2005

Women, Men, and Empires of Law

Douglas Hay
Osgoode Hall Law School of York University, dhay@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation

This Book Review is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
WOMEN, MEN, AND EMPIRES OF LAW


The six books reviewed here cover a wide topical, geographical, and temporal range. Some concentrate on details of legal doctrine or practice in one or more jurisdictions, and why these changed; others are more concerned with the ways in which law permeated other kinds of social relations and reflected them, as part of a culture; and several are broadly comparative, over centuries and continents and world legal regimes. The best have several or all of these strengths. Most were written by historians with a particular interest in law or by lawyers with a particular interest in history; there is also at least one representative each of sociology and anthropology, informed and curious about high law and low. All have much to say to historians of politics, gender, economy, culture, race, social structure, and imperialism.

The first three titles are all closely focused on juries, courts, and the implications of legal doctrine as it worked in practice. The jury collection edited by Cairns and McLeod greatly expands our knowledge of an institution central to both the workings and the mythologies of common law countries. It is the fate of contributors to collections to receive only brief notices, but chapters on the jury of medieval Wales (Dafydd Jenkins), the jury in manor courts (Maureen Mulholland),

1 Cairns and McLeod’s book comprises selections from the papers at the Fourteenth British Legal History Conference, Edinburgh, July 1999.
petty larceny and mercy in the thirteenth century (Roger D. Groot), jurors’ handling of forgery at the Old Bailey in the early nineteenth (Philip Handler), Wigmore and Thayer’s theory of the role of juries in explaining the origins of the hearsay rule (Richard A. Friedman), the moral and political significance of the jury in England and the United States (J. R. Pole), and suits for malicious prosecution (Joshua Getzler) all present new and important evidence, often on areas that have seen much recent writing. James Oldham shows the usefulness of the digital version of the English Reports, in spite of its multiple misprints, to revisit and update some of his important earlier work on the jury of matrons, special merchant juries, and the historical background relevant to arguments about the constitutional entrenchment of juries in the American Constitution.

Two articles on civil juries open new territory. John Cairns tells us what happened when a largely civilian system, Scotland, tried to accommodate the most distinctive common law institution when the jury was introduced for civil cases in 1816 (the Scots criminal jury, on the other hand, had deep historical roots). The motives for introducing civil juries were mixed: reducing the power of Scots judges, emphasizing the union, advancing democracy and/or civil liberties. The historical moment, the first half of the nineteenth century, saw increasing deference in Scots courts to British legislation and the common law, in part through the precedents imposed on Scotland by the House of Lords, a tribunal swamped with Scots appeals allegedly because of the lack of general verdicts in a system without juries. The delays and uncertain conclusions of written “Roman-Scots” law, descended from Romano-canonical procedure (leading to all those appeals) suggested to some that juries, neatly deciding the facts and leaving the law to the judges, would improve the assessment of both and efficiency above all. The innovation seems likely to have hastened the decline of the institutional tradition in Scots law, and although the vicissitudes of the civil jury in Scotland need further work, as Cairns concedes, a host of questions and comparisons to the common law civil jury are suggested.

Michael Lobban gives an excellent survey of the English nineteenth-century civil jury, an animal about which we know far less than we do about its criminal counterpart. He explains its survival in the English high courts, in spite of widespread criticism of the perversity of jurors, as due to the response of conservative lawyers and judges and the importance of constitutional sensitivities in both the profession and the public. The lawyers were preoccupied with the problems of merging equity and common law procedure. Changes in pleading, distrust of affidavit evidence, and a willingness to preserve common law juries rather than introduce them to courts of equity, whose practitioners felt uncomfortable addressing jurors, all kept common law civil juries in business. Jurors continued to be of great importance in English law into the twentieth century, particularly in tort cases, and Lobban’s elucidation of the debates, legislation, and statistics is the first since R. M. Jackson’s pioneering article in the 1930s and much more revealing. The special significance of the nineteenth-century special jury (more qualified, more wealthy, more knowledgeable), especially in London, is explored here in detail for the first time. Lobban also shows that jury service, supposedly the democratic leaven in the figgy pudding of English justice, was the experience of only one percent of the population, all male, carefully selected from the wealthy

[2] Published by Juristat, and available now in an online version as well as on CD-ROM.
and respectable by sheriffs and their assistants, who displayed an exquisite sensitivity to the claims of rank and the dangers of working-class perversity and ignorance. That is perhaps not surprising in a nation that had one of the most undemocratic franchises in the Western world until after World War I.

Allyson May’s *The Bar and the Old Bailey, 1750–1850* takes us into one of the archetypal sites of perversity and ignorance, but by illuminating some dark corners she makes it a much more interesting place. In much of the literature and some contemporary comment, the perversity and ignorance was that of the Old Bailey’s lawyers, often represented as rather like counsel in some inferior criminal courts today: inexperienced youngsters, burnt-out failures, and the corrupt. This version of Old Bailey justice has become one of the arguments in assessing reconstructions (from the published reports of the Old Bailey Sessions) of the evolution of the felony trial from its early modern rather inquisitorial form to its modern adversarial structure. David Cairns has argued that John Beattie, John Langbein, and others have exaggerated the competence and significance of Old Bailey advocacy and therefore misrepresented the timing of the emergence of the truly modern adversarial trial.\(^3\) On the other hand, David Lemmings has suggested that counsel at the Old Bailey in the late eighteenth century were self-conscious “tribunes of the people,” anxious to address juries in the protection of civil liberties, and that they therefore received, and merited, respect from their fellow citizens. (Meanwhile most other barristers and judges were excoriated for gorging on fees that denied justice to all but the rich.)\(^4\)

May (a student of Beattie) accepts neither of these generalizations about the Old Bailey bar in her presentation of a detailed and convincing account of its members and the complexities of criminal practice. She argues that the notoriety of the Old Bailey by the mid-nineteenth century arose partly from press caricature and London politics, partly from real alarm about the moral implications of the Prisoners’ Counsel Act of 1836, which now allowed silver-tongued advocates to speak for silent defendants. Trials did not change immediately after 1836, but change became inevitable. With respect to civil liberties, she concedes a cult following for Thomas Erskine and a few other famous barristers among democrats and the poor in the late eighteenth century but finds (not surprisingly) that most Old Bailey lawyers were anything but radicals, dedicated above all to making a living in the courts of the city because reputation in Westminster Hall eluded them. They were apparently opposed to the introduction of full rights of counsel (the project of whig politicians) a generation later. One of the most interesting chapters in the book describes the ensuing debate about the moral implications of advocacy on behalf of guilty defendants and the acceptance, by 1849, of the modern view of the right to a full defense. May gives us a thoughtful summary of a great deal of recent research, as well as a revealing collective biography and assessment of the Old Bailey and City of London bar. She surveys the current learning on the dynamics and public significance of pretrial procedure and the

---


felony trial itself in its century of transition, and she provides much detail from archival sources about the Old Bailey version, giving a vivid understanding of the difficulties defense counsel faced in the eighteenth century and of the incremental steps by which the nature of criminal law changed. This is an important and very readable contribution to our understanding of criminal procedure, the legal professions, and London crime.

Although virtually all the archival evidence in Garthine Walker’s book comes from Cheshire and is deployed in many bar charts and narrative sequences, she insists that it is not a full county study of the administration of the law, since it ignores all courts but quarter sessions and the Palatinate’s great sessions, which had the jurisdiction of assizes in other counties. (Her criterion implies that no such county study has yet been written.) The goal is rather to elucidate the law, cultural meanings, and social practices that gendered justice. The argument is founded on the Cheshire archives but also on wide reading in legal treatises (though not the reported cases), other printed primary material, and a wide range of secondary literature. Honor, the household, war, the image of Charles I (man of blood or father of his people), and representations of ideal womanhood are all used to comment on and to explicate the stories and statistical patterns arising from the court records and beliefs about violence, theft, and state law. A central argument is that male pride strongly conditioned descriptions of female violence, even the willingness to admit its existence. Some gestures to theoretical issues (Mikhail Bakhtin in particular is invoked) are not as fully developed as aficionados would wish, but the material is never less than interesting, and Walker’s arguments and evidence reveal inarticulate assumptions in both the historiography and the law of early modern England.

Walker focuses on physical violence and theft but widens the view to scolds, forcible rescues, illegal cottages, bastardy. Her approach is exemplified in the central chapter on “Homicide, Gender, and Justice,” in which she interrogates repeated statements in the literature that women were treated more leniently than men by the criminal law and that certain crimes particularly carried the stamp of gender bias. She contests both as oversimplifications. The usual position is that women were prosecuted, put on trial, convicted, and executed less often than men; the explanation has often been male assumptions (including those of historians) of women’s physical weakness or subordination or of men’s chivalry (however interpreted). Walker argues rather that the structure of the law, especially its categories of legitimate defenses, strongly shaped the experience, and record, of women defendants. In particular, the force and assertion acceptable in women’s defense of their households, often with weapons and celebrated in images of righteously avenging viragos, which she describes in an earlier chapter, had no place whatever in cultural valuations of women committing intimate and domestic violence. The contrast with men was great. Men killing other men, women, or children, including their intimates, were offered a range of legal exculpations, reflected in numerous manslaughter and accidental death verdicts. Homicide between adult males was frequently explained by the categories of honor, directly acknowledged in manslaughter verdicts. Men who killed women or children were often exonerated by the invocation of “accident.” Women virtually never benefited from such jury judgments. More women than men were released before trial, and over twice as many were acquitted, but those actually convicted were never given the lesser
verdict of manslaughter, were ineligible for benefit of clergy, and were almost never pardoned: as a result, women were twice as likely as men to be hanged once convicted of a killing.\(^5\) In particular, their crimes against members of their families, notably their husbands, carried the stamp of cowardice and treachery for jurors and judges; provocation was an impossible defense, although murdering husbands frequently benefited from it.

Walker also reconsiders the peculiarly “female crimes” of older literature. Poison has often been thought peculiarly the weapon of women, but Walker shows that in crimes of intimacy it was as much used by men. Finally, in a consideration of the interpretive issues in infanticide, Walker points out that the judges, almost from the beginning, treated the offense (in spite of the 1624 statute, with its reverse onus for concealment) much as they treated all homicide, with culpability dependent on motive, evidence, and (increasingly) the state of mind of the mother rather than simply the fact of having concealed a bastard birth. In this and in other chapters on violence by men and by women that fell short of killing, on varieties of homicide, on theft (some of it developed from her contribution to the book that she edited with Jenny Kermode),\(^6\) and on “authority, agency and law,” she disagrees intelligently, sometimes impatiently, with many scholars in the field, in an original and sustained argument that gender mattered far more in the cultural impact of law than concentration on a few offenses and on raw statistics can ever show.

The cultural impact of law is the focus also of the three remaining volumes, but all of them have a greatly widened field of view and an explicitly comparative interest in law and imperialism. Like most collections from conferences with a wide remit,\(^7\) the volume edited by Kirkby and Coleborne is varied in its subject matter, but the authors of the seventeen chapters include many of the best contributors to the legal history of the former British Empire, including Peter Fitzpatrick, Chris Tomlins, John McLaren, Constance Backhouse, David Philips, Mark Walters, John Borrows, Diane Kirkby, and John Weaver, among others. The names suggest the range of the volume: the thirteen American colonies, Canada, Australia, New Zealand, parts of the Pacific, South Africa, and India are among the jurisdictions; aboriginal custom and law and title, settler incursions, racial definitions, the rule of law, representative democracy, insanity, appropriation of land, coverture, nation and gender, and international law are among the subjects. The perspective varies from that of the postcolonial theorist, through feminist legal scholarship, to studies more modest about theory but rooted in close archival work, and all of them (as far as I can judge areas remote from my own work) are of a high standard. The unifying theme, presented in a brief introduction by the editors, and the reason behind the conference from which the book developed, was the late British Empire, a structure of law as much as it was one of peoples, economies,

\(^5\) Walker does not consider whether the higher rate of acquittals might be in part explained by the fact that juries sometimes acquitted because they knew that these mitigating defenses were not available to women.


\(^7\) In this case, the seventeenth Annual Law and History Conference, organized by the Australian and New Zealand Law and History Society, with the assistance of the Canadian Law and Society Association, in July 1998.
and military power.8 The book appears in a series edited by John M. Mackenzie, one of the few scholars of the last century to take seriously the comparative study of a legal topic (game and game laws) on an imperial scale.9 Kirkby and Coleborne argue that both law and history are “culturally specific ways of knowing and ordering experience, inherently implicated in relations of power” (p. 2). They, and many of their contributors, point particularly to the inseparability of law, sovereignty, and nation, and the contradictory effects of this for both the colonizers and the colonized. Many suggestive connections and comparisons appear in the papers, but individual readers are likely to be particularly interested in specific themes.

Peter Karsten’s original and hefty volume attempts to reduce the multitude of variables in studying comparative imperial law through a sustained examination of “Land,” “Agreements,” and “Accidents”—roughly, what lawyers think of as property, contract, and tort. The venues are the United States and what he calls, concisely if inelegantly, CANZ: Canada, Australia, New Zealand. This is the “British diaspora,” sharing not only national roots, social practices, and language but also the inheritance of the common law (although Quebec makes a significant contrasting appearance and Louisiana and Cape Colony brief ones). The law of each is compared with the others but also with the law of England (sometimes also Ireland and Scotland) and with indigenous law almost everywhere. The mass of evidence adduced is remarkable, the approach interesting, although experts in each jurisdiction or area of law are likely to challenge particular conclusions.

The common law means, distinctively, case law, but custom and statute are also its sources, and Karsten has much to say about all three. The first has always interested him.10 Appellate-level case law, interrogated in the way that the legal realists pioneered, and critical legal scholarship encouraged, has preoccupied an increasing number of legal historians, who have pushed the idea further. The thickly described leading case can explain both legal change and much about the society that produced it. Case law is the daily meat of the law student, of course, but in the past (and in some legal issues to this day) it was in fact almost all the law, in spite of the growing incursions of statute from the eighteenth century. And how and why do judges decide the way they do, particularly in making decisions that profoundly affect the lives of thousands of their fellow citizens? Hence the anatomical title of his earlier book, a theme that runs throughout this one also. Nineteenth-century case law was constructed around some received new theories and policy imperatives, of which the self-regulating market, the self-reliant individual, and economic growth were salient: the up-to-date judge of the 1850s knew in his head that this was the Way Things Had To Work. (Young readers will think this unremarkable, since law-and-economics is almost the only intellectual paradigm allowed in many American law schools today, but their elders will remember a time when the competitive market was known to have disappeared not long after

8 A sustained version of this argument, focused on the law of employment, is Douglas Hay and Paul Craven, eds., Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955 (Chapel Hill, N.C., 2004).
10 Peter Karsten, Head versus Heart: Judge-Made Law in Nineteenth-Century America (Chapel Hill, N.C., 1997).
1850, and unregulated markets were feared for their proven ability to produce social and economic catastrophe.) But faced with the inevitable hardships such precedents produced, what did the judge with heart do?

In the “Accidents” section of this book Karsten compares the case law in each jurisdiction in search of variation: as elsewhere, the method is more classification than thick description. He finds interesting variations; one example must suffice. The doctrines critical in industrial accident lawsuits—contributory negligence, voluntary assumption of risk, and the justly notorious fellow-servant rule—in England combined to give almost perfect protection for employers, including railway companies, against lawsuits by their many maimed employees. We know that in England the judges celebrated and enforced these rules on grounds of economic efficiency and deterrence to workers’ negligence. It has also long been known that in the United States, whose judiciary had first elaborated the fellow-servant rule in classic form in Massachusetts in the 1840s, other doctrines were later used to weaken the rule, and to allow some workers to recover damages, in the course of the nineteenth century. What of CANZ, whose common law judiciaries were in theory bound to follow the heartless doctrines of the House of Lords? Karsten’s survey of the case law of each jurisdiction suggests that there was much variation, and that some Canadian jurisdictions and more Australian ones were prepared to distinguish, slight, ignore, and occasionally bluntly reject what should have been binding precedent; where it was possible, they sometimes cited more equitable American law. In Nova Scotia, they were aware that the House of Lords had imposed the English rule on Scotland in 1858, which had formerly followed the more benign civilian doctrine. In the Ontario case, Karsten disagrees with some recent work, arguing that it paints the judges as far more deferential to England than was in fact the case. The arguments are not conclusive, because they rest in part on assumptions about the relationship of reported case law to the unknown dimensions of actual and potential litigation, but certainly the judicial comments quoted by Karsten suggest a very interesting, and distinctive, form of CANZ accident law. (He says less about why.) Interestingly, the most proworker sentiments and judgments were found in Quebec, although it was the most industrialized province in the 1860s, because its jurists jettisoned the English rule after the promulgation of its revised Code Civile in 1866, which enshrined the civilian doctrine of comparative negligence. The bench happily applied it.

Besides case law, Karsten is interested in the protean concept of custom, particularly local custom, which an increasing number of historians have rediscovered, and which animates his chapters on “Land.” Medievalists always knew custom’s importance (Mulholland’s chapter in the Cairns and McLeod volume describes the role of manorial courts in finding it), and it has had profound influence on recent writing on aboriginal title and rights (see Mark Walter’s chapter in the Kirkby and Coleborne book). The word can cover both the lived law of a people, whether recognized or not by the state, and the judicially received custom that becomes law in a common law system, either as general custom (the common law) or particular custom (peculiar to a trade or locality). Here Karsten explores the conflict between aboriginal land use and the assumptions of British settlers.

about the acquisition of title by occupation, tenant and landlord law, and the law of nuisance. He seeks to discover the “lived law” of his several polities and the many populations in them. Beliefs about what was law clearly depended on who could make them stick, particularly in newly settled areas far from learned judges and interfering imperial authorities concerned to protect aboriginal populations from settler incursions. Dispossession occurred through the alternating modalities of white settler custom beyond imperial control and, eventually, state structures of law that validated what had gone before.

Here, and elsewhere, Karsten muddies the water somewhat in not distinguishing carefully enough between popular beliefs about the legality of custom, popular custom as lived practice, custom as defined in the high courts, and what magistrates (those ubiquitous enforcers of the common law) were prepared to tolerate or encourage as legal. But historians with many different interests will find the argument stimulating and suggestive. When it comes to statute, he is perhaps less curious and diligent; the account of employment law in the “Agreements” section of the book is inadequate and somewhat misleading as a result.12 Karsten holds an appointment in sociology and history, and historians may feel there is more sociological structure and less historical explanation than they would wish. But his book contains an enormous amount of research into the case law, statute, and legal professions of these jurisdictions and exhibits an extensive acquaintance with the scholarship in many jurisdictions.

The angle of approach to comparative imperial law by Lauren Benton in Law and Colonial Cultures is quite different. This is one of the most exciting and richly suggestive books that I have read in years, comparable in its originality to Patrick Glenn’s survey of world legal systems but more explicitly historical.13 It explores the place of law in the early modern world—all those parts of the world affected by Western legal systems—over a very long period. In part it is a critique (sometimes implicit, often explicit) of the dominant large-canvas explanations of world history: world systems theory, institutional economic history, and the more recent literature coming out of colonial cultural studies. Unlike most works in these genres, Benton’s book takes law seriously, and in a series of well-chosen empirical studies (usually with a significant amount of work in primary materials) she explores the interactions of law, cultures, colonial relations of power and subordination, economies, and ideologies. Her willingness to tackle the question of how colonial regimes in general, and different legal systems in particular, were articulated over this long course of history has resulted in an immensely interesting and convincing book. Very little work has tried to offer general answers to the question of how the dominant Western legal regimes interacted with each other in colonial settings, as well as with the immense diversity of indigenous legal regimes they encountered in Asia, Africa, and the rest of the world. (There are a handful of titles, with more limited aims.)14 Students of modern international law will be fascinated by the description of structures of expectation generated in the early modern world by an immensely fluid system of low-level mercantile and colonial initiatives. Histo-

12 Hay and Craven, Masters, Servants, and Magistrates, chap. 3.
rians will enjoy the detail and broader conclusions of the accounts of specific intergroup relations and the role of law both within and between communities in contact. (An instance is the author’s exploration of the Janus-faced role of indigenous interpreters and enforcers of the colonizer’s law.) Benton’s anthropologically informed willingness to take equally seriously all varieties of legal regimes and her sensitivity to their different cognitive modes give her accounts of the contact of Western imperial with indigenous law both specificity and theoretical richness.

*Law and Colonial Cultures* is a synthesis and critique of a wide range of secondary writing, informed by current theoretical debate, which she has tested against carefully chosen evidence resulting from primary research. The book ranges over the histories of Iberian Europe, Spanish colonial America, French west Africa, Australia, Dutch and British south Africa, and Bengal. Experts in all those areas will have things to say about sources, details of interpretation, and more recent research that could have been used. But writers of broad interpretive forays cannot do everything, and readers in British imperial and postcolonial histories will find that Benton has made good use of the writing on south Africa, India, and Australia and has illuminated these works with the bold explanatory propositions of the book: propositions about culture, economy, and especially the place of law in human societies. She situates each within an explanation that describes a trajectory from fluid, personal, immensely variegated yet mutually recognizing legal regimes (often of extremely local jurisdiction) to the construction of the dominant and dominating legal regimes of high imperialism in the late nineteenth century. As the largest and most powerful expression of colonialism of that period, the British Empire is a prime exhibit for explorations of the place of law in colonial capture, transformation, and resistance.

The titles reviewed here show the extent to which legal history has been absorbed into general history and the extent to which the history of law is integral to understanding power, economy, gender, race, class, ideology, nation, and empire. The best of this writing integrates technically sophisticated accounts of legal doctrines and institutions with the most recent scholarship in cognate fields of history. All of it demonstrates the centrality of law to historical explanation.

*Douglas Hay*, York University, Toronto