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“The extreme penalty of the law”: mercy and the death penalty as aspects of state power in colonial Nyasaland, c. 1903–47

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Capital punishment was the pinnacle of the colonial judicial system and its use of state violence, but has previously been neglected as a topic of historical research in Africa. This article is based on the case files and legal records of over 800 capital trials – predominantly for murder – dating between 1900 and 1947. It outlines the functioning of the legal system in Nyasaland and the tensions between “violence” and “humanitarianism” in the use and reform of the death penalty. Capital punishment was a political penalty as much as a judicial punishment, with both didactic and deterrent functions: it operated through mercy and the sparing of condemned lives as well as through executions. Mercy in Nyasaland was consistent with colonial political objectives and cultural values: it was decided not only on the facts of cases, but according to British conceptions of “justice”, “order”, “criminality”, and “African” behaviour. This article analyses the use of mercy in Nyasaland to provide a lens on the nature of colonial governance, and the tensions between African and colonial understandings of violence.

Keywords: Nyasaland; capital punishment; mercy; murder; law; violence

the fact that the man is an ignorant Mang'anja cannot be considered as tending to mitigate the crime of which he has been found guilty; although he is an ignorant, degenerate native he is perfectly aware of the seriousness of his act, which was one of sheer brutality and merits the extreme penalty of Law.¹

Murder, among themselves, is fairly common, usually about women and committed under the influence of drink, but I do not remember trying a case where even admitting the facts alleged against him, there was not a good deal to be said for the culprit.²

Capital punishment is the ultimate judicial assertion of sovereign authority and power. Most scholarship focuses on the death penalty as a mechanism of social control or seeks to explain its evolution through discourses of “civilization”.³ This article, however, investigates capital punishment as a political – rather than simply penal – measure, using the death penalty as a lens through which to shed light on the nature of colonial rule as well as on tensions within African society.⁴ Notions of punishment in Africa were intimately linked to concepts of “civilization”, “justice” and “good governance” in the colonial period, but also to the necessity of violence in sustaining European rule. Nowhere was the symbolic relationship between the “primitive savagery” that colonialism claimed to supplant and the resemblance its corporeal technologies bore to that savagery more evident than in the use of the

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death penalty.⁵ Despite the emergence of a rich historiography on crime and punishment in Africa, there has been surprisingly little research on this apogee of the colonial legal system.⁶ Moreover, with the exception of Chanock's seminal *Law, Custom and Social Order*, Nyasaland itself has been overlooked in much of the existing literature.⁷ And yet the colonial archives in Zomba offer a wealth of detail on both the operation of colonial law and punishment in the territory, and the social tensions highlighted by criminal activity and its prosecution. The focus here is not on the terminal violence of the executions which occurred under British rule, but rather on the legal and political processes which led an accused murderer to the gallows, and the manner in which the Royal Prerogative of Mercy was used to moderate the violence of capital punishment in shaping a form of "justice" which could uphold British authority.⁸

Criminal law defined the African as an individual with inalienable rights, but also as subject to the disciplinary apparatus of the state.⁹ Although colonial states tended to think of African subjects within tribal collectivities and stereotypes, legal proceedings before the courts individualized the African accused. Criminal records can reveal how colonial categories of knowledge – in this case usually the "African murderer" – constituted colonized people as an object of study and control in the service of state power.¹⁰ The high level of evidence required for conviction on a capital charge meant that the colonial state often knew more about suspected murderers than about almost any other colonial subject. The value of criminal records for history is not so much what they uncover about a particular crime, about "guilt" or "innocence", as what they reveal about the practice of state power and otherwise invisible or opaque aspects of human experience, particularly in Africa where scholars' knowledge of communities' daily lives is often sparse.¹¹ A reliance on judicial records, however, creates a number of methodological concerns for the historian. As with all crimes, such texts only record cases that were reported to the authorities and successfully brought to court. With murder cases representing an exceptional form of violence and the surviving archival records being of variable quality, murder trial narratives cannot give us a comprehensive view of manifestations of violence within African communities, their general treatment in courts, nor even of colonial penal violence itself. Extant records suggest, however, that accused murderers interacted with the colonial legal arena as both individuals and stereotypes, shaping their narratives to suit and exploit colonial (mis-)understandings of "truth", "criminality" and "African" cultures. Both truths and lies inevitably shaped the final outcomes of the murder trials discussed below, alongside what Stoler terms "the hierarchies of credibility" through which colonial courts evaluated testimonies from various African and European witnesses: hierarchies formed along lines of race, gender, ethnicity, class and religion.¹²

Violence in the colonies was constitutive of difference, but it was also limited by the contradictory nature of colonial governance and its need for legitimation.¹³ In studying the death penalty, we need to seek the limits of its violence – its legal boundaries and sentencing outcomes – as much as its terminal force. The article will begin with a brief introduction to the legal and administrative procedures of capital punishment in Nyasaland between 1908 and 1947, before outlining the general trends of murder trials and capital convictions. Although, as Chanock has written, "law was the cutting edge of colonialism", sometimes a colonial state chose to blunt Justice's sword and spare the lives of subjects it had sentenced to death.¹⁴ The Royal Prerogative of Mercy allowed the Governor of a colony to reprieve a capital conviction

and moderate the rigour of the law to suit colonial societies and modes of governance.¹⁵ This article looks at the reasons behind these decisions in order to illuminate the attitudes of colonial states towards their recalcitrant subjects and the crimes of murder they committed, but also to highlight the competing legal, political, administrative and cultural imperatives which shaped colonialism in Nyasaland.

The path to the gallows: murder and the colonial courts

As elsewhere in British colonial Africa, the law relating to murder in Nyasaland was based on English common law; the death penalty was a mandatory sentence for crimes of treason and murder, and a discretionary sentence in rape cases, although in the latter it served as symbolic legislation and was seemingly never implemented.¹⁶ Aside from the treason convictions during the Chilembwe Uprising of 1915, capital trials were almost exclusively held for the offence of murder. To contextualize the extent of the death penalty's usage, in the period between 1903 and 1947 there are some 897 extant capital trials in the Zomba archives.¹⁷ The quality of these records is variable: whilst some cases are recorded in extensive detail, others contain little more than a name and date of trial. Even where the prosecution was successful and the record is more substantive, it would appear that judges in many cases were unable to determine the exact circumstances and motives behind murders. Some tentative conclusions can be reached, however, from the available evidence. The majority of murders in Nyasaland were regarded as being a result of domestic quarrels between spouses or families.¹⁸ Almost 25% of capital convictions were designated as spousal murders. Eighty-one of 456 murders with ascribed motives involved beer drinks or drunkenness. Other significant motive factors included fights, assassination, sudden affray, insanity, sexually motivated murder, robbery or theft and the killing of suspected witches. The vast majority of accused were male, with only 27 cases definitely involving female offenders.

Prosecuting these cases was often a protracted affair, with cases moving from police investigations to preliminary enquiries before finally arriving to full trial in assize courts held across the territory. Despite its importance in the operation of colonial rule, justice in Nyasaland was a skeleton operation and was openly acknowledged to be imperfect.¹⁹ The legal system in Nyasaland was administrative and political, rather than professionally "legal," for much of the period, a fact underscored by the wide divergences between colonial legal practices and the ideological model of British law: before 1930s the accused was likely to have no defence counsel; once at court, cases could be tried in a matter of hours; laws of evidence and procedure were frequently misinterpreted or disregarded; and multiple languages and world-views clashed to obscure trial narratives and testimonies.²⁰ A lack of qualified legal staff meant that before 1936 Nyasaland was forced to empower District Magistrates rather than professional judges to try some capital cases in the first instance, with such sentences then sent for review in the High Court.²¹ This use of administrative officers as magistrates tended to favour "substantive" or "administrative justice" over "due process" and the strict application of the law, creating tensions between legal and administrative departments as well as between African opinion and European officials over the practice of "justice".²²

Whilst more research is needed into pre-colonial attitudes towards murder and its punishment in Nyasaland, colonial ethnography and post-colonial memory suggest that physical "chastisement" was seldom inflicted, except among the Angoni where a

range of “treasonable” offences against chiefs could result in an individuals’ death.²³ Chewa communities were reported to punish murder through the payment of *nkuku* (admission of guilt) and *lipo* (compensation), the *lipo* being heaviest where *kucita dala* (intention) was admitted. The death sentence was available for serious or repeat offenders, but was generally carried out only where the offender refused to reveal the reasons behind his actions or where his family refused to pay *lipo*. A death sentence was carried out through spear thrust, burning, drowning or *secatéra* (impalement), and was enforced on chief’s orders rather than by family members, except in *ufitwe* (witchcraft) cases.²⁴ The fact that under colonialism some crimes previously regarded as befitting death – such as adultery, theft and witchcraft – were no longer capital offences, whilst others that had been accepted as legitimate mechanisms of social defence – such as the killing of suspected witches – now resulted in a capital sentence, created significant tensions. Most judges were aware of these tensions between English and “customary” law and many felt that “Native custom and mentality . . . should be considered so far as circumstances permit so long as legal principles applied at home are not seriously affected in their application to the Protectorate”.²⁵ The courts which tried capital cases were not monolithic blocks but sites of contestation where values and beliefs were both expressed and shaped.²⁶ In an attempt to mediate such tensions, judges were assisted in court by Native Assessors, often European missionaries or settlers in the early days of colonisation but by the 1920s usually Provincial or Village Headmen, who were to advise on points of native law and custom.²⁷ Opinion was divided among judges as to the usefulness of African assessors. Whilst some argued that assessors opinions were of the utmost importance in understanding circumstances and motivations behind the crime, another found that:

I do not think that there are two headmen in this district with intelligence enough to give an opinion of any weight; their presence is beneficial only in as much as a convicted native, pleading not guilty, understands that he is not convicted by the European alone, on interpreted evidence, but that his own people judge him as well.²⁸

After sentencing, the convicted man had the right to appeal, with recourse lying from the District Courts to the High Court, from there to the East African Court of Appeal, and *in extremis* to the Judicial Committee of the Privy Council in London. It was not until the 1920s that appeals became commonplace.²⁹ If an appeal failed, the final chance for a condemned prisoner to escape the gallows lay in the Royal Prerogative of Mercy, exercised in the colonies by the Governor, who was advised by his judges and Executive Council.³⁰ The Governor had the power to confirm sentence and order an execution, commute the sentence to imprisonment, or pardon the condemned man.³¹ This authority made the death penalty fundamentally different from other forms of punishment, in that it was an expressly politicized penalty. Ultimately, this made capital punishment an instrument of state politics, as much as, if not more than, a penal policy.³² An analysis of the final disposition of these capital cases, taken from the available trial records, reveals that the period 1903–47 witnessed a general decline in the rates of execution accompanied by a marked increase in manslaughter pleas and convictions, the latter being a direct result of the widespread introduction of defence attorneys and pleaders from the mid-1930s.³³ Of 897 recorded outcomes in murder trials, 181 executions were

ordered, and 97 sentences were commuted to life imprisonment, with a further 100 commuted to lesser prison sentences.³⁴

The power of life and death: the principles of mercy

There have been a number of competing interpretations of the functioning of mercy in English and colonial criminal justice systems. The eminent criminologists Leon Radinowicz and Roger Hood argued that mercy decisions in England were made on the basis of the law, with murders involving deliberation and planning resulting in execution.³⁵ For Victorian England, Roger Chadwick maintains instead that it was the social and moral meanings of murder that were key to allocating mercy, whilst for Canada Carolyn Strange has proposed that mercy was at base arbitrary.³⁶ Within Africa, Robert Turrell has stressed the importance of political cultures in shaping South Africa's shifting patterns of mercy.³⁷ Most influentially, Douglas Hay argued in his classic appraisal of criminal law in eighteenth-century England that mercy was a discretionary instrument whose exercise confirmed the mental structures of paternalism and deference to uphold the social order, allowing criminal courts to function as "a selective instrument of class justice".³⁸ Whilst mercy in Nyasaland was similarly influential in upholding social hierarchies and supporting the self-representation of colonial paternalism, it also functioned as a selective instrument of a racialized colonial justice: the bureaucratic calculus of its decisions was shaped by shifting landscapes of power and stereotyped conceptions of African behaviour.³⁹ Although Governors were not legally required to state the reasons behind their decisions, it was rare for them to go against advice from their judges; the rationale behind mercy decisions can thus be inferred from the details of case records, judge's recommendations, and the confidential reports prepared by District Officers on the background to a case.⁴⁰ From this evidence, mercy in Nyasaland can be theorized as operating on three different levels: as an arbitrary modulation of judicial severity; as the implementation of established metropolitan principles; and, finally, as an expression of the politics of colonial rule.

At its most basic level, the operation of mercy was essentially arbitrary. Translated from principle to practice, as mercy was decided on a case-by-case basis, capital punishment inevitably took on a degree of arbitrariness that made the fate of the individual capital offender a matter of circumstance as much as law: whether a man lived or died could, quite literally, depend upon a Governor's personal reaction to the case placed before him.⁴¹ In 1935 the case of Amos alias Fewst Eber was brought before Governor Kittermaster. Amos had killed his two children by another woman after being taken to court for adultery by his wife. Child-killing was normally severely punished but although no signs of insanity were found after six months of medical observation and the judge made no recommendation to mercy, Kittermaster decided to commute Amos' sentence.⁴² Yet whilst arbitrary decisions can account for some of the commutations granted by Governors in Nyasaland, it is inconsistent with what we know about the operation of colonial governance to argue that there were no rational or calculated motivations behind the reprieves granted.

At another level then, mercy was decided according to established principles: categories of murder befitting of commutation or execution which had emerged in Britain before being transplanted into Africa and adapted for use.⁴³ Indeed, Nyasaland conducted a survey of mercy in 1924 specifically to confirm that sentencing was operating in line with these British principles.⁴⁴ There were a number

of categories of murder held as demanding the “extreme penalty of the law”. The primary justification given for the use of capital punishment was one of deterrence. It was thus those crimes most threatening to the colonial order, at a village or national level, that were most severely punished. The Chilembwe Uprising in January–February 1915, led by the Baptist preacher John Chilembwe, provides the strongest example of this use of the death penalty to re-establish colonial authority. Chilembwe’s rebellion shocked British officials and settlers; his men launched attacks on settler plantations in Magomero, killing three European men whilst allowing the women and children to live. The rebellion failed (as Chilembwe’s call to his followers to “strike a blow and die” suggested he believed it would) because it lacked wide support from the local population and because the state responded quickly and brutally to the threat, with military, police and settler volunteer forces hunting down and killing suspected rebels.⁴⁵ The impression from the archive is of a colonial state scrambling to regain control, and deploying exceptional levels and forms of violence to achieve this. As Governor Smith later wrote, “the lesson learnt had necessarily to be a harsh one”, and perhaps 50 of Chilembwe’s followers were killed in battle, 300 others given prison sentences and a collective fine imposed on the area.⁴⁶ As part of this repression a series of hastily convened courts passed a death sentence on 46 men for the offences of murder and high treason. Thirty-six were executed, with the ring-leaders hanged in public along the main Mlanje-Mikalongwe road near the Magomero Estate where the Europeans had been killed, in an effort to increase the deterrent message of the sentence.⁴⁷ The very exceptionality of penal excess in this case, rather than abrogating the rule of law which the British considered integral to their colonial legitimacy, in fact served to re-establish its boundaries.⁴⁸

In peace time, those convicts most likely to face the gallows were “those who commit cold-blooded and premeditated murder, or those who accompany robbery with murder”.⁴⁹ As Radzinowicz and Hood argue for twentieth-century England, the primary legal basis for determining mercy was the element of premeditation involved in a murder, but judges in Nyasaland believed that many murders there were unpremeditated.⁵⁰ Murders which directly challenged colonial authorities and social hierarchies, such as inter-racial murders and attacks on chiefs or policemen, were rare in Nyasaland but were punished severely when they did occur. In his memoirs, former judge Charles Belcher recalled discussing with Executive Council members in the mid-1920s the case of a young African man accused of murdering an Indian trader. Fearing protests from the Indian community if the condemned man’s sentence was commuted, some Executive Council members argued that “After all, Nyasaland natives are plentiful and not very vocal. One [argued] ‘I do not think that it would hurt to hang a few of them’. And, no doubt, on a very broad view, it would not.” Contrary to Belcher’s advice, “the native was hanged, and Indian resentment at any possible commutation was thus obviated”, demonstrating the importance of maintaining social and racial hierarchies in the disposition of capital cases.⁵¹ Murders committed for pecuniary motives, such as those committed in the act of robbery or by hired assassins, were particularly likely to result in execution, indicating the role of the law in defending property as well as person.⁵² The severe treatment of pecuniary murders was in line with African attitudes towards such crimes; Elijah Nyirongo was executed in 1951 for a murder committed to gain money to repay debts after the District Officer at Mzimba reported that “local opinion considers this the worst crime ever committed in the Northern Province under European rule”.⁵³ The type of weapon used could also affect a person’s chances of

being executed. As a person was assumed to intend the probable consequences of their acts, assaults with a lethal weapon like a gun, axe, or spear were presumed to convey malice and treated severely.⁵⁴

On the other hand, there were recognised categories of murderers who were frequently regarded as befitting of mercy, categories established following British precedent, but adapted to fit colonial conceptions of African behaviour and psychology. As in Britain, certain categories of convicted murderer were automatically spared the death penalty under statute: youths under the age of 18 and pregnant women.⁵⁵ In a break from metropolitan precedent, however, women were very rarely executed: 16 women were convicted of murder during this period, but only one – Aiba – was executed (in 1926) for participation in the cannibalistic murder of a young girl, a practice deemed particularly “repugnant” by British courts.⁵⁶ Violent female offenders usually escaped the gallows through a combination of a colonial “chivalry of mercy” and a cultural reluctance to inflict violence publicly on female subjects, alongside the belief of many judges that “the mind of the female native is insufficiently developed to justify the application of the extreme penalty of the law”.⁵⁷ Youths over the age of 18 often avoided the gallows because they were assumed to be acting under the influence of older men, a fact indicative of the emphasis placed by colonial administrators on generational difference and discipline in discourses on African socialization (and this despite contemporary complaints by many elders about rebellious youths who were no longer recognizing their authority).⁵⁸ Elderly convicts were routinely spared the gallows, less due to respect for their age than because even a relatively short sentence of imprisonment would see them die in prison.⁵⁹ Doubt as to the actual circumstances of a case was another significant factor in the granting of mercy, particularly where there were discrepancies between “known” and legally “admissible” evidence in a trial.⁶⁰ It would seem from the evidence that Nyasaland’s judges were not “hanging judges”, regarding capital punishment as a necessary but distasteful tool in enforcing law and order. In their minds, the death penalty was a British imposition, which required adaptation and moderation through mercy to function effectively and “humanely” in an African environment. Sufficient numbers of sentences were being commuted in the post-Chilembwe years that by 1922 a Punishment of Murder (Natives) Ordinance was proposed to create a discretionary rather than mandatory death penalty for African offenders. Although the Colonial Office rejected the proposal, Chief Justice Jackson maintained that the mandatory penalty was inhumane and inefficient for all involved.⁶¹

Women, witches and beer: social and moral meanings of murder

Other categories of mercy were more culturally contingent and fluid, with the outcome depending upon the interpretation of the specifics of the case set against shifting conceptions of problematic African social behaviour. These included cases of intoxication, domestic violence, suspected insanity, and witchcraft. Alcohol consumption was a major contributing factor in many murders. Officials had long noted that “beer and women” were the main causes of violent crime in colonial Africa.⁶² Beer drinks were central to communal life across many parts of Nyasaland and were a frequent site of quarrels, many of which turned violent and could result in murder. With the development of *kachaso*- (local gin) and beer-brewing in urban areas from the 1920s, colonial awareness of the problem increased dramatically.⁶³ By 1947 the Annual Judicial Report stated that “It is clear that attendance at beer drinks is the

cause of the majority of the crimes of violence committed”, with alcohol involved in 43 of 79 reported murders.⁶⁴ In sentencing such cases, judges and officials were torn between the desire to inflict punishment to deter future cases and the knowledge that such measures would undoubtedly fail. Mercy was usually accorded only where the accused was judged sufficiently intoxicated to compromise their ability to resist provocation.⁶⁵

As outlined above, domestic murders – particularly spousal killings – were a common category of murder in colonial courts. This highlights the severity of gender tensions in Nyasaland societies during this period, which resulted from factors including labour migration, urbanization and the impact of Christian cultures.⁶⁶ The vast majority of cases involved husbands attacking wives. Marital difficulties which escalated into murder ranged from a wife refusing to cook for her husband, spending his money and calling him names to more serious disagreements over issues such as bridewealth, adultery, desertion and disputed sexual access to the wife.⁶⁷ In the 1910 case of Majawa – in which the accused cut his wife’s throat because, he claimed, she had been guilty of constant nagging, hiding his things and throwing their child into the fire during a quarrel – Native Assessor Syasya recorded that:

Before the white men came here the women were afraid to behave ill to their husbands, they would have been punished at first and her witnesses to marriage would be made to pay, and they would most certainly have been killed had they committed adultery . . . Majawa has killed his wife and if he is killed it is as the law is now, but we chiefs do not think that he deserves to be put to death. Many women are giving trouble because they no longer fear their husbands. If Majawa is killed it will have a bad effect on all our women who are often troublesome now. We think that from our point of view Majawa should be released, but we do not think that this will be done.⁶⁸

In the end, Majawa was given a life sentence, to be reconsidered after five years. The colonial period saw a broad evolution in judges’ attitudes to spousal killers, which seems to have altered in tandem with wider concerns about gender relations, marriage and adultery in African communities, developments in “customary law”, and the bargains of collaboration between colonial officials and Native Authorities.⁶⁹ In the early days of colonization many men who killed their wives were sent to the gallows in an attempt to enforce British conceptions of morality, but by the 1920s, as fears of detribalization increased, colonial judges seem to have become more sympathetic towards African patriarchs’ concerns about disobedient women, and many convicted wife-murderers had sentences commuted, before attitudes again hardened against spousal murders in the late 1930–40s.⁷⁰

Whilst domestic murders often had clear attributable motives, many other cases brought before the courts were more opaque in their rationales. Trial narratives frequently drew links between violence and mental instability or insanity to explain otherwise apparently motiveless murders, particularly those which displayed high levels of unrestrained violence.⁷¹ The law applicable to criminal insanity in Africa was the same as in England: the M’Naghten rules, which declared a person “not criminally responsible for an act if at the time of committing it he is, through any disease affecting his mind, incapable of understanding what he is doing, or of knowing that he ought not to do the act”.⁷² Colonial rule was predicated upon the supposed difference between the “European” and “African” mind, and the European official’s power to define and defend this alleged difference.⁷³ However, establishing the state of mind of a murderer at the time of the crime was a difficult prospect in

Africa, where psychiatric facilities were limited and understanding of the “African mind” was openly acknowledged to be incomplete. Moreover, conceptions of what constituted socially abnormal or “insane” behaviour differed between African and European perspectives.⁷⁴ The high numbers of Africans who were gathered into the medical system after trial in colonial courts led to extensive theorizing about the connection between mental illness and violence in African communities from both legal and medical perspectives.⁷⁵ The Zomba alienists Shelley and Roberts certainly believed that “the nearer one descends to the state of primitive man, the more keen is the desire to kill”.⁷⁶ Africans were seen by judges as being particularly prone to mental instability: “a form of mental chaos very much more common with Africans than with Europeans causing them on very little provocation to commit acts of violence, attempt suicide or run amuck”.⁷⁷ Temporary fits of insanity were frequently attributed to Africans convicted of murder, particularly when excited by intense emotion, alcohol or sexual passion. Acting Attorney-General Martin stated in 1934 that “it is generally recognised that natives frequently lose their heads when excited sexually”.⁷⁸ Particular ethnic groups were also viewed as having collective propensities towards mental weakness. In the case of Kapopo, a policeman convicted of murdering his wife, it was noted “that the Awemba tribe to which Kapopo belongs are notoriously apt to become unbalanced under strong emotional influences – so much so that they are no longer recruited for the Nyasaland Police”.⁷⁹ Both judges and doctors felt there was a blurred boundary between insanity and low intelligence.⁸⁰ Much of the behaviour attributed to or claimed by Africans during murder trials, however, could not be easily classified as “criminal insanity” under the M’Naghten rules: “one of those temporary fits of mental derangement, which for a want of a better terms are commonly called running amok”, or “something having all the effects of insanity though falling without the legal definition of that mental state”.⁸¹ The medicalization of penal discourse was only partial across Africa for much of the colonial period; judges tended to use medical opinion to support their rulings rather than determine them, privileging their localized knowledge over the more universalistic, scientific knowledge of medical discourse.⁸² This contest for dominant knowledge on the African mind reflects the wider conflicts within the colonial state, particularly between the increasingly professional judicial service and the colonial administration, over the best method of ordering the African population.⁸³

If colonial courts had difficulty in interpreting the rationality of murder in an African cultural context, the treatment of insanity was further complicated by the prevalence of witchcraft beliefs as motives for lethal attacks.⁸⁴ The problem for the courts was to how to determine between the “mad”, the “bad”, and those who thought themselves bewitched. The 1911 Witchcraft Ordinance established that deaths directly resulting from witchcraft practices (such as *mbauvi* poison ordeals) were to be tried under its regulations, rather than under murder statutes, and were consequently not liable for capital sentencing. However, many murder cases in Africa resulted from the killing of suspected witches by individuals or communities who felt threatened by a witch’s powers. Colonial law summarily dismissed a witch’s claims to supernatural powers, but was still forced to take into account the numerous occasions on which magic provided a powerful motive for criminal action.⁸⁵ Such cases were problematic not only because the killing of suspected witches was “repugnant to justice or morality”, but because they challenged the monopoly of force on which colonial rule rested. Under English common law, as applied in

Nyasaland's Penal Code, witchcraft was not a "reasonable belief" and so the killing of a suspected witch could not be held as self-defence.⁸⁶ In cases where persons were convicted of such a murder, however, the death sentence would almost invariably be commuted, as "education" not "execution" was widely regarded throughout the period as the only effective method of eradicating the belief in witchcraft.⁸⁷ Some courts displayed considerable sympathy towards Africans reacting against perceived witchcraft, portraying them as victims of superstition rather than violent criminals.⁸⁸ Loid and Liason Kwilambo were two brothers convicted in 1945 of murdering two of their uncles, whom they suspected of having bewitched and killed their nephew Kusweje. The murders took place in broad daylight, and in front of witnesses, in Cholo. District Magistrate MacDonald, giving testimony about the crime, stated that it was "Undoubtedly a deliberate and unpremeditated crime, executed with an unusual degree of barbarity. Yet [it was not] not actuated by love of gain, or lust, or selfish revenge, or by any other sordid motive, but by the superstitious fears and out of pity for relations believed to have been bewitched and killed", and the brothers' sentences were commuted.⁸⁹

Cultural defences: "African" behaviour and the state of a society

Perhaps the most influential scholar on modern studies of capital punishment has been Michel Foucault.⁹⁰ Moving beyond *Discipline and Punish*, in his later writings and lectures Foucault accorded capital punishment a brief, yet strategically significant, role in the genealogy of bio-power, arguing that capital punishment was an active tool of power, marking the changing political contours of life.⁹¹ In modern states, he argues that "capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One has the right to kill those who represented a biological danger to others." This scientific and moral demarcation of "monstrosity" was mediated primarily through racism, Foucault taking race as a means of division rather than a biological substratum.⁹² Following this argument, the establishment and dehumanization of the African murderer as a monstrous biological and criminal "Other" should facilitate the use of the death penalty. Certainly there are numerous examples of racialized and "dehumanizing" stereotypes being employed in trial narratives and judgements to highlight the "monstrosity" of the criminal, as with the "ignorant, degenerate native" Nsuera, mentioned at the outset of this article, who was executed for the murder of his wife.⁹³ The idiom of "brutality" was frequently invoked in calling for execution, linking the violence of the crimes with a bestial atrocity redolent of contemporary tropes of African animalistic savagery.⁹⁴ However, colonial penal and judicial discourse reflected a more conflicted view of the African murderer than a broadly Foucauldian narrative alone would suggest.

At a further level of analysis, mercy was shaped by the political and cultural landscapes of colonialism.⁹⁵ To the minds of many colonial officials across Eastern Africa, murderers were in fact the most "manly" and honest of African criminals, particularly when compared to recidivists and thieves: as Belcher noted, "I do not remember trying a case where, even admitting the facts alleged against him, there was not a good deal to be said for the culprit".⁹⁶ In Nyasaland, many African murderers were seen as acting according to tribal custom or natural "warrior-instinct", a sentiment which was particularly prevalent during the 1910s and 1920s. It can be

suggested that the form and rhetoric of juridical-bureaucratic language, alongside the presence of African crowds at trials, prevented resort to extreme dehumanizing tropes in explaining and prosecuting murders. Crucially, the very tropes of “primitive mentality” and “savagery” that could dehumanize an accused African and subject him to the death sentence were also appropriated and repackaged in defence narratives in order to deny full criminal responsibility or *mens rea* for his actions and to facilitate commutation where the crime fell within established categories of potential mercy.⁹⁷ An elderly man, Bokosi, on trial in 1932 for the murder of his young wife was convicted only of manslaughter after Judge Harragin found “no doubt being of the older generation, [the accused] still has a modicum of the old unrestrained spirit of the savage”.⁹⁸ Judges’ reports are replete with assertions that Africans lacked the self-control and discipline of the “civilised European” and were more prone to violent acts, either through provocation or “irresistible impulse”.⁹⁹ Such typologies were expressly used to justify mercy by judges and defence counsels alike: in the case of Chigwenemba, convicted in 1924 of murdering a man during a fight at a beer drink, Acting Judge Charles Belcher asserted “the primitive nature of the native mind and the ease with which it is inflamed by drink and also by sexual passion should call where those considerations arise for different treatment from that which an European in like circumstances should receive”.¹⁰⁰ Particularly in the 1920s and 1930s, successful cultural defence narratives for Africans on trial depended upon portraying them as “primitives” who could not fairly be judged by the norms of “civilised” white men. Belcher notably believed that “Allowances must be made for the tendency of the native to react violently to trifling provocation,” and judges agreed that the majority of murders were results of “crimes of passion” or unpremeditated actions.¹⁰¹ In fact, this represented a fundamental contradiction in the use of capital punishment in Nyasaland and across British colonial Africa: if the majority of murders were unpremeditated, as colonial officials believed, how could capital punishment act as an effective deterrent?¹⁰² Cultural defence narratives successfully inspired mercy for individual Africans, whilst simultaneously reinforcing discriminatory hegemonic social relations and ideas of race.¹⁰³ Interestingly, educated Christian or “Europeanized” natives were less likely to be judged befitting of mercy than their “primitive” counterparts. In the case of Julius, convicted of the murder of his wife Malita in Port Herald Nyasaland in 1946, it was stated: “As a Christian teacher, Julius presumably takes a greater responsibility for his actions than do his less enlightened brothers for theirs. Consequently he can have less recourse to the clemency of His Excellency the Governor.”¹⁰⁴ The higher an African climbed up the evolutionary ladder, the more dangerous he became in colonial eyes, and the more subject to violence should he fail to adhere to colonial expectations.

Mercy decisions were also explicitly related to the general level of law and order in a locality, and to a community’s perceived standing on the “ladder of civilization”. Once order had been restored after the Chilembwe Uprising, the colonial state faced few serious threats to its authority, allowing a generally high level of mercy. Colonial authority did have to be constantly maintained and extended, however. In 1925 District Officer Nichols of Fort Johnston successfully called for the execution of two men, Sikumbuli and Bonomali, arguing that “The crime was a brutal one and was committed in a section of the District which is inclined to be unruly. On that account I consider it necessary to make an example of the chief offender.”¹⁰⁵ Regarding the case of an Agomba man who deliberately killed his wife after suspecting she was committing adultery with her former husband, Judge Johnson wrote to Governor

Kittermaster: "Whether the sentence shall be carried out will doubtless be considered by Your Excellency in Council in relation to the development of the particular tribe."¹⁰⁶ When a case went to the Governor-in-Council for final disposition, the District Officer from the condemned's home area was required to draft a "mercy report" to aid deliberation. This report aimed to gather local background information about the crime, including a personal history of the prisoner and details of any mitigating factors or "native customs" that might have shaped the condemned's actions.¹⁰⁷ The records of these reports from Lilongwe and Dodoma districts in the 1940s and 1950s reveal that there was considerable support for capital punishment among the African population for murders they viewed as serious, although it is questionable both whether such communities were telling the District Officer what they thought he wanted to hear and whether these are representative samples. Whether those interviewed spoke well of their fellow villager or denounced him as a troublesome member of society could strongly influence a mercy decision. Chikwenka villagers, supporting the execution of one man, Kachinga, in 1945, reveal an important consideration in their support for capital punishment: "They admit he has shown no previous tendency to murder or assault and that they cannot see any motive for the crime, but they hold by the central fact that in spite of his previous good character he is no longer to be trusted as a member of the community."¹⁰⁸ It was those regarded as a danger to the stability and security of the community whose deaths would be called for. District Officer Wickham, reporting on the case of Mangulnji convicted of murdering his wife in Kota Kota, stated that local opinion believed:

For what he has done he thoroughly deserves to pay the penalty of death. Everyone is glad to know that the death sentence has been passed on him, and that he will therefore pay that penalty. They go so far as to say that had the case come before their Court he would already have paid.¹⁰⁹

Conclusion

As colonial states and penal systems developed their networks of power to become less arbitrary and more routinized, a specifically colonial economy of penal violence emerged to fulfil the competing objectives of self-contradictory colonial governmentality.¹¹⁰ The legal-administrative nexus in Nyasaland closely linked the operation of justice with the maintenance of order and the defence of the colonial state and society, and it was those cases deemed most threatening to the colonial order which resulted in judicial execution. Whilst political instability often shaped patterns of commutation, particularly in the context of anti-colonial struggles like the Chilembwe Uprising, the archives reveal what contemporaries recognized – mercy was both arbitrary and predictable.¹¹¹ Judges and District Magistrates in Nyasaland tended not to be "hanging judges". Most saw the necessity of adapting the law to fit local circumstances and to reconcile it to their understandings of "native custom".¹¹² Broadly speaking, many avoided death sentences or recommending executions where possible, although it is difficult to determine how far this reluctance to apply the extreme penalty of the law was a result of an opposition to capital punishment itself, or of paternalism towards the African accused. Overall in Nyasaland, the use of the death penalty was determined by the particular character of colonial justice and the ideological landscape of colonial governance. Social and political appraisals of murder proved crucial to the disposition, alongside legal

definitions and arbitrary decisions. Racialized stereotypes of “primitive” African mentalities and “customary” justifications for violence suffused the operation of criminal justice, but in many murder trials such collectivising and dehumanizing tropes formed “cultural defence” narratives crucial to securing commutations. The flexibility in sentencing facilitated by mercy helped fill the chasm between “customary” and colonial attitudes to murder, ultimately helping to uphold British authority whilst allowing the larger structural injustices of the colonial judicial regime to remain unaddressed.¹¹³

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Notes

1. R v Nseura, District Magistrate G. Bainbridge-Ritchie, Mlanje, 1921, National Archives of Malawi (NAM), J/5/12/16.
2. Sir Charles Belcher, “Reminiscences,” 93, Rhodes House Library (RHL), Oxford, MSS.Brit.Emp s.347.
3. See Foucault, *Surveiller et punir*; Hay et al., *Albion's Fatal Tree*; McGowen, “Civilising Punishment.” On “civilizing processes” see Elias, *The Civilizing Process*.
4. See Meranze, “Michel Foucault, the Death Penalty.”
5. Pierce and Rao, *Discipline and the Other Body*.
6. Notable exceptions are Turrell, *White Mercy*; Anderson, *Histories of the Hanged*.
7. Chanock, *Law, Custom and Social Order*.
8. For a discussion of executions, see Hynd, “Killing the Condemned” and “Decorum or Deterrence.”
9. Mamdani, *Citizen and Subject*; Crais, *The Politics of Evil*, 84–5.
10. Colebourne, “Crime, the Legal Archive and Postcolonial Histories”; Stoler, “Colonial Archives and the Arts of Governance.”
11. Ginzburg, “Checking the Evidence.”
12. Stoler, “In Cold Blood,” 152–4.
13. Comaroff, “Governmentality, Materiality, Legality, Modernity.”
14. Chanock, *Law, Custom and Social Order*, 4.
15. For comparative historical studies of mercy see Strange, ed., *Qualities of Mercy*; Hay, “Property, Authority and the Criminal Law”; Chadwick, *Bureaucratic Mercy*.
16. *Penal Code (Laws of Nyasaland) 1929*, s. 170, *Criminal Procedure Code 1929*, s.316–20; Capital Punishment for Rape, NRA, CO 859/636.
17. These figures have been compiled from NAM Judicial and Secretariat files, case records and trial registers, reconciled against published *Annual Reports on the Administration of Prisons 1926–1947*, *Annual Report of the Judicial Department 1926–47* and *Blue Book Annual Statistics*.
18. See Hynd, “Fatal Families.”
19. See Nyasaland Protectorate, *Ordinances of the Nyasaland Protectorate For the year ended 31st December 1929*. Zomba, 1930, s. 168–76; Procedures to be followed in murder cases in Nyasaland, 1924–59, NAM, 4–4–8R 2952; Belcher, “Reminiscences,” 370, RHL, MSS.Brit.Emp s.347. On the weakness of law enforcement, see McCracken, “Coercion and Control in Nyasaland.”
20. See Lawrence, Osborn and Roberts, *Intermediaries, Interpreters and Clerks*.
21. This system began in 1904 as a result of delays caused waiting for the sole Judge to travel across country. See Nyasaland Protectorate, *Annual Report of the Judicial Department for the Year 1917–18*. Zomba, 1918.

22. See Bushe Commission; Morris and Read, *Indirect Rule and the Search for Justice*, 73; Chanock, *Law, Custom and Social Order*, 71–84, 103–4; Mamdani, *Citizen and Subject*, 109.
23. Chimango, “Traditional Criminal Law in Malawi,” 25–39.
24. Rangeley, “Notes on Cewa Tribal Law,” 25; Duff, *African Small Chop*, 334, 340. *Lipo* could be up to six goats, two to four ivory tusks, or two or three persons being given into slavery to the victim’s family.
25. R v Chetezera, Attorney-General Clifton-Roberts to DO Hughes, Lilongwe 1921, NAM, J5/12/17. See also Roberts, *Tangled Justice*.
26. Wiener, *An Empire on Trial*.
27. Judicial Circulars 1921–37, Circular 2/1927, NAM, S1/250/21. On the “native mind” and settler experts, see Jeater, *Law, Language and Science*.
28. R v Chibwana, DO Ockenden to Chief Justice Griffin, October 7, 1911, NAM, J5/12/7.
29. Consolidation of Rules regarding Practise and Procedure of Appeals to His Majesty in Council, NAM, S1/454/28.
30. It was rare for the Governor-in-Council to go against an express recommendation by the presiding Judge; CC30/45 R v Chimfuko, Memorandum Chief Justice Jenkins to Governor Smith, January 20, 1946; NAM, J5/5/90b.
31. *Ibid.*, R v Saidi 1923, NAM, J5/12/19.
32. Evans, *Rituals of Retribution*, vii.
33. Procedures to be Followed in Murder Cases in Nyasaland, 1924–59; NAM, 4–4–8R/2952; Nyasaland Protectorate, *Annual Report of the Judicial Department for the Year Ending 1936*. Zomba, 1937. Experienced District Officers with legal backgrounds frequently acted as pleaders as defence counsels were scarce and expensive.
34. In the remaining cases the accused were either found not guilty, guilty of manslaughter or a lesser charge, guilty but insane or unfit to plead, appealed successfully, sent for retrial, or saw charges against them discontinued.
35. Radzinowicz and Hood, *A History of English Criminal Law*, 677–81.
36. See Chadwick, *Bureaucratic Mercy*; Strange, *Qualities of Mercy*.
37. Turrell, “‘It’s a Mystery,’” 94.
38. Hay, “Property, Authority and the Criminal Law,” 48.
39. Chadwick, *Bureaucratic Mercy*.
40. See R v Chimfuko CC30/45, Memorandum Chief Justice Jenkins to Governor Richards, January 10, 1946, NAM, J5/5/90b; Penal-Death Sentences 1940, Procedures for the Prerogative of Mercy, extract from Sir Edward Troup, “Home Office,” National Records and Archives, London (PRO), CO 859/37/11. A few judges chose not to give recommendations on mercy to avoid influencing the Governor.
41. Evans, *Rituals of Retribution*, 907–8.
42. R v Amos @ Fewst Eber CC9/35, Governor Kittermaster to Secretary of State MacDonald, October 2, 1935, NAM, S1/235/35.
43. See Chadwick, *Bureaucratic Mercy*; Hay, “Property, Authority and the Criminal Class.”
44. Outcomes of Death Sentences, 1922–23, NAM, 4–4–8R/2952. As cases were legally to be decided upon an individual case basis, these principles were never formally codified but were accepted as generally holding.
45. Shepperson and Price, *Independent African*; Mwase, *Strike a Blow and Die*; Rotberg, “Chilembwe’s Revolt Reconsidered.”
46. Sir George Smith, “The Empire at War: Nyasaland,” 8, NAM, S1/496/19. There is no official death toll for the Uprising, see Shepperson and Price, *Independent African*, 399.
47. *Ibid.*; Phiri, *Let us Die for Africa*, 86–7.
48. Agamben, *Homo Sacer*, 19; see also Hay, “Property, Authority and the Criminal Law.”
49. R v Zimanga Sakala, Minute by Treasurer April 24, 1930, NAM, S1/688/30.
50. Radzinowicz and Hood, *A History of English Criminal Law*, 677–81.
51. Belcher, “Reminiscences,” 223, RHL, MSS. Brit. Emp s.347.
52. CC53/43 R v Zuze, NAM, J5/5/80a.
53. Confidential Reports on Persons Convicted of Murder and Sentenced to Death, CC9/51 R v Elijah Nyirongo, Report by DO Mzimba, May 2, 1951, NAM, PCN 1/20/13.
54. R v Tom, August 22, 1921, NAM, S1/1244/21.
55. R v Yona, Chatolambega, Nelson, NAM, S1/598/31.

56. *R v Njali @ Ntokoma and Aiba*, NAM, S1/384/26; Belcher, "Reminiscences," 352–3, RHL, Brit.Emp.s.347. For British precedent see, Ballinger, *Dead Women Walking*.
57. *R v Alikutu*, 1926, NAM, J5/12/23. For a detailed discussion of women and the death penalty, see Hynd, "Deadlier than the Male?"
58. See Chanock, *Law, Custom and Social Order*, 226; Waller, "Rebellious Youth in Colonial Africa."
59. *R v Bokosi*, Judgement by DO B Fairfax-Franklin, March 24, 1932, NAM, J5/12/30.
60. *R v Palanjeta*, Judge Jackson to Chief Secretary November 19, 1923; NAM, S1/3077/23.
61. Local Legislation to obviate the necessity of passing sentence of death, NAM, S1/42/22; *R v Matthew*, Chief Justice Jackson to Attorney-General Belcher, December 8, 1920, NAM, J5/12/16.
62. Belcher, "Reminiscences," 93, RHL, MSS.Brit.Emp s.347.
63. Ng'wane, "Economics of Kacasu."
64. Nyasaland Protectorate, *Annual Report on the Administration of the Police Department for the Year ending 1946*. Zomba, 1947, 15; *R v Kandeu*, Report by District Magistrate, NAM, J5/12/34.
65. See *Wilson v Regem*, RNCA Criminal Appeal 267/1952, 1 *ALR. Mal.* (1923–60), 268.
66. See Hynd, "Fatal Families."
67. *R v John Seremani* 1922, Confession by John Seremani, November 27, 1922, NAM, S1/2627; *R v Chiseka Mateyo Mvula* CC17/38, NAM, S1/147/38; *R v Frank Mwale*, NAM, 1936, J5/12/36; *R v Mjepa* CC34/47, Acting Chief Justice Lockhart-Smith, NAM, J5/5/101a.
68. *R v Majawa* 1910, NAM, J5/12/7.
69. 1931 League of Nations Questionnaire – Freedom of Native Women, NAM, S1/2065/10. See Chanock, *Law, Custom and Social Order* on gender and the law.
70. *R v Mbalati*, Judge Belcher to Chief Secretary, NAM, S1/1915/24.
71. See *R v Chikomo*, Report by Acting Judge Harragin, July 17, 1925, NAM, S1/1214/5.
72. M'Naghten's Case (1843) 8 E R 718; see s.13. (cap. 88), Criminal Procedures Code, Nyasaland 1929.
73. See Jeater, *Law, Language and Science*.
74. See Vaughan, "Idioms of Madness" and *Curing their Ills*; McCulloch, *Colonial Psychiatry*; Mahone, "Psychiatry and the East African Offender."
75. McCulloch, *Colonial Psychiatry*, 142.
76. Shelley and Watson, "An Investigation Concerning Mental Disorder," 728–9.
77. Legal Correspondence PC Northern Province to DO Blantyre, *R v Barry*, November 28, 1945, NAM, NS 1/12/1.
78. *R v Chakwera*, report by Acting Attorney-General R. Martin, April 28, 1934, NAM, J5/12/34.
79. *R v Kapopo*, Governor Bowring to Colonial Secretary, September 1, 1927, NAM, S1/1164/27.
80. Confidential Reports on Persons Convicted of Murder and Sentenced to Death, *R v Chiwawo*, NAM PCC 1/16/2; *R v Chikomo* 1925, NAM, J5/12/23.
81. *R v Sumbuleta*, DM J. Moir, NAM, S1/1084/31; CC9/26 *R v Alikutu*, Judge Belcher, NAM, J5/12/23.
82. *R v Wikita* CC50/1941, Judgement by Chief Justice H. Morgan, November 10, 1941, J5/5/75.
83. See Morris and Read, *Indirect Rule and the Search for Justice*; Bushe Commission.
84. Chanock, *Law, Custom and Social Order*, 85–102.
85. Orde Brown, "Witchcraft and British Colonial Law"; Roberts, "Witchcraft and Colonial Legislation."
86. See CC49/45 *R v Kachinga of Chikwenka*, Judgement by Chief Justice Jenkins, December 8, 1945, NAM, J5/5/91b.
87. *R v Grant*, District Magistrate R. Murray to Attorney-General Hogg, 1916, NAM, J5/12/12.
88. CC22/46 *R v Lameck*, Report by Chief Justice, August 29, 1946, NAM, J5/5/94.
89. CC42a/45 *R v Loid Kwilambo and Liason Kwilambo*, Statement by DO MacDonald, Cholo, NAM, J5/5/91a.
90. See Meranze, "Michel Foucault"; Evans, *Rituals of Retribution*.

91. Foucault, *History of Sexuality*, 136–8.
92. Foucault, *Society Must be Defended*, 254–7.
93. R v Nsuera, Report by DO G Bainbridge-Ritchie, 1920, NAM, J5/12/16.
94. See R v Frank Mwale 1936, NAM, J5/12/36.
95. See Turrell, “‘It’s a Mystery’.”
96. Paterson, *Report on a Visit to the Prisons*, 26; Belcher, “Reminiscences,” 93, RHL, MSS.Brit.Emp s.347.
97. See Loo, “Savage Mercy” for a comparable argument regarding the treatment of Canadian First Nations.
98. R v Bokosi, Judgement by Chief Justice Harragin, March 24, 1932, NAM, J5/12/30.
99. R v Chatonda, Judgement by Judge Belcher, 1926, NAM, J5/12/23; Vaughan, *Curing their Ills*, 115.
100. R v Chigwenemba, CC42/1924, Judgement by Acting Chief Justice Belcher, NAM, J5/12/21.
101. R v Chatonda, Judgement by Judge Belcher, 1926, NAM, J5/12/23.
102. R v Misi Kwanda, Judge Jackson to DO Wade, Dowa, June 28, 1920, NAM, J5/12/16; Proposed Abolition of the Death Penalty in Colonial Territories, 1963–5, PRO, CO 1032/467.
103. Loo, “Savage Mercy.”
104. Confidential Reports on Persons Convicted of Murder and Sentenced to Death, CC 44/1946 R v Julius, October 31, 1946; NAM, PCC 1/16/2.
105. R v Sikumbili + Bonomali, report by C.S. Nichols to Chief Secretary, November 5, 1925, NAM, J5/12/23.
106. R v Saidi, Judge Johnson to Governor Kittermaster, July 7, 1936, NAM, S1/274/36.
107. Secretariat Circular, January 23, 1942, NAM, PCN 1/20/13.
108. CC49/45 R v Kachinga of Chikwenka, NAM, PCC 1/16/2. Kachinga was eventually acquitted, with the Court of Appeal for East Africa finding him guilty but insane.
109. Confidential Reports on Persons Convicted of Murder and Sentenced to Death, CC 58/43 R v Mangulnji Phiri, Report by B. Wickham, February 23, 1944, NAM, PCC 1/16/1.
110. Pierce and Rao, “Discipline and the Other Body.”
111. Strange, *Qualities of Mercy*, 9.
112. See Benton, *Law and Colonial Cultures*.
113. Turrell, *White Mercy*, 21; Murphy, “Mercy and Legal Justice,” 171.

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