Between Law and Custom

"High" and "Low" Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600–1900

PETER KARSTEN

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For

Professor Bruce Kercher of Macquarie Law School,
"a one-man version of the Selden Society,"* with gratitude for
his pioneering efforts in revealing to us all, free of charge,
The Law as determined by British Diaspora jurists in cases
decided by the New South Wales Supreme Court in its first
several decades of existence (www.law.mq.edu.au/scnsw)

And for

The administrators and staff of the Alexander Turnbull
Library, Wellington, New Zealand, deft and helpful collectors
and keepers of the records of past popular norms and the
images that sometimes illustrate them

* Professor Ian Hollaway's apt phrase.

We have continued, as you, to cite the decisions of Mansfield and Eldon and their successors. The divergences have been so slight, compared with the whole body, that like the mountains of the moon, they are lost to the distant eye.

– David Dudley Field, "Address to Dalhousie University Law School Convocation, Halifax, Nova Scotia, 1885," 19 *American Law Review* (1885), 617

You could scarce believe what legal intricacies are familiar here, in this early stage of settlement. Though it is a new country, settlers retain all their old manners, habits, prejudices, and notions of a sturdy, free, commercial, litigious people.

– Barrister–Settler George Moore, JP, to his brother, Jan. 1, 1833, from Western Australia

Our colonists are becoming fonder of law every day.

– George Moore, diary entry, March 15, 1832

Civil law is an admirable institution any where except on a frontier situated in the center of an Indian Country . . .

– J. F. Hamtramck, Commanding Officer, Ft. Knox, to Secretary of War Henry Knox, March 21, 1792, noted in Francis Prucha, *American Indian Policy*, 69

The power of the law is unavoidably feeble when compared with the predominant inclinations of any large body of the people. In [South Australia] unpopular regulations, unless supported by a force . . . overwhelming, must become little more than a dead letter.

– Colonial Office Undersecretary James Stephen, in a draft reply to the South Australia Commissioners, Oct. 27, 1836

. . . [T]he uncontrollable force of the natural laws of society to which even Governments must bend have prevented the efficient protection of the [Six Nations'] Indian Reserves. . . .

– Investigative committee report of the legislature of Upper Canada, 1847

True equality before the law in a society of greatly unequal men is impossible: a truth which is kept decently buried beneath a monument of legislation, judicial ingenuity and cant.

– Douglas Hay in "Poaching and the Game Laws on Cannock Chase," in *Albion's Fatal Tree*, Hay et al. eds. (1977), 189

Jacko [a hired hand in Queensland] probably knew nothing of law or justice in the abstract, but he greatly valued law when exercised against those he hated.

– Anthony Trollope, *Harry Heathcote of Gangoil* (1873)

What is common in community is not shared values or common understanding so much as the fact that members of a community are engaged in the same argument . . . , in which alternative strategies, misunderstandings, conflicting goals and values are threshed out.

– David Sabean, *Power in the Blood* (1984), 29

Men stuck to their bargains and negotiated their disputes. . . . A man would have been excluded if he had shown himself to be unneighborly. . . . The Common law on these matters was clear and well enforced: A man was obliged to put his neighbor's need ahead of his own and everyone did. . . . No one ever declined. . . . The social penalty would have been too severe.

– John Kenneth Galbraith, describing life in his family's Ontario community in the nineteenth and early twentieth century, in *The Scotch*

Laws are sand; customs are rock.

– Mark Twain

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Introduction

Colonists have always carried their own Laws with them, observing these formal rules in the new settings to which they have migrated. How could they fail to do so? Laws pervade one's culture, and, as the Roman poet Horace observed, "they change their skies but not their minds, who sail across the seas." But many colonists, in time, come to reject certain of these Laws as being out of sync with their perceived needs. "The true problem" worthy of analysis, anthropologist Bronislav Malinowski maintained, is "not to study how human life submits to rules – it simply does not; the real problem is how the rules become adapted to life"[1] – that is, how do people alter rules that others would have them live by when those rules no longer appear to be compatible with new conditions or surroundings? Horace's words apply well to much of the behavior of the British Diaspora of the seventeenth, eighteenth, and nineteenth centuries – to those who left the British Isles to settle North America and the Antipodes. But so do those of Malinowski. The tension between these two descriptions of how people regulated their affairs and property is the central subject matter of this book.

In the course of my writing this, American law enforcement officers completed a successful siege of a group of white supremacists holed up in a farmhouse in Jordan, Montana. Calling themselves "the Freemen," these Bible-quoting foes of all forms of existing government had armed themselves, threatened neighbors, claimed federal range land, bilked banks, refused to pay taxes, filed false liens against the homes of local judges, and created their own government complete with what they call "Common Law Courts." The Freemen resemble their fellow travelers (the Aryan Nations, the Posse Comitatus, The Order, the Covenant, the Sword and Arm of the Lord, and the various "Militias"), in that they claim the right to supplant such existing legal authority as they do not accept with a self-crafted "common law" of their own. Active throughout much of the Midwest, Great Plains, Rocky Mountains, and

[1] Bronislav Malinowski, *Crime and Custom in Savage Society* (1926), 127.

the Northwest, these anarchic organizations appear to many as a new and frightening blight on the rural landscape.

They are frightening enough, and their firepower, communications capabilities, and capacity for fraud, terrorism, and mayhem is new in scale and scope. But in another sense they are at least a little familiar. After all, we are all a *bit* defiant now and then when it comes to certain rules of law. We jaywalk, double-park, xerox sheet music, and download songs from Napster without paying royalties; we walk dogs in places where they aren't allowed, and some of us in the States interpret I.R.S. rules rather liberally come April. Most of these traits hardly constitute major threats to public order or fiscal well-being (something that the "Militias" collectively may be said to pose); moreover, while these more modest defiant traits are not "lawful," they represent for many "the norm," and in that sense they may be said to be popular or "common law" rules, created in a less overt but ultimately more effective fashion than any of the Freemen's "Common-Law Courts."

In any event, groups like these, resisting authority or defying legal rules, may be detected in one form or another in the history of every major British colonial settlement. Resistance to authority and defiance of legal rules are recurrent themes in the history of the Diaspora who left Britain for North America or the Antipodes in the seventeenth, eighteenth, and nineteenth centuries, be that resistance organized, as was that of the Sons of Liberty, the various claim associations of the frontier communities, or the group of lawyers in Upper Canada who destroyed the printing press of a Liberal editor in the 1830s; be it essentially unorganized but communally accepted, as was that of the typical squatter or moonshiner; or be it merely tolerated, as was the Megantic Outlaw among Scots in Lower Canada, Ned Kelly among many ordinary folk in Victoria, Te Kooti among many Maori, and George Magoon among Downeasterners in late nineteenth century Maine.

Free-born Britons and their North American and Australasian Diaspora were generally quite law-abiding folk, proud of their homelands, and thus choosing to name their New World hamlets after their Old World ones. Their Old World laws went with them, but they took their customs and the "rights as Englishmen" too. Long before the appearance of the Freemen, disaffected Britons, Americans, Canadians, Aussies, and Kiwis created their own "common law" when they found themselves at loggerheads with British statutes and Common-Law rules of property or contract that seemed inconsistent with their conditions or climate. The Colonial Office, Parliament, and the Law Lords of Privy Council in London sought to regulate, indeed at times to control, the ways that British Diaspora immigrants to North America and the Antipodes acquired land, interacted with indigenous people, and

administered their affairs. For example, Parliament legislated on the treatment of slaves in the British colonies from 1815 to 1833 and then abolished slavery altogether.

In the first stage of settlement, the British Crown's governors, judges, magistrates, and legislative councils issued proclamations, created ordinances, and rendered judicial decisions in each colony, and this Law was but rarely out of step with that of the Mother Country. For example, in 1828 the government of the Crown Colony of the Cape of Good Hope created Ordinance 50, declaring all free people to be equal before the Law irrespective of race, as, indeed, they were in England (but had not been until that date in that formerly Dutch colony). At this stage of development we might say that "the Center" or "the Core" set the legal standards for its "Periphery." But, even at this first stage, the ways that ordinary folk actually *behaved* could be quite different from, sometimes at odds with, the formal Law.

A second stage of legal development occurred when the colonial Diaspora leaders effectively persuaded Parliament to grant them the constitutional power to make Law for themselves, to be administered by officials responsible to their elected assemblies (hence styled the era of "Responsible Government"). First accomplished by rebellion and force in "the thirteen colonies" that became the United States, this process of wresting the Law-making authority from Crown and Parliament came quite nonviolently in the other Diaspora lands, largely in the second and third quarters of the nineteenth century. Thereafter, while the newly empowered Diaspora legislatures engaged in a good deal of copy-cat adoption of statutes created by the Parliament at Westminster, they also struck out on their own; the "Periphery" increasingly found its own legislative voice.

The Law[2] as expounded in courts is the forum where ordinary people generally face off against one another (and sometimes against the State) if they are going to do so. I wanted to know how well or poorly certain statutes, Colonial Office instructions, and English Common-Law rules were applied in the lands of the British Diaspora[3] by both British- and native-born governors and jurists. What were the norms and rules

[2] In order to accent or draw attention to the contrasts or differences between "formal" and "informal" law – that is, statutes and common-law rules, on the one hand, and popular norms, on the other – I will always capitalize the former (the Law/ Common Law).

[3] I recognize, of course, that the seventeenth, eighteenth, and nineteenth century newcomers to North America and the Antipodes included other Europeans and Africans, but, for most of these years immigrants from the British Isles predominated and English Law prevailed (except in the mixed-origins legal world of Lower Canada/Quebec, Louisiana, and South Africa). Hence, as a convenient "short-hand," I will refer to the Canadian, United

that ordinary people employed to resolve property and contract disputes, and what happened when these two legal cultures collided?

When popularly generated norms prevail for long enough periods of time, they often come to be viewed by jurists as constituting "customary law" and thereby are granted the status of "Law." I do *not* limit my inquiry to such rules as came to be accepted as customary law by jurists. In the first place, the rules that people of British origin lived by from day-to-day were of notoriously recent vintage, quite unlike "customs" that had prevailed for centuries. In the second place, while the judicial branch of the early-modern English State did come to embrace some popular customs as "customary law," it also rejected others. The views of the first few generations of legal anthropologists and historians, that "the law" simply grew out of and absorbed "customs" as "civilization advanced,"[4] has proven to be quite inadequate. The tension between developing States and popular customs and norms in the sixteenth, seventeenth, and eighteenth centuries was often violent and irreconcilable. And, in the third place, whether these informal norms were accepted or not as Law by jurists, their *practice* at any moment by ordinary folk in one or another of these Diaspora settlements has been sufficient cause for me to report them. When farmers, dairymen, grazers, sea captains, and manufacturers came to understandings with ploughmen, shepherds, domestics, sailors, and artisans that ignored some aspects of the Common Law governing labor contracts; when buyers and sellers adjusted terms oblivious to the Law of Sales; when neighbors resolved fencing disputes and animal trespasses without recourse to ordinances or courts, they thereby supplanted the formal rules of the statutory and Common Law and, in a sense, created their own "common law."

There is another facet to this story of tension between the formal Law brought with the British Diaspora jurists and governors and the customary law of ordinary people: The British Diaspora settlers were not the only people inhabiting North America and the Antipodes whose popular norms were, at times, in conflict with the English Common Law of the courts created there. The Aboriginal people of those lands possessed customs of their own, created over the centuries, regarding right to land, water, fish, and game. They had norms regarding the exchange of goods and services which also differed in some regard from the rules employed by the Diaspora settlers and their courts. This book,

States, Australian, and New Zealand colonies/states/dominions throughout as "the lands of the British Diaspora."

[4] James C. Carter, *Law: Its Origins, Growth and Function* (1907); Henry Maine, *Ancient Law* (1861); Paul Bohannan, *Justice and Judgement Among the Tir* (1957). For a critique of this perspective see Stanley Diamond, "The Rule of Law versus the Order of Custom," 38 *Social Research* 42 (1971). And see Simon Roberts, *Order and Dispute* (N.Y., 1979), Chapter 11.

then, tells the story of conflict between the Law, the popular norms of Diaspora settlers, and the customary law of the Aboriginal peoples of North America and the Antipodes, a comparative tale of past human behavior, of power, and culture.

WHAT I ASK ABOUT FORMAL LAW

Let me begin by offering two cases to illustrate some of the questions I am asking about the formal Law. One day in 1873 a man by the name of Ray, in navigating a sidewalk in Petrolia in Upper Canada (Ontario), tripped first on a trap-door hinge and then on a warped sidewalk plank. Injured, he sued the township, but was "nonsuited" by the trial court judge – that is, the judge held that, as a matter of Law, the township was not liable to Mr. Ray. Ray's appeal to the Upper Canada Court of Common Pleas from this decision was rejected. In his opinion, Chief Justice Hagarty clearly signaled that lower courts were expected to be unfriendly to suits aimed at establishing the liability of municipal corporations for accidents like this one, accidents their modest municipal resources were incapable of preventing:[5]

> The warping of a plank, the starting of a nail, the upheaval of the ground from the action of frost, constantly form inequalities [in the levels of sidewalks]. . . . Unless we declare it to be the duty of a village corporation – when they try to improve the streets, in a place not many years taken from the forest, by laying down wooden sidewalks – to insure every passer-by against every unevenness or inequality in the levels, we can hardly hold these defendants liable.

One who focused solely on Chief Justice Hagarty's language and reasoning might conclude that he and his colleagues applied Common-Law rules "instrumentally" – that is, with a socioeconomic purpose, in this case one friendly to municipal corporations. But were one to shift one's attention to a decision handed down only two years after *Ray*, by the counterpart and equal of Hagarty's Court of Common Pleas, Upper Canada's Court of Queen's Bench, one might conclude that Queen's Bench jurists had been cut from different cloth entirely. A man named Castor had been injured in the town of Uxbridge in April 1875 when a sulky he had hired hit a telegraph pole that had been left in the road. He had also been nonsuited by the trial judge. He

[5] *Ray v. Corp. of Petrolia*, 24 UCCP 73 at 77 (1874). Compare with Hagarty, C. J., in *Boyle & wife v. Corp. of Town of Dundas*, 25 UCCP 420 at 429 (1875): Issues in this case are of "most vital interest to Canadian municipalities. . . . We cannot but see that attempts are often made to fasten on them a most onerous burden of responsibility, sometimes wholly disproportioned to their means and resources."