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Introduction to Law, Authority & History: A Tribute to Douglas Hay

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Introduction



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Introduction to Law, Authority & History: A Tribute to Douglas Hay

Abstract

On 5 and 6 May 2016, Osgoode Hall Law School and the York University History Department sponsored a symposium entitled “Law/Authority/History: A Tribute to Douglas Hay” to mark the recent retirement of Professor Douglas Hay. The call for papers circulated to legal historians in Canada and elsewhere, and a particular attempt was made to contact Professor Hay’s former graduate students. Twenty papers were presented at the symposium, of which eight appear in this issue of the Osgoode Hall Law Journal.

It seemed self-evidently appropriate to us to recognize this milestone in Douglas Hay’s career, in his home town, and at the University where he has served with such distinction as a faculty member for some thirty-five years. Douglas Hay received his Master of Arts degree in history from the University of Toronto in 1969 and then pursued his doctorate at the University of Warwick under the iconic historian of law and society E.P. Thompson. After seven years as a faculty member in the history department at Memorial University of Newfoundland, Douglas Hay spent a year as a visiting professor of Canadian Studies at Yale before being hired at York in 1981. Cross-appointed in law and history, Hay’s appointment at Osgoode was unusual, as Canadian law faculties did not at the time normally appoint candidates without a law degree. After a two-year stint back at Warwick from 1982-1984, Hay returned to Osgoode permanently, where he has been a mainstay of legal history teaching and research.

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Cover Page Footnote

The Symposium was part of the suite of events marking the 50th anniversary of the affiliation of Osgoode Hall Law School with York University. We would like to thank the Osgoode/York@50 Fund for sponsoring the Symposium, along with the Centre for Criminology and Sociolegal Studies at the University of Toronto and the following units of York University: the Department of History, Faculty of Graduate Studies, Faculty of Liberal Arts and Professional Studies, Office of the Provost, and Robarts Centre for Canadian Studies. All contributed generously to ensure the success of the event.

Special Issue of the Osgoode Hall Law Journal

Introduction to Law, Authority & History: A Tribute to Douglas Hay

PHILIP GIRARD* & JIM PHILLIPS†

ON 5 AND 6 MAY 2016, Osgoode Hall Law School and the York University History Department sponsored a symposium entitled “Law/Authority/History: A Tribute to Douglas Hay” to mark the recent retirement of Professor Douglas Hay.¹ The call for papers circulated to legal historians in Canada and elsewhere, and a particular attempt was made to contact Professor Hay’s former graduate students. Twenty papers were presented at the symposium, of which eight appear in this issue of the *Osgoode Hall Law Journal*.

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One of the best-known legal historians in the English-speaking world, Douglas Hay carried the Warwick critical social history of law approach to Canada and around the world. In the early 1970s, Warwick was the epicentre of new, critical approaches to social and legal history that broke with the field's long tradition of insular, technical, and consensus-based approaches. Students were encouraged to expose and critique the power relationships underlying the law as revealed by its actual administration, and to take seriously resistance to law by subaltern groups. In turn, however, devotees of this new direction in legal historical study had to take seriously the law itself—to understand it from the inside in order to critique its uses and misuses from the outside. Perhaps no other work summed up so brilliantly the critical potential of this approach as Hay's "Property, Authority and the Criminal Law," the first chapter in a collection by Thompson and his students entitled *Albion's Fatal Tree*.² First published in 1975, and written when Hay was still a graduate student, the chapter has been relentlessly anthologized since. In this study of the apparent discrepancy between the constant addition of capital offences to the statute book in the eighteenth century and an execution rate that held steady despite these additions, Hay demonstrated that the apparent irrationality of English criminal law was nonetheless effective as a method of social control, based as it was on an ideology of majesty, terror and mercy. Capital punishment administered with 'delicacy and circumspection' was a much more effective tool in securing popular acquiescence than mass executions would have been.

Eighteenth-century England would remain the centre of gravity of Hay's subsequent scholarship, which dealt with every aspect of the criminal law and its administration, from the relationship between economic cycles and patterns of prosecution of property crime to the changing incidence and meaning of capital and other punishments. He also branched out into other periods, terrains, and legal traditions. Particularly noteworthy was his magisterial study, with Paul

2. Douglas Hay et al, eds, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975).

Craven, of master and servant law in Britain and the Empire from 1562 to 1955.³ This study pioneered the application of computer-based techniques to the study of legislative diffusion through the identification of key words and phrases. It also innovated by revealing how carefully the “low law” of master and servant, administered mainly by justices of the peace, was insulated from the high law of the superior courts, ensuring that the role of local magnates would continue to be paramount. In turn, his book on the Court of King’s Bench showed us just how far the higher jurisdiction did, and did not, control the local lower magistracy.⁴

Hay’s achievements have been recognized by a sheaf of honours, from election as an honorary fellow of the American Society of Legal History to delivering keynote lectures in Oxford, Dublin and elsewhere. While his scholarship has been devoted primarily to British topics, Hay has also contributed to Canadian legal history, particularly with respect to post-1760 Quebec. His contributions to the Canadian State Trials series, on civilians tried in military courts, greatly expanded our understanding of the period.⁵ Hay’s work on Britain, Canada and the wider British empire has been an inspiration to Canadian scholars for its scope, ambition, sophistication and creative utilization of sources, while providing interpretive frameworks that have been readily adopted in a broad range of Canadian scholarship.⁶

The papers in this issue of the Journal, four of them by scholars who were taught by Hay, all reveal his influence. Some of them do so directly, such as Carolyn Strange’s study of executive pardons in New York and Randa Helfield’s re-interpretation of the origins of the right to silence.⁷ Others draw less directly on topics that Hay himself wrote about but they show his widespread and profound influence. Examples here include Eric Tucker’s examination of the

3. Douglas Hay and Paul Craven, *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill, NC: University of North Carolina Press, 2004).

4. Douglas Hay, ed, *Criminal Cases on the Crown Side of King’s Bench: Staffordshire, 1740-1800* (Stafford, UK: Staffordshire Record Society, 2010).

5. Douglas Hay, “Civilians Tried in Military Courts: Quebec, 1759-1764” and Jean-Marie Fecteau & Douglas Hay, “Government by Will and Pleasure Instead of Law: Military Justice and the Legal System in Quebec, 1775-83,” both in F Murray Greenwood and Barry Wright, eds, *Canadian State Trials: Law, Politics, and Security Measures, 1608-1837* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1996).

6. See e.g. Carolyn Strange, ed, *Qualities of Mercy: Justice, Mercy and Discretion* (Vancouver: UBC Press, 1996).

7. See Carolyn Strange, “Pardon and Parole in Prohibition-Era New York: Discretionary Justice in the Administrative State” (2017) 54:3 Osgoode Hall LJ page 909. See also, Randa Helfield, “Let the Facts Speak for Themselves: The Empiricist Origins of the Right to Remain Silent” (2017) 54:3 Osgoode Hall LJ page 877.

brief criminalisation of the non-payment of wages and Eric Adams's and Jordan Stanger-Ross's study of the confiscation of Japanese-Canadians' property in the Second World War.⁸ All of the articles in this special issue demonstrate the vitality of the field of scholarly inquiry called legal history, a field that Douglas Hay has done so much to invigorate and transform during his long and fruitful career.

8. See Eric Tucker, "When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Masters' Tool Against the Master" (2017) 54:3 Osgoode Hall LJ page 933. See also, Eric Adams, Jordan Stanger-Ross & the Landscapes of Injustice Research Collective, "Promises of Law: The Unlawful Dispossession of Japanese Canadians" (2017) 54:3 Osgoode Hall LJ page 687.