War, as aforesaid; and at the end of thirty days from the time of such Martial Law being declared, it shall ipso facto determine."<sup>42</sup> The governor together with the Council of War proclaimed martial law on 13 October for all of the county of Surrey except Kingston. Martial law remained in force for its full statutory limit, and the reprisals against the resisters seem to have been extremely violent: even by the official account of the Royal Commission appointed to investigate in January 1866, 439 people were put to death, either by being shot on the spot or hanged after court-martial, 600 men and women were publicly flogged, and over 1,000 cottages were burned down.<sup>43</sup>

As news of these punishments started reaching London, an immense controversy erupted. In December 1865, the Jamaica Committee was formed by a number of prominent public figures, including John Stuart Mill, Charles Buxton, John Bright, Charles Darwin, and Thomas Huxley, in order to pressure the government to inquire into the reports. Ultimately, however, the committee focused its efforts not on the general incidents of troop atrocities, but on the specific issue of the execution of Gordon. In a meeting of the committee in July 1866, John Stuart Mill declared that "the objects of this committee are simply to ascertain whether there exists in this country any means for making a British functionary responsible for blood unlawfully shed, and whether that be murder or not."<sup>44</sup> In response, by August 1866 an Eyre Defense Committee was formed, with Carlyle, Ruskin, Dickens, and Tennyson among others as members.

The legality of the proceedings against Gordon, even by the looser standards of emergency rule, certainly seems to have been suspect. While Gordon had been responsible for a number of inflammatory statements prior to the outbreak, he was not in Morant Bay when the

violence started but was staying in Kingston, a town exempted from the jurisdiction of martial law. Eyre, however, arrested Gordon on 17 October and brought him over to Morant Bay for a trial under a military tribunal. Accordingly, on 21 October, Brigadier Nelson put together a tribunal of some very junior officers with Lieutenant Brand as its president, and the tribunal found Gordon guilty and sentenced him to death.<sup>45</sup> The proceeding, however, violated a number of basic judicial rules. Nelson had put together two charges against Gordon on the basis of some documents and affidavits: high treason and complicity with certain rebels. Capital punishment for an action in which there was no direct involvement, and based on circumstantial evidence at best, may have been excessive. Even more problematic was the fact that Gordon was forcibly brought into the jurisdiction of martial law. On the morning of 23 October, however, Gordon was executed.

Such an outcome was a substantial circumvention of a procedural legality. More important, it could not even be squared with an English doctrine of necessity. Gordon was not an insurgent, imminently involved in violence against the state at the moment of his execution. The justification for martial law that rested on the assertion that rebels essentially became soldiers and thus forfeited the claim to a civil legal response thus could not immediately be applied in this case. Even Geoffrey Dutton, in his pro-Eyre account, is forced to concede that Gordon was "morally guilty and legally innocent."<sup>46</sup> What would then be needed, as I indicated earlier, was an altogether different conceptualization of necessity, one that highlighted the social situation of a colony with a racially distinct conquering class. Such a conceptualization, however, was not without ideological consequences. Specifically, it would create a split between the legal identity of the metropole and the colony. As we have already seen, English colonialism had long recognized that it could not bring English law wholesale to the colonies, that it would have to recognize cultural and social differences. It had, however, hoped to resolve these differences by positing an essential legal identity between metropole and colony at the constitutional level, particularly through the assertion of a single form of procedure and guarantee. Emergency, however, made sociological differences intervene in this legal-constitutional identity.

We can explicate this argument by reading the trials in England that followed the incident of martial law in Jamaica. Two separate efforts

were made to indict those involved in the Gordon case in front of a grand jury, both of which were unsuccessful: the first against Brigadier Nelson and the president of the court-martial that tried Gordon, Lieutenant Brand, in 1867; and the second against Eyre himself in 1868. In both cases the judges—Lord C. J. Cockburn in the case against Nelson and Brand, and Justice Blackburn in the Eyre case—had to determine the law as it applied to the issue of martial law in order to give instructions to the jury, which led to a rare and public disagreement between two of England's most prominent jurists.

*Regina vs. Nelson and Brand* came up before Sir Alexander Cockburn, Lord Chief Justice, at the Old Bailey in 1867.<sup>47</sup> Cockburn, who took more than six hours to persuade the jury to find a bill against the two, rejected the argument that martial law meant no more than the will of its administrators responding to necessity. No such force, he argued, resided in any servant of the Crown since the Petition of Right, and such force was deeply inimical to all declared law. Cockburn began his charge by reiterating the circumstances of the outbreak of violence. These, he suggested, warranted emergency action. What was unwarranted, according to him, was the prolonged continuation of martial law, when in fact the rebellion had immediately collapsed upon the arrival of troops. Since Jamaica was a settled and not a conquered colony, which meant that English common law had been brought to it by the settlers, the standard of emergency would have to be that of English common law: the only authorized force, thus, would be against insurgents in the act of imminent violence. The continuation of martial law and the execution of Gordon after such violence had been suppressed would, according to Cockburn, presumably be illegal.

For Finlason, a contemporary jurist, absolutely prolific in his coverage of the Jamaica case and in his support for Eyre,<sup>48</sup> the charge of the Lord Chief Justice entirely missed the crucial racial dimension of the situation. The fact that the ratio of the black population to the whites was 450,000 to 13,000, and that the whites feared a planned conspiracy to expel or kill them, meant for Finlason that the response to the rebellion had to look beyond the imminent violence.<sup>49</sup> The Lord Chief Justice had, according to Finlason, made the mistake "that he looked only to the outbreak, and forgot the rebellion of which it was the outbreak. In other words, he was thinking of a riot or a casual revolt."<sup>50</sup> This is an interesting twist on the connection we have already noted between the

legal understanding of responses to domestic riots and colonial martial law. Finlason's argument consists of denying that connection, of insisting that a common law understanding of necessity could not be stretched to cover the actual necessity of a colonial emergency. And at each step of his argument, it is race that undermines the legal identity between metropole and colony.

The English common law as it existed in Jamaica, according to Finlason, was meant for English-born subjects and their descendents and not for Africans. Sir Alexander Cockburn had thus "fallen into" the fallacy of the counsel for the prosecution, in presuming "that because the common law was carried to Jamaica by the English settlers as their birthright, therefore it precluded martial law against the Africans, except when allowed by the common law here."<sup>51</sup> For Finlason, what had resulted in Jamaica was not the common law version of emergency at all, but a true martial law responding to a different standard of necessity.<sup>52</sup> To object to a deterrent measure, such as the summary execution of Gordon, beyond the incidence of immediate violence, was to presume "not only legal, but actual and social identity between this country and the colony."<sup>53</sup> Finlason's criticism of the chief justice's charge ends then with an explanation of dizzying circularity:

He utterly failed to realise the danger of the rebellion, and therefore he of course failed to recognise the necessity for deterrent measures, of which the necessity could only be recognised by realising the danger, and without realising which severities would easily appear to have been cruelties.<sup>54</sup>

Martial law appears here as a deeply cognitive problem. We can now recognize the anxiety over the slippage between the same act of violence as it can appear within the authority of the law and opposed to it, so that an excessive cruelty can easily be mistaken for a warranted severity. Necessity is the legal category of a correct cognition—nothing new there—but what Finlason discloses with a startling simplicity is that, unlike some other legal rules, necessity cannot avoid the explicit recognition of the sociological, and in this case of the racial. What Finlason discloses, in other words, is the fact that the authority for martial law would have to be found not in the self-regulating discourses of legality but in the unspoken and violent origin of the state.

For colonial ideology, however, to concede to Finlason's assertion would be to posit a separate legal standard for segments of the population that were, after all, "Her Majesty's Subjects." To insist, as Finlason had done, that the English common law standard of necessity was only applicable to English subjects and their descendents, but not to Africans, was to raise the logical extension of that assertion: that martial law of the Jamaican variety could be applied to Ireland. This connection was not lost on Irish liberals in Parliament, whose objection to it even Finlason had to notice:

As an Irishman, he [Major O'Reilly] said the subject had a vital and thrilling interest. It touched him and his countrymen more than it touched England and Englishmen. To them it was a vague tradition of the past; but to Irishmen, almost within the memory of living men, it had been a bloody and cruel reality, and even within his lifetime it had been clamoured for by those who ought to have known better.<sup>55</sup>

Like the earlier questions of an absolute sovereignty for the colonies, martial law could not be exclusively situated in the colonial realm; its ideological consequences would inevitably return to Britain itself.

The juries refused to find a "true bill" in both proceedings. For John Stuart Mill, "it was clear that to bring English functionaries to the bar of a criminal court for abuses of power committed against Negroes and mulattoes was not a popular proceeding with the English middle classes."<sup>56</sup> In other words, to the philosopher of liberalism, the racialism that a colonial emergency made explicit equally barred an effective check on the authority of the state. Carlyle's critique, on the other hand, focused on the necessarily violent underpinnings of even a liberal state. In *Regina v. Nelson and Brand*, Sir Alexander Cockburn had taken six hours to read his charge to the jury. When the grand jury, however, refused to indict, Carlyle took it upon himself to explain why:

Nobody answers this remarkable Lord Chief Justice, "Lordship, if you were to speak for six hundred years, instead of six hours, you would only prove the more to us that, unwritten if you will, but real and fundamental, anterior to all laws and first making written laws possible, there must have been, and is, and will be, coeval with



Human Society, from its beginnings to its ultimate end, an actual Martial Law, of more validity than any other law whatsoever. Lordship, if there is no written law that three and three shall be six, do you wonder at the Statute Book for that omission."<sup>57</sup>

Even as he dismisses them under the inexorable logic of an original sovereign might, Carlyle neatly catches the enduring concerns of jurisprudence: the origin of legal authority and lawfulness, and the related question of the cognitive conditions for distinguishing lawful violence, distinguishing, following Kelsen, "between the state and a gang of racketeers."<sup>58</sup> It is this concern that animates both modern jurisprudential analysis and the more important constitutional cases in the former British Empire. For Carlyle, the justification for martial law must be sought in the unspoken and violent origin of the state. In the case of the colonies, however, where this origin is both more sudden and more specific, the ideological disclosures forced by martial law are more dramatic.

The Eyre case then is a crucial moment in the story of how the category of martial law changes through its experiences in the colonies—as a moment in the gradual enlargement of the temporal structure of martial law, of what is permissible and for how long. It was more or less settled after the events in Jamaica that the fear of conspiracies against the state was more real in the colonies than at home, and martial law as such could be kept in force beyond the immediate acts of violence that provoked it in the first place. This, however, still did not mean that the authority for martial law could be legislated in advance. Despite Justice Blackburn's legal opinion emphasizing the right of a colonial legislature to statutorily permit martial law, the entire tenor of both English law and political policy continued to be one of discouraging the stipulation of an emergency condition in advance, of insisting on a case-by-case basis. This was the declared policy of the Colonial Office in a circular sent to all colonial governors soon after the Eyre case.

An enactment which purports to invest the Executive Government with a permanent power of suspending the ordinary law of the colony, of removing the known safeguards of life and property, and of legalizing in advance such measures as may be deemed con-

ducive to the establishment of order by the military officer charged with the suppression of disturbances, is, I need hardly say, entirely *at variance with the spirit of English law*.<sup>59</sup>

Notice how in such a formulation the colonial enactment is in conflict not with the substance of English law, which may or may not apply to the colony, but with an English constitutional understanding of legality, which is always to be applicable to the colony. Such a “spirit” of the law would, of course, mean that the Jamaica statute recognized by Justice Blackburn would have to be *ultra vires*. The circular posits the legitimacy of the empire in terms of a legality, and it posits that legality in terms of the legal identity between metropole and colony. It instructs all colonies to submit to their local legislatures “an Act repealing so much of the law as authorizes the proclamation of martial law.”<sup>60</sup> This is not to be construed, the circular goes on to explain, as a prohibition against martial law, but only as a directive that the governor cannot “be relieved from the obligation of deciding for himself.”<sup>61</sup> If that decision involved continuing martial law beyond the incidence of an imminent violence, a *post facto* act of indemnity, taking into account the exigencies of a colonial situation, could be successfully resorted to. Thus the Jamaica case emphasized the need for tying a decision of emergency to the necessity of the moment, even as it gave greater latitude to the definition of that emergency.

Within English constitutional debates, however, the *initial* condition that could justify martial law was also historically variable. For a long time, it was taken as settled doctrine that the operative rule was whether the civil courts could actually, physically sit and convene. Only their inability to do so was to be taken as a condition of war.<sup>62</sup> In 1902, during the Boer War, however, the Judicial Committee of the Privy Council considered the question in *Marais v. General Officer Commanding; Ex Parte D.F. Marais* and found that because the theater of war had so extended itself and the conditions of emergency had become so diverse, this rule could no longer be upheld.<sup>63</sup> The Lord Chancellor stated the court’s position: “The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging.”<sup>64</sup> Once martial law had been declared, the court stated, military decisions were not justiciable by the ordinary courts. In addition, here we once again find an effort to disso-

ciate the emergency conditions in the colonies from instances of domestic unrest. Thus, the court found that it might be the case with a "mere riot" that the decision of military intervention was unduly severe and questionable on those grounds. This, however, did not preclude the permissibility of martial law "once let the fact of actual war be established."<sup>65</sup> But by removing the inability of ordinary courts to function as a necessary precondition, the Privy Council gave more latitude to the establishment of the "fact" of war. The case of *Marais*, then, continues a tendency in English law from the mid-nineteenth century onward to widen the scope of the condition of necessity.

The *Marais* decision generated some criticism and led to a series of articles in the *Law Quarterly Review*. In placing the decision within a more general and historical context, the various authors were able to isolate some of the persistent themes constitutive of martial law. For Frederick Pollock, martial law could not be dissociated from the constitutional rules of the English common law, and he doubted whether there was "any jurisdiction under the British flag where these rules are not assumed to have become part of the local law."<sup>66</sup> This meant that the final authority to decide whether there had been an excess of duty during martial law would have to reside in the civil courts, once they were able to function again. For Earle Richards, however, although such a proposition may be the desired form of legal functioning, the logic of the *Marais* ruling seemed to suggest the opposite: that once martial law had been declared, the power of the civil courts to intervene was entirely superseded.

Indeed, if it once be admitted that the courts have no power to interfere at the time, it seems to us to follow that the right is gone altogether. To suspend the law in such circumstances is in general to annul it altogether. To refuse to interfere at any rate in the case of a prisoner condemned to death is not suspension of law but abrogation; it is not a postponement of justice but a denial of the only remedy.<sup>67</sup>

The *Marais* ruling thus significantly increased the scope of power available to martial law. It also, in a move that Earle Richards approved of, dispensed with the "artificial rule" that functioning courts precluded a conclusion that war existed. For Earle Richards, "war is self-evident, and the fact that the courts may continue to sit cannot prevent the exist-

tence of war.”<sup>68</sup> Reading the case, however, it would seem that war is anything but self-evident. From the Petition of Right onward, the purpose of this so-called artificial rule was to prohibit an “expectancy of danger” as a condition of emergency itself. The *Marais* ruling increased the latitude for deciding on a condition of emergency, by allowing such an expectancy of danger as a condition of emergency itself.

It is reasonably safe to conclude then that the English law of emergency as it met the condition of the colonies became less rather than more narrow. This movement was to create one of the conditions for the possibility of a disaster such as the Amritsar massacre in 1919. One of the more exemplary cases of colonial martial law, it is to that situation in the Punjab, India, in 1919, that we now turn. In doing so, we move chronologically forward from the nineteenth century into the twentieth century. But we must also now move analytically forward, from examining the source of martial law and the moment of its introduction to the question of the proper object of martial law. What is it exactly, we must ask, that martial law hopes to accomplish? On the face of it, the answer to such a question seems obvious: martial law is the ultimate force needed to restore a situation of law and order. However, just as the condition of necessity that justifies the introduction of martial law turns out to be anything but straightforward, so the object of martial law turns out to be a problematic question, and one that reveals the contradictions inherent in ordinary law and state power itself.

### *Emergency and Law's Violence: The Amritsar Massacre*

So far, I have argued in terms of a corrective logic. That is, I have tried to argue against the self-evident and unchanging postures of emergency by showing the historical malleability of martial law, its temporal expansions, its changing cognitive conditions, in order that we may be in a better position to evaluate the rules that apply in emergency. But now, I would like to shift the register of analysis and turn from a corrective answer to what I consider a foundational question. So I shall try once more to answer the question of what martial law is by focusing on what it does. Let me say outright that the questions of punishment and order, while they may form a part, are not the whole of the answer here. We must not too readily presume the effectiveness of martial law as remedy to an ordinary lawlessness. Reading the documentation of

martial law, it is striking that martial law in its operations as the replacement of civil authority is not as efficient as one would presume. Power may transfer from the lengthy procedures of civil adjudication to military tribunals, but repeatedly we encounter the picture Charles Townshend has drawn of officers struggling with *Banning's Military Law Made Easy*. What martial law does, and does terribly well, becomes clear only if we nuance the catchall phrase "law and order," distinguishing issues of force and order from issues of authority. It is the reconstitution of the general authority of the state that martial law performs, and while this involves the exercise of violence, it is a specific form of violence.

If we are to explicate the function of violence in martial law, to explicate its extreme condition, we shall have to reemphasize the limit condition to which it responds—the inscription of racial difference. The presence of race must here be more than an acknowledgment of a racial animus that would putatively explain the vigor and venom of much of the rhetoric. Rather, we must once again view race as the limit condition within the articulation of both the liberal conditions of rule and of positivist legality.

There is perhaps no other text in the liberal canon where the racial differentiation of subjects and the criteria of forms of rule are woven together more tightly and with more clarity than John Stuart Mill's *Considerations on Representative Government*.<sup>69</sup> The embryonic ideas of this text, as Homi Bhabha reminds us, were first formulated in precisely the context of debate on morality and education: in response to Lord Macaulay's infamous 1835 Minute on Indian Education, with its clarion call for the creation of "a class of persons Indian in blood and colour, but English in tastes, in opinions, in morals and in intellect."<sup>70</sup> Faced with the task of convincing the reader of the ideality of the specific form of representative government, distinguished in degree and kind from despotism on the one hand and direct democracy on the other, Mill must specify the optimum conditions in which such a form may successfully operate. It is clearly not suitable to all: "a rude people, though in some degree alive to the benefit of civilized society, may be unable to practice the forbearances which it demands . . . in such a case, a civilized government, to be really advantageous to them, will require to be in a considerable degree despotic."<sup>71</sup> The virtues of order and obedience are what colonial government has to offer to the natives, but Mill

insists that “there are different degrees of obedience,” and the most desirable form is obedience of a general order, of “mandates issued in the deliberate form of laws.”<sup>72</sup> After all, Mill asks us, what is it that distinguishes a slave from a savage, making the former preferable in the evolutionary scheme of ordered government? The answer is a developmental scale of modes of obedience: the slave is in advance of a savage, for “he has learnt to obey. But what he obeys is only a direct command. It is characteristic of born slaves to be incapable of conforming their conduct to a rule or law.”<sup>73</sup>

This story of the stages of civilization and of the corresponding, progressive scale of juridical subjects is reasonably well known, and we need not dwell on it much longer. But what is more important to those interested in reading the reflections and refractions of modern law through the prism of colonial discourse is the way in which *the distinction that organizes Mill’s scale—the distinction between types of force, and the distinction between command and rules—is also the initial and animating condition of much positivist jurisprudence.* We shall now turn to that theory and to the work of H. L. A. Hart in particular before returning to India.

Hart’s theory is cast in the form of a historical *Bildung*: a primitive society may have law to the extent that it contains primary rules of obligation, but it cannot be considered a mature legal system until it has a secondary set of rules—rules directed not to the general populace but to officials who determine, declare, and enforce the law. Indeed, as Hart tells it, the mode of obedience (whether subjects obey the law out of a sense of fear or social conformity or moral bearing) becomes less important than the development of an official legal establishment: “The history of law does, however, suggest that the lack of official agencies to determine authoritatively the fact of violation of rules is a much more serious defect.”<sup>74</sup> In fact, by the end of Hart’s story, the definition of law does entail more than notions of command and obedience, if only because it has jettisoned the concern over why people obey the law, content with the fact that they just do, and has more vested in how officials determine with certainty the validity of a rule and its potential violation.

I am, however, going to dwell on the original problem that Hart began with: the distinction between rules and commands, and the relation between obedience and authority. Certainly, Hart is successful in

trying to diffuse the force of law, to insist that the effect of rules upon the naked power of the gunman is not so much a masking as it is mediation. Indeed, in its attempt to decenter the simple act of force associated with the gunman, by introducing secondary rules that stipulate who gets to make the law in the first place—"persons qualified in certain ways to legislate by complying with a certain procedure"<sup>75</sup>—Hart's text is saturated with tropes of immediacy versus mediate force, face-to-face commands versus general declarations. The maturation of a legal system, in Hart's *Bildung*, builds in distance between the source and object of violence. It is precisely such distance that Stanley Fish calls our attention to in his reading of *The Concept of Law*. "Notice how much distance there is," Fish points out, "between the source of power and the object of its exercise. In the gunman scenario the coercion is direct and discrete; in the world of rule the coercing agent stands at the end of a long and articulated chain, beginning with the rule itself, which mandates not an act but a procedure."<sup>76</sup>

Legal control, Hart argues, could not be implemented through a system dependent on face-to-face commands, if only for logistical reasons: "no society," Hart correctly points out, "could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do." But what follows such a declaration is a curious sentence, seemingly commonsensical and cursory, but one that requires some further elaboration. "Instead such particularized forms of control," Hart continues, "are either exceptional or are ancillary accompaniments or reinforcements of general forms of directions."<sup>77</sup> Now what remains somewhat obscure is both the substantive content of these particularized moments and their relation, whether directly causal or otherwise, to the smooth functioning of a generalized legality. We could accept that such particular moments refer to the face-to-face orders of a policeman, addressed to motorist or vagrant (examples that Hart himself offers), or even the performative speech of a judge faced with a defendant. It would, however, be curious to identify Hart's particularized forms with these mundane encounters, if only because such examples do not so much represent a "reinforcement" of the law as they do its enforcement in the first instance. All law, after all, has to be enforced on bodies—protocols of interpretation, procedures of institutions, require the body, require its constraint and movement, signature and utterance.

Certainly, given the tenor of some analysis of legal interpretation, it is necessary to be reminded of law's essential dealing with force—with its ability and desire to enforce—and it is precisely such a necessity and such a reminder that give the opening sentence of Robert Cover's now famous essay "Violence and the Word" its puncturing effect: "Legal interpretation takes place in a field of pain and death."<sup>78</sup> But surely for Hart's purposes, and indeed ours, a reminder that violence is imbricated in law at every level cannot be sufficient. After all, might there not be another mode of violence, one that not only enforces a prior sanction but also, and this is Hart's vocabulary, relates particularized instances to generalized forms? What would such an establishing violence look like? Readers familiar with Walter Benjamin's essay "Critique of Violence" will have already noticed in my vocabulary of enforcing and establishing violence an echo of the crucial distinction between "law-preserving" and "law-founding" violence that structures Benjamin's essay.<sup>79</sup>

"Zur Kritik der Gewalt"—the original title is important here, as it points to the evaluative and demarcational project of *Kritik*, and to the double meaning of sanctioned force and violence that make up the German *Gewalt*—was first published in 1921. One of Benjamin's more dense and difficult essays, "The Critique of Violence" combines Benjamin's terse, aphoristic style with his Marxism and messianic sensibility. The essay begins with a series of rigorous distinctions between positive and natural law, means and ends, only to abruptly catapult us into the apocalyptic arrival of a final and divine violence that will expiate the "rotten" and "bloody" violence of lawmaking. This final condition, by which, as Peter Demetz points out, "the essay subverts its own fundamentals in order to enact something of the ontological 'break' in which the old world is suddenly transformed into a new," adds to the difficulty of assimilating Benjamin's insights.<sup>80</sup> Indeed, "The Critique of Violence" offers us no totalizing theory of violence, but at the level of aphoristic suggestion it is invaluable.

Earlier I emphasized the tropes of distance and proximity, means and mediation, which occupy Hart's text, and it is now significant to note that a topology of means and ends also animates and frustrates Benjamin's effort. Indeed, Benjamin's essay begins with an awareness of the fact that the circular justifications of ends and means in natural and positive law threaten to eclipse the object of critique: "natural law



attempts, by the justness of the ends, to 'justify' the means, positive law to 'guarantee' the justness of the ends through the justification of means."<sup>81</sup> The escape from such casuistry comes with Benjamin's decision to focus on positive law because its effort to render violence legitimate is also to render it historical. That is to say, positive law focuses primarily on the quality of means, on their origin and authority, precisely by drawing a distinction between sanctioned and unsanctioned force (authorization), which for Benjamin is done by asking of all violence the "proof of its historical origin." "The Critique of Violence" employs the German *mittel* which can be translated variously as *means*, *mediate*, and *mediation*. Benjamin plays with the word and its derivatives, such as *unmittelbare* (unmediated but also immediate), *reine unmittelbare* (purely unmediated), and *eine nicht mittelbare* (non mediate), in order to designate the modalities of violence within positive law.<sup>82</sup> The modes of violence are represented in the essay as a dyad: violence, Benjamin insists, is either "law-preserving" or "law-founding." Violence that preserves that law is a mediated mode, in that its immanent application is mediated through and by a prior rule that dictates the form and content of the instance and that crucially makes such a violence "subject to the restriction that it may not set itself new ends."<sup>83</sup> This is distinct for Benjamin from that other form of violence, which seems to dispense with the question of ends as a prior stipulation altogether. Thus the archetype of law-founding violence is "mythical violence"—the representation of the anger of the gods in mythology—and its exemplary story, for Benjamin, is the legend of Niobe. Apollo and Artemis's reaction to Niobe's arrogance, sparing the life of the mother but in a whimsey of fate subjecting her children to a cruel death, could perhaps be read on some level as a punishment, but if so it is a strange punishment, neither particularly rehabilitary nor retributive in its effect. Rather, Benjamin notes, "mythical violence in its archetypal form is a mere manifestation of the gods. Not a means to their ends, scarcely a manifestation of their will, but first of all a manifestation of their existence."<sup>84</sup>

It is these moments of law-founding violence that Benjamin locates in the modalities of positive law. *Foundational* is perhaps a misleading description, to the extent that it suggests the singular instance of an origin. Benjamin certainly wants to retain some sense of the ideological labor performed by the notions of origin and foundation, but also

wants to locate such moments in their episodic (perhaps even atavistic) repetition. Thus when he turns to the agency of enforcement—the modern police—the rigor of the distinction gives way, not so much to a blurring as to a “spectral mixture.” The police in their discretion necessarily mix the right of disposition (to enforce a prior sanction) with right of decree (to insist on the instance of a need for a sanction). Thus Derrida notes that “what threatens the rigor of the distinction between the two types of violence is at bottom the paradox of iterability. Iterability requires the origin to repeat itself originarily.”<sup>85</sup> It is, however, this very paradox—this understanding of a certain kind of legal violence as the episodic repetition of the origin, or analogous to Hart’s vocabulary, as the particular and episodic reinforcement of the general form, which constitutes one of Benjamin’s essay’s more profound insights.

We may return then, with Benjamin’s insights, to the question of emergency and martial law in general, and the situation in Amritsar in particular. Here, two related questions highlight the disjunction between rules and violence. First, what is it that the law permits emergency measures to accomplish—what were the rules that governed its special use of force? Second, what was perceived as the need for martial law in the spring of 1919 in the Punjab? Let us recall and consider with a seriousness, a deadly earnest if you will, Carlyle’s insistence on the priority of martial law—“real and fundamental, anterior to all laws and first making written laws *possible*”—and we must not miss the double sense of priority here, in terms of an importance and a temporal originality. Martial law seeks to effect not just the restoration of order but the restoration of the general authority of the state. In doing so, it takes advantage of the absence of normative constraints on power not just to punish *more*—which it may or may not do—but to punish out of a different logic. This punishment, if we can even call it that, is not caused by questions of innocence or guilt or a specific transgression of the law, nor is it particularly rehabilitatory or retributive in its effect. Rather, it is a purely nonmediate form, purely performative, the purpose of which is the sheer manifestation of power itself. It is the form of violence that Walter Benjamin called “mythical violence.”<sup>86</sup> It is in this sense, perhaps, that martial law “saves” the state, by re-creating the conditions for the possibility of its existence. Specifically how it does so will become clearer as we return to the example of martial law in colonial India.

The *Indian Minority Report* had strongly disagreed with Dyer's remarks. To them such an explanation echoed "Prussian tactics," not unlike those used by German military commanders in Belgium and France.<sup>87</sup> They saw General Dyer's "moral effect" as "terror" and explained its source thus.

People like General Dyer have the fixed idea that the effective way of governing India is force. It is the same idea that General Drake-Brockman of Delhi gave expression to in his written statement at Delhi: "Force is the only thing an Asiatic has any respect for."<sup>88</sup>

On the other hand, General Dyer was to protest against these charges by pointing out that force was, in fact, required, and that the Majority Committee was placing soldiers in an impossible situation: "if they consider only the immediate needs of the moment, they are liable to be condemned for not looking further ahead . . . if they consider the situation as a whole . . . they are liable to be told that they must not look beyond the dispersal of the crowd."<sup>89</sup> Indeed, the British government and the secretary of state for India, Edwin Montagu, while agreeing with the committee that Dyer had a mistaken conception of duty, did recognize the problem for the military to which Dyer referred. Accordingly, it ordered the Indian government to prepare a martial law manual for future use.<sup>90</sup>

I list these responses here in order to emphasize how little has changed from the earlier instances of military intervention. For an event that was supposedly singular, the Amritsar massacre prompted rhetorical responses that were considerably timeworn. General Dyer's protest against the difficult position the military were placed in during moments of civil unrest may as well have been taken from Sir Charles Napier and the debate following the Bristol riots and *Rex v. Pinney*.<sup>91</sup> On the other side, the *Minority Report's* statement that General Dyer's mentality was of the sort that believed that a rule of force was appropriate to India only meant that he belonged in a long tradition of British ideology that advocated a paternalist despotism as the best mode of British governance of India.

The Amritsar massacre and, indeed, martial law in the Punjab are best understood, then, as the culmination of several intensely ambiguous discourses, some specific to an English political imagination's

negotiation between the military, state power, and a rule of law, others the result of that negotiation in a regime of conquest. It is thus not surprising that the official British response to the massacre focuses not on the number of people who were killed or their particular guilt or innocence, but the reasons for their death. That is, it focuses not so much on the substance of Dyer's actions, but the logic with which they are explained. Everywhere in these official documents one finds confused answers to a question, sometimes tacit, sometimes explicitly asked: What is the proper object of martial law? It is answered by placing the massacre and martial law in the Punjab itself in its wider political context.

Discussions over the object of martial law are linked to questions of the causes for the unrest, that is, to the reasons why martial law may have been needed in the first place. Although social and economic conditions in the Punjab, following World War I, contributed to the "disturbances" there—notably the influenza epidemic of 1918–19, high inflation of basic goods prices, and aggressive troop conscription in the countryside<sup>92</sup>—the immediate catalyst for the agitation and subsequent declaration of martial law was, ironically enough, an emergency law. On 18 March 1919, the imperial council placed on the statute book the Emergency Powers Bill, or the so-called Rowlatt Act, after Justice Sydney A. T. Rowlatt, the main author of the *Report of the Committee appointed to investigate Revolutionary Conspiracies in India*.<sup>93</sup> The committee had painted a picture of elaborate conspiracies in India and had recommended the continuation of some wartime measures, including the suspension of certain civil liberties. The Rowlatt Act was passed against the express urging of nationalist leaders, who saw it as a betrayal of promises made by the British during the war to extend Indian political participation. To that extent, it was seen as mitigating the effect of the already meager political changes of the Montagu-Chelmsford Reforms.<sup>94</sup> Gandhi denounced the act and called for a civil disobedience movement to protest it on 7 April 1919. Two days later Gandhi was forbidden to enter the Punjab and was arrested attempting to do so. By 10 April, the arrests of Drs. Satyapal and Kitchlew in Amritsar had provoked further unrest.

The agitation against the Rowlatt Act, particularly Gandhi's Satyagraha, is given a causal force in the Hunter Committee's inquiry after the fact. On the one hand, "rumors" are blamed for producing a general

misunderstanding of the scope of the act, portraying it as increasing executive interference in daily life.<sup>95</sup> On the other hand, the civil disobedience movement is expressly criticized, not for its opposition to the act, but for asking people to disobey the laws of the act. In India's particular state of political development, we are told, to permit disobedience to one law is to invite a more general and complete disobedience to all law.<sup>96</sup> This was equally Lord Chelmsford's explanation for the situation in 1919. In a letter from the government of India to the secretary of state in London, he hoped that politicians would from now on refrain from "invoking forces which they can neither direct nor control." He went on to explain why:

when this movement (Civil Disobedience) was initiated, it was apparently not obvious to its promoters, as it was to all thoughtful persons, that in India in its present state of development (whatever may be the case in other countries) the unsettling effect of the advice to the public in general to break selected laws was likely to lead to a situation which might involve the overthrow of all law and order.<sup>97</sup>

Lord Chelmsford's understanding of the effects of civil disobedience in India is curious but significant. A developmental scale of judicial subjects is set up here, whereby more developed (read civilized) subjects are able to distinguish between specific laws, which may appear to them to be wrong for some reason, and the general authority of the state that subtends those laws. Thus, they are able to selectively "disobey" a specific law without threatening the overall authority of the state. In India, however, where the subjects are presumably unable to appreciate what John Malcolm nearly a century before had called "the more artificial systems of jurisprudence,"<sup>98</sup> no such cognitive distinction is possible. Here, Lord Chelmsford suggests, echoing once again a thematic of despotism, every law is a personal and direct manifestation of the sovereign. To call for even the nonviolent disobedience of the Rowlatt Act is to unleash a more general "disturbance" that threatens the authority of the state. Thus, the real need for martial law is not merely to put down this or that outbreak of violence but to restore this authority.

Although Lord Chelmsford is at pains to confine such a dynamic to countries lower on his developmental scale, it is not that different from

the understanding we encountered earlier of the effects of violent riots in England. There, we may recall, the fear was that such violence did more than disobey a single law, that it set up a logic parallel to the law itself, daring, as C. J. Tindal put it, "to usurp its place."<sup>99</sup> The understanding of the conditions that require martial law in the Punjab, then, is an intensification of such a dynamic. What is required of martial law is a corrective to this "unsettling effect," as Lord Chelmsford calls it—perhaps in the form of the "moral effect" that General Dyer stated to be his proper object and aim.

Once one explicates the state's understanding of this "real" need for martial law, the logic of its violent actions becomes clearer: not the punishment of the guilty, not the end to specific transgressions, but the restoration of a general condition. Moreover, it is crucial to once again remind ourselves that this general condition cannot be reduced to notions of public peace and order. In fact, in each explanation for an action by an officer, there is a will to generality—an order whose obedience will itself teach the subject about general rules. As I indicated at the beginning of this chapter, both General Dyer's explanation for his actions and the official response to his explanation are saturated with this ambivalence about specific tasks and general ends. In General Dyer's statement we get an uncanny reflection of the relation between performative violence and a return to legality, and the distinction between such violence and mere mechanical notions of force and the preservation of order.

The schism between the immediacy of violence and the putative object of its accomplishment saturates the dialogue of criticism and defense of Dyer's actions, making it into an uncanny reflection of the relation between a performative violence and a return to what Hart would call "legal control"—a reflection of the gap between the mechanics of force and the preservation of order. As I mentioned at the start of this chapter, the Parliamentary Inquiry into Dyer's actions would concede that the firing was crucial to the "stability" of the entire Punjab region, but could not allow itself to concede that such "excessive force" was "justified because of the effect such firing may have upon people in other places." General Dyer's statement in his own defense, in fact, rather astutely picks up on this aphasic moment. Dyer insists that for the firing to be considered excessive, one would first have to agree on its putative object, in order to determine what it is in excess of—"if I

was not confined to the bare mechanical operation of getting the crowd 'to move on' then no evidence or ground is anywhere suggested to show that the force I used was in the least degree excessive." Dyer's argument is that his actions can only be understood as excessive if they are contained within a closed economy of transgression and punishment, disturbance and the restoration of order. But Dyer insists that his object was not specific—rather it was a *specific action taken to establish rather than merely enforce a general rule*. This is then General Dyer's "moral effect throughout the Punjab," but it is a mode not confined to him alone. Throughout the inquiry report one finds instances of official actions that seem to move away from specific objects to the more general object of revealing the power of the state.

The actions of Lieutenant Colonel Johnson in Lahore demonstrate this desire to reveal the power of the state. After government proclamations posted on the walls of the Santan Dharm College were found defaced, Lieutenant Colonel Johnson made the students and professors march in the hot sun through the city and then interned them for more than three hours in the Red Fort. When pressed by the Minority Committee's investigation, Johnson admitted that there was no evidence to suggest that any of these people had been directly responsible for the defacement of the posters. In fact, detection and punishment of the guilty was not the object. Rather, Johnson admitted that he was "longing for an opportunity to show them the power of martial law."<sup>100</sup> Indeed, this remark is an uncannily accurate example of Benjamin's notion of mythical violence—of a violence that is not so much about means and ends as it is about the manifestation of power.

What the power of martial law is used for becomes apparent from some of the other incidents that the committee investigates. In Kasur, the committee found that Captain Doveton had resorted to "fancy punishments," designed in order to counter the effect of people chanting "*Hukum kya chiz hai, hum koi hukum nahin jante*—what is an order; we know of no such thing as an order."<sup>101</sup> The punishments then were only meant to reinforce the general notion of the command itself. Indeed, this logic can become increasingly general, as is evidenced by the committee's findings in Gujranwala. There the local commander issued the infamous "salaaming [greeting] order," which required Indians when they encountered European officers to leave their conveyances and salaam. When pressed by the committee to explain the purpose of such

an order, the commander insisted that it was not meant to humiliate Indians, but only to reinforce a general sense of respect for authority. This sense had been breaking down, according to the commander, at all levels of Indian society: "The tendency of the present day is to abolish respectfulness. The Indian father will tell you that sons are not respectful even to their parents."<sup>102</sup>

Obviously, these instances are different from the Amritsar massacre, as they contain a more psychic rather than physical violence. What is not very different, however, is the mode of explanation. For these army commanders, as much as for General Dyer, the object of martial law is the restoration of what legal theorists like to call the "habit of obedience." It is difficult to miss the performative and very general nature of these instances. We are now far from the "precise line" standard set down in *Rex v. Pinney*, if only because it is difficult to make a judgment of precision on an act that seems to have no precise and immediate object: remember, for Dyer the aim was more than dispersing the crowd but something else; for Colonel Johnson it was more than punishment for defacing the posters but something else. In fact, we are probably closer to the Duke of Wellington's understanding of martial law as not a legal but a sovereign act, not only because it was brought forth under the Crown's prerogative but also because, as we may recall, for Wellington martial law was the expression of a pure will. It is the expression of this will, this sovereignty, that is required as the prior condition before law and state resume their normal course. And the necessity of this condition is more than just a pragmatic one. That is, it is not just a question of martial law applying to a situation where you must expend more force than you would normally, in some total quantum of ergs. Rather, it seems a deeper, almost conceptual necessity. And what happens when the law returns, so to speak; when the parliamentary committee considers these instances in the form of their normative and normalizing narrative? The Majority of the Hunter Committee find themselves unable to object too much to these odd displays of power.

After all, the question is not one of words but substance. The power of ordinary law to preserve order lies, not in its ability to enforce itself on every subject, but in the fact that with all subjects save a few, no need of enforcement will arise. It depends upon the law-abiding



instincts of the great majority and upon the authority of the government being a received fact. In India at present ordinary methods of government depend for their possibility—not merely their efficiency—on the existence of this relation between people who are Indian and a Raj which is British.<sup>103</sup>

As this report suggests, something other than authority is seen as needed to counter a breakdown in authority. What follows at this point in the report is the by now inevitable comparison between the situation in the colony and domestic riots. The Majority Committee commends the Punjab government for not viewing each outbreak of unrest as an isolated riot and responding accordingly. That mode, we are told, would only suffice “upon the condition that the authority of Government in the main be respected.”<sup>104</sup> Thus, at each point we get a sense that martial law in the colony is a return to a prior condition, before law and before state legitimacy. It is what is needed to construct the state all over again.

To the official mindset, however, the troubling aspect of such a formulation was that it placed this coercive force at the heart of law and made such force a condition for the very possibility of law’s existence. Thus, we get the not surprising result of the Hunter Committee condemning each of these punishments, even as it concedes their efficacy, indeed, their indispensability. The committee compulsively returns to an ambivalence, unable either to condemn or condone these actions. Critical of the form of these actions, the committee nonetheless concedes their indispensability. And we are left with this object of performative violence as it floats in and through the text, foundational to the language and action of legal positivism that the committee employs and yet everywhere disavowed.