

BLACKSTONE *in* AMERICA

Selected Essays of Kathryn Preyer



EDITED BY

Mary Sarah Bilder

Maeva Marcus

R. Kent Newmyer

CAMBRIDGE

Blackstone in America

Selected Essays of Kathryn Preyer

Edited by

MARY SARAH BILDER

Boston College Law School

MAEVA MARCUS

George Washington University Law School

R. KENT NEWMYER

University of Connecticut School of Law



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521490870

© Mary Sarah Bilder, Maeva Marcus, and R. Kent Newmyer 2009

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2009

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Bilder, Mary Sarah.

Blackstone in America : selected essays of Kathryn Preyer / Mary Sarah Bilder,
Maeva Marcus, R. Kent Newmyer.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-49087-0 (hardback)

1. Preyer, Kathryn (Kathryn Turner) 2. a Common law – United States – History.

3. Judicial review – United States – History. 4. Federal government –

United States – History. 5. Justice, Administration of – United States – History.

I. Marcus, Maeva, 1941– II. Newmyer, R. Kent. III. Title.

KF394.B455 2009

340.5'70973 – dc22

2008055957

ISBN 978-0-521-49087-0 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party Internet Web sites referred to in
this publication and does not guarantee that any content on such Web sites is,
or will remain, accurate or appropriate.

Blackstone in America

Selected Essays of Kathryn Preyer

Blackstone in America explores the creative process of transplantation – the way in which American legislators and judges refashioned the English common-law inheritance to fit the republican political culture of the new nation. With current scholarship returning to focus on the transformation of Anglo-American law to “American” law, Professor Kathryn Preyer’s lifelong study of the constitutional and legal culture of the early American republic has acquired new relevance and a wider audience.

All nine of Professor Preyer’s important and award-winning essays are easily accessible in this volume, with new introductions by three leading scholars of early American law. The collection includes Preyer’s work on criminal law, the early national judiciary, and the history of the book.

Mary Sarah Bilder is a professor of law at Boston College Law School and the Michael and Helen Lee Distinguished Scholar. She is the author of *The Transatlantic Constitution: Colonial Legal Culture and Empire*, which won the Littleton-Griswold Prize in American Law and Society, awarded by the American Historical Association. She also serves on the editorial boards of *Law and History Review*, *Journal of Legal Education*, and *New England Quarterly*.

Maeva Marcus is Director of the Institute for Constitutional Studies and a Research Professor of Law at George Washington University Law School. She is the author of *Truman and the Steel Seizure Case*; an editor of *The Documentary History of the Supreme Court of the United States, 1789–1800* (8 volumes); an editor of and contributor to *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*; and a former member of the Permanent Committee for the Oliver Wendell Holmes Devise.

R. Kent Newmyer is a professor of law and history at the University of Connecticut School of Law and a Distinguished Alumni Professor Emeritus at the University of Connecticut. He is the author of *Justice Joseph Story: Statesman of the Old Republic* (1985), which won both the Littleton-Griswold Prize in American Law and Society, awarded by the American Historical Association, and the Silver Gavel Award, awarded by the American Bar Association. He is also the author of *John Marshall and the Heroic Age of the Supreme Court* (2001), which received the Francis Landry Award from Louisiana State University Press and an award from the State Library of Virginia for the best non-fiction book of the year.

Preface

Blackstone in America explores the creative process of transplantation – the way in which American legislators and judges refashioned the English common-law inheritance to fit the republican political culture of the new nation. With current scholarship returning to focus on the transformation of Anglo-American law to “American” law, Professor Kathryn Preyer’s lifelong study of the constitutional and legal culture of the early American republic has acquired new relevance and a wider audience.

Professor Preyer’s nine essays do justice to the complexity of the story of transformation. English law and legal institutions, imperfectly understood to start with, and themselves in transition, were refracted through colonial and state experience and then adjusted to the needs of the new nation, which itself was in the throes of radical transformation – from republicanism to democracy; from an agrarian economy to a commercial manufacturing economy; and already in the 1790s, from slavery to freedom. When these divergent forces and competing interests coalesced into political divisions, as they did in the 1790s, the stage was set for the creation of distinctively American legal institutions.

The political conflict over law and legal institutions focused on Constitutional interpretation and pitted those who championed nationalism (represented by the Washington and Adams Federalists) against a tenacious state and local legal culture (championed by the Democratic Republican party of Jefferson and Madison). In Kathryn Preyer’s words, “The struggle to establish harmony between nationalism and localism, the whole and its parts, is the single greatest link between the past and present in this country’s traditions.”

“Harmony” was not established, however, as Preyer’s scholarship makes clear. Rather, the competing parties, operating simultaneously at the state and national level, fashioned a legal institutional framework that struck an uneasy balance between nationalism and localism, between inherited ideas and creative improvisation. Traditional accounts of this period focus on the results; Preyer concentrates on the process itself – on the interplay of idealism and self-interest; the role of accident and contingency; and the indeterminacy of the final compromise. In short, Preyer’s pioneering scholarship captures American legal institutions in the making.

During her lifetime, Preyer contemplated a collection of her essays, which she planned to entitle *Blackstone in America*. The essays, while conceptually of a single piece, were intended to be free-standing. The organization of this book follows her outline.

Part I deals primarily with developments at the national level, focusing on the Judiciary Acts of 1789 and 1801, and on the conflict between state and federal authority (the subject of her essay on the Callender trial). These essays draw on Preyer’s important Ph.D. dissertation, “The Judiciary Act of 1801,” completed in 1959 at the University of Wisconsin under the direction of Merrill Jensen and Merle Curti.

The subject of criminal law, broached in the Callender essay, is the main theme of Part II. Preyer’s essay, “Crime, the Criminal Law and Reform in Post-Revolutionary Virginia,” on this subject won the Surrency Prize awarded by the American Society for Legal History.

Criminal law is also the focus of the essays in Part III, dealing with the trans-Atlantic exchange of ideas between American and continental reformers.

In all of these essays, Kathryn Preyer’s deep learning is manifest, as is her distinctive voice. The collection includes Preyer’s major essays. She also wrote numerous book reviews (most of which are now available electronically) that reveal her extensive knowledge and critical insight. Her early work to the mid-1960s appears under the names Kathryn Conway Turner or Kathryn Turner. Minor changes have been made to the essays for clarity and grammatical correctness. In a few instances where minor errors have come to the editors’ attention, they have been silently corrected.

The editors would like to thank the many friends of Kathryn Preyer who contributed to and participated in programs in her honor at the American Society for Legal History’s Annual Meeting in November 2005 and at Wellesley College in September 2005. Thanks also to Professor

Christine Desan of Harvard Law School, who assembled much of Preyer's written scholarship, and John D. Gordan III. Senior Editor Lew Bateman of Cambridge University Press was enthusiastic about the collection from the outset, and the editors appreciate his efforts and those of the Press in publishing this volume. We gratefully acknowledge the administrative work of Emily Spangler at the Press. The editors also thank Ronald Cohen for his careful editing of the manuscript and his concern for the integrity of the original. Kathryn Preyer would have loved to have had him as her editor.

Above all, the editors are deeply grateful to Robert Preyer. His support and encouragement have been invaluable.

Editors' Note

In order to maintain the historical integrity of the original articles, we have retained Kathryn Preyer's style, citation format, and typing conventions throughout. The first three chapters were written under the name Kathryn Turner.

Acknowledgments

The editors of *Blackstone in America* thank the following for kindly granting them permission to use Kathryn Preyer's previously published essays in this collection:

Chapter 1. The Omohundro Institute of Early American History and Culture. "Federalist Policy and the Judiciary Act of 1801," *William and Mary Quarterly*, 3rd Series, XXII, 3-32 (January 1965). Copyright © 1965 *William and Mary Quarterly*. Used with permission.

Chapter 2. The Omohundro Institute of Early American History and Culture. "The Appointment of Chief Justice Marshall," *William and Mary Quarterly*, 3rd Series, XVII, 143-163 (April 1960). Copyright © 1960 *William and Mary Quarterly*. Used with permission.

Chapter 3. *The University of Pennsylvania Law Review*. "The Midnight Judges," *The University of Pennsylvania Law Review*, 109: 494-523 (February 1961). Copyright © 1961 *The University of Pennsylvania Law Review*. Used with permission.

Chapter 4. Oxford University Press, Inc. "*United States v. Callender*: Judge and Jury in a Republican Society," in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, ed. Maeva Marcus (New York: Oxford University Press, 1992), 173-195. Copyright © 1992 Oxford University Press. Reprinted by permission of Oxford University Press.

Chapter 5. *American Journal of Legal History*. "Penal Measures in the American Colonies: An Overview," *American Journal of Legal History*,

XXVI, 326–353 (October 1982). Copyright © 1982 *American Journal of Legal History*. Used with permission.

Chapter 6. *Law and History Review*, University of Illinois Press, and the *American Society for Legal History*. “Crime, the Criminal Law, and Reform in Post-Revolutionary Virginia,” *Law and History Review*, 1: 53–85 (Spring 1983). Copyright © 1983 American Society for Legal History. Used with permission.

Chapter 7. *Law and History Review*, University of Illinois Press, and the American Society for Legal History. “Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic,” *Law and History Review*, IV, 223–265 (Fall 1986). Copyright © 1986 American Society for Legal History. Used with permission.

Chapter 8. The Edward Mellen Press. “Cesare Beccaria and the Founding Fathers,” in *The American Constitution: Symbol and Reality for Italy* (Lewiston, New York: The Edward Mellen Press, 1989). Copyright © 1989 Emiliana P. Noether. Used with permission.

Chapter 9. Professor Floriana Colao and Professor Luigi Berlanguer, University of Siena. “Two Enlightened Reformers of the Criminal Law: Thomas Jefferson of Virginia and Peter Leopold, Grand Duke of Tuscany,” in “*La Leopoldina*,” *Criminalità e Giustizia Criminale Nelle Riforme del Settecento Europeo* (Milan, 1989) V: 657–687, eds. Luigi Berlinguer and Floriana Colao. Copyright © 1989 Floriana Colao and Luigi Berlanguer. Used with permission.

Blackstone in America

Selected Essays of Kathryn Preyer

Contents

<i>Preface</i>	page vii
<i>Acknowledgments</i>	xi
General Introduction: <i>Stanley N. Katz</i>	i
PART I: LAW AND POLITICS IN THE EARLY REPUBLIC	
Introduction: <i>Maeva Marcus</i>	7
1. Federalist Policy and the Judiciary Act of 1801	10
2. The Appointment of Chief Justice Marshall	39
3. The Midnight Judges	59
4. <i>United States v. Callender</i> : Judge and Jury in a Republican Society	92
PART II: THE LAW OF CRIMES IN POST-REVOLUTIONARY AMERICA	
Introduction: <i>R. Kent Newmyer</i>	115
5. Penal Measures in the American Colonies: An Overview	118
6. Crime, the Criminal Law, and Reform in Post-Revolutionary Virginia	147
7. Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic	185
PART III: THE HISTORY OF THE BOOK AND TRANS-ATLANTIC CONNECTIONS	
Introduction: <i>Mary Sarah Bilder</i>	235
8. Cesare Beccaria and the Founding Fathers	239

9. Two Enlightened Reformers of the Criminal Law: Thomas Jefferson of Virginia and Peter Leopold, Grand Duke of Tuscany	252
<i>Index</i>	277

General Introduction

Stanley N. Katz

Kathryn Turner Preyer – Kitty to her friends – was one of the most admired legal historians of my generation, and surely the least well-known eminent scholar in the cohort. She was highly regarded by the legal history community not only for the series of stunningly original research essays she produced but because of her extraordinary capacity to befriend and nurture younger scholars in the field. But she never published a monograph, and historians tend to judge their peers by their books. This volume is our effort to put together the culminating volume she planned to write. The editors hope that this volume will introduce Preyer to the broad readership she deserved.

I was a latecomer to Preyer's specific academic field, early American legal history, having been trained as a colonial political historian. But it was my great good fortune to be selected as a Fellow of the Charles Warren Center at Harvard in its first year, and to meet Kitty Preyer, another Fellow. That was the year I was beginning to work in legal history, and Preyer took me under her wing. It is a wing I sheltered under for thirty-eight years. Only someone who worked with Preyer as a fellow scholar would know the distinctive way in which she brought the rest of us along. She was always patient, for of course she knew everything and we did not, but she was impatient when we made stupid mistakes. She let us know so in the bluntest of terms, and she knew how to ask the tough questions about what we were doing. She also expected us to engage ourselves in what she was doing, and she was not satisfied with simple-minded pieties – she wanted to know where we thought she had gone wrong. At the Warren Center, we talked about many things, and I have discussed a variety of topics (especially politics) with Kitty and Bob

Preyer over the years. But, above all, Preyer loved historical shop talk. She was a pro, and she taught me what it meant to be a pro.

After her death, Bob sent me the most up to date *curriculum vitae* he could find. She was not interested in self-promotion, so it is not surprising that the document dates from 1989. It is actually quite a lousy document of its type – her degrees (Goucher B.A. and Wisconsin Ph.D.) and teaching jobs (easy, since apart from a single year as an Instructor at Rockford College, she spent her entire career at Wellesley); five lines on various administrative assignments for the College over the years; four lines on fellowships; a page of major paper presentations; and two detailed pages of publications (none with a precise enough bibliographical reference that would have made it easy for a novice to find the article in the library!). As a professional, Preyer was concerned with teaching and scholarship.

What a fine and distinctive scholar she was. In Isaiah Berlin's terms, Preyer was a *hedgehog*. You will remember Berlin's definition:

There is a line among the fragments of the Greek poet Archilochus which says: 'The fox knows many things, but the hedgehog knows one big thing'. . . . For there exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organizing principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends. . . .¹

Preyer's "one big thing" was the role of law in the creation of the American republic, and especially the role of judges in articulating that law. Everything she wrote over her long and productive career addressed that problem, and of course the choice of that problem resulted from her "single central vision" – that the rule of law, supervised by a competent judiciary, is the key to the success of democratic society. Her related sub-theme concerned the democratization of the criminal law in a constitutional regime. She sometimes personified the problem by analyzing judicial appointments, especially in her fine article on the selection of John Marshall as Chief Justice of the Supreme Court (Chapter 2 of this volume).

Preyer was of course a historian, not a lawyer, though she spent a year (1962–63) as a Carnegie Fellow at the Harvard Law School, which became very much a home away from home for her. A student of Merrill Jensen and Merle Curti's at the University of Wisconsin, she was particularly influenced by Merrill's devotion to the rigorous analysis of source

¹ Sir Isaiah Berlin, *The Hedgehog and the Fox* (1953).

materials and by both his and Merle's profoundly progressive understanding of the origins of our national state. Her dissertation – a work of scholarship that has never been replaced or surpassed in nearly fifty years – was a study of the Judiciary Act of 1801, a piece of legislation that is still one of the cornerstones of the federal judicial framework. In it, and in her later work, she displayed a dual competence in history and law, one of the first historically trained legal historians to do so. And, as she once said about Morton Horwitz:

Considerable effort has been made to make the history of technical areas of law understandable to the nonlegally trained scholar, and to treat the law as one of the dynamics of historical change, while retaining, as the center of gravity, the internal technical life of legal doctrine.²

Merle and Merrill taught Preyer that style was related to content, and she never forgot. Hers was a style that I would call quietly magisterial – Hemingway meets Oliver Wendell Holmes.

Preyer was a political historian of the law who understood fully that law resides in a social and political system. Her earliest published essay, on John Adams's appointment of the "midnight judges," shows how skilled she was in contextualizing legal events:

As a whole, the group of midnight judges reflected the relatively moderate political positions of the men who had selected them. They were not facsimiles of the fanaticism which had led the Federalists to prosecute the Whiskey Rebels and John Fries for treason and to enforce the Sedition Act with such vigor. One might have expected that some Republicans would even have sighed relief that Samuel Chase, Associate Justice of the Supreme Court, would ride the circuit no more!³

Another of my favorite examples of Preyer's flair for context comes in one of her brilliant articles on the emergence of a distinctively American approach to criminal law. Consider these three Gibbonian sentences:

Neither certainty nor proportionality characterized penal measures in the late eighteenth century to those who made the laws and administered them. At the same time as the European world, but particularly fuelled with the ideology of the beneficent potentialities of a newly independent American republic, some, although not all, former colonies joined other nations in the conviction that a more rational criminal code which made punishment certain but genuinely humane would not only increase enforcement of the law but could also reform the offender and in so doing actually reduce the number of criminal offenses. It was easy in

² Review of *The Transformation of American Law, 1780–1860*, *Journal of American History*, 1978, p. 1099.

³ *Penn Law Review*, 1960–1, p. 522.

America to identify reason and humanity, the watchwords of the Enlightenment, with the successful republicanism of the new nation and to find in imprisonment the ideal embodiment of these new goals.⁴

Alas, Preyer's faithfulness to documentary evidence (a commitment she brought to her long advisory support of Maeva Marcus's *Documentary History of the Supreme Court of the United States* [Columbia University Press, 1986–2007]), and her reluctance to publish until she had her ideas and text "just right," meant that she put into print tragically little of the groundbreaking research that she had undertaken.

The deeper point is that Preyer's relatively modest publication record, in part the result of her dedication to her role as undergraduate liberal arts teacher, belies the huge influence she has had on our understanding of the primary role of law in American history. Reading over her list of publications, one realizes that she reviewed every significant book in early American legal history published since 1958 for one or another of the major scholarly journals. These reviews are a remarkable tribute to the breadth of her knowledge, the depth of her historical insight, and her uncanny ability to criticize without hurting. Would that the last quality were in greater supply.

Preyer was among the leading legal historians of the last half century. Her gem-like essays will always be monuments to her unique amalgam of intelligence, originality, breadth of vision, historical sensitivity, and deeply humane vision. That her scholarship on the early nineteenth century remains so germane to today's conflicts of law and politics is a testament to the enduring worth of what she wrote.

⁴ "Penal Measures," *Journal of American History*, 1982, p. 353.

PART I

LAW AND POLITICS IN THE EARLY REPUBLIC