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MAPPING IMPERIAL LEGAL CONNECTIONS: TOWARD A COMPARATIVE HISTORICAL SOCIOLOGY OF COLONIAL LAW

Abstract

While the study of nineteenth century British colonial history has been fundamentally transformed over the past decade with the advent of new comparative and transnational studies aimed at the more nuanced scrutiny of 'imperial connections' and 'networks of [personal and official] communication' that linked Britain and its colonies, legal historians are only now beginning to more carefully explore and map the nature of imperial legal connections that spanned the British Empire. In essence, this (still rather embryonic) comparative/transnational mapping of the development of law across different nineteenth century British colonies can be seen to be undertaken in primarily three different, but overlapping, ways: first, through the study of the personal biographies of legal administrators and judicial officials who 'careered across the empire'; secondly, through the comparative study of the development of legal institutions and practices (such as the institution of colonial policing, and the application of colonial criminal law to Indigenous peoples); and thirdly, and more uniquely, through the approach of attempting to explore and document the challenges faced by Colonial Office officials in England (like James Stephen, Jr) who sought to fashion and implement a system that would produce relative uniformity in the manner in which English law was applied across all of Britain's nineteenth century slave and white-settler colonies. In this article, I discuss illustrative examples of these different approaches to mapping nineteenth century imperial legal connections across the British Empire, and argue that careful attention to the multi-faceted study of imperial legal connections provides an indispensable starting point for the development a more adequate comparative and transnational historical sociology of colonial law that has the capacity to help better understand the nature of the development of colonial law in both British and other European-controlled colonies, and potentially even across territories colonised by other historically-important non-European imperial powers.

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I INTRODUCTION

The study of nineteenth century British colonial history has been transformed in recent years by the publication of a number of studies aimed at exploring 'imperial connections' and 'networks of personal communication' between England — the 'metropole' — and the colonies, as well as between various British slave and white-settler colonies themselves. From Catherine Hall's reconstruction of the connections linking British, Australasian and West Indian experiences in *Civilizing Subjects*,[1] to Elizabeth Elbourne and Alan Lester's respective studies of *Blood Ground* and *Imperial Networks* between South Africa and Britain,[2] alongside Zoë Laidlaw's analysis of *Colonial Connections* across the three sites of Britain, the Cape Colony and New South Wales,[3] and David Lambert and Alan Lester's recent collection of essays on *Imperial Careering in the Long Nineteenth Century*,[4] we find evidence of historians raising new and important questions about the nature of imperial connections and their effect on colonial governance across the British Empire, particularly in the first half of the nineteenth century. In his well-received book on *The Birth of the Modern World, 1780–1914,* Chris Bayly arguably takes this transnational approach even further, encouraging historians to look beyond the British Empire to examine cross-national and global connections apparently tied, especially in the nineteenth century, to the development of 'many hybrid politics, mixed ideologies, and complex forms of global economic activity'. Indeed, Bayly goes on to argue that 'all local, national, or regional histories must, in important ways, therefore, be global histories'.[5]

While the study of nineteenth century British colonial history has been fundamentally transformed over the past decade with the advent of new comparative and transnational studies of this type, legal historians are only now beginning to explore and map more carefully the nature of imperial legal connections that spanned the British empire. As such, it is important to examine more closely leading examples of recent scholarly work on British colonial history for the significant historiographical themes and issues raised in these studies, and for the related insights they offer that can aid in the development of a more rich and diverse comparative and transnational historical study of colonial law. More broadly, it is particularly valuable to explore this literature for the insights it may offer into the mapping of imperial legal connections, primarily in the context of the British experience, but also in relation to the colonial legal histories of other

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1 Catherine Hall, *Civilizing Subjects: Colony and Metropole in the English Imagination, 1830–1867* (2002).

2 Elizabeth Elbourne, *Blood Ground: Colonialism, Missions, and the Contest for Christianity in the Cape Colony and Britain, 1799–1853* (2002); Alan Lester, *Imperial Networks: Creating Identities in Nineteenth-Century South Africa and Britain* (2001).

3 Zoë Laidlaw, *Colonial Connections, 1815–1845: Patronage, the Information Revolution and Colonial Government* (2006).

4 David Lambert and Alan Lester (eds), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (2006).

5 C A Bayly, *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (2004) 1–2.

European, and potentially even non-European, imperial powers. Toward this ambitious goal of establishing a more adequate conceptual foundation for the development of a sociologically-informed comparative historical sociology of colonial law, this article is divided into three substantive parts. Part I provides an overview of the work of authors who have made, what are in my view, among the most significant recent scholarly contributions to the comparative and more broadly conceived transnational and 'global' study of nineteenth century British colonialism. In Part II, I review the different, but overlapping, ways in which legal historians are now beginning to map the development of law across different nineteenth century British colonies: first, through the study of the personal biographies of legal administrators and judicial officials who 'careered across the empire'; secondly, through the comparative study of the development of legal institutions and practices; and thirdly, and more uniquely, through the approach of attempting to explore and document how Colonial Office officials in England, especially in the first half of the nineteenth century, sought to fashion and implement a system that would produce relative uniformity in the manner in which English law was applied across all of Britain's slave and white-settler colonies. In Part III, I move beyond the careful explication and analysis of nineteenth century British colonialism and colonial legal history literature to discuss the implications and opportunities posed by this literature for future research and theorising in the field. As part of this discussion, I argue that attention to the multi-faceted study of imperial legal connections provides an indispensable starting point for the development of a more adequate comparative and transnational historical sociology of colonial law. In particular, I contend that this approach has the capacity to help better understand the nature of the development of colonial law in both British and other European-controlled colonies, and potentially even across territories colonised by other historically-important non-European imperial powers.

II Re-writing British Colonial History: Current Themes and Issues in Comparative and Transnational/World History

In this article I examine the work of a number of authors whose studies have recently contributed to the significant re-writing of British colonial history, with my aim being to identify and elaborate upon key historiographical themes and issues reflected in this corpus of scholarly work. Particular attention is given to the work of the prominent Cambridge University historian and specialist on the history of colonial India, Chris Bayly, who, through his book on *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons*, established himself as a leading proponent of what can be referred to as global 'world history'.[6] Needed attention is also given to the influential work of the leading postcolonial feminist historian, Catherine Hall, and especially her book on *Civilising Subjects: Colony and Metropole in the English Imagination, 1830–1867*, which have been a noticeable inspiration to other historians who have now taken up the study of

6 R I Moore, 'Series Editor's Preface' in C A Bayly, *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (2004) xix.

imperial connections across the British Empire.[7] In addition, I draw out insights offered in the work of other British and European colonial historians who in recent years have made what I consider to be significant contributions to the study of comparative, transnational, and world history.[8]

A *Bayly on 'The Birth of the Modern World'*

According to Bayly, 'the long nineteenth century' (which he dates from around 1780 to 1914) witnessed Western ideas and practices associated with modernisation spread throughout the rest of the world. Through his study of widespread — arguably global — developments of this period, Bayly attempts to show 'how historical trends and sequences of events, which have been treated separately in regional or national histories, can be brought together'. According to Bayly, making these global connections and comparisons is fundamentally important for rethinking modern world history, in that it helps to reveal 'the interconnectedness

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7 Other significant writings of Catherine Hall include: Catherine Hall, 'What did a British World Mean to the British? Reflections on the Nineteenth Century' in Philip Buckner and R Douglas Francis (eds), *Rediscovering the British World* (2005); Catherine Hall, 'Introduction: Thinking the Postcolonial, Thinking the Empire' in Catherine Hall (ed), *Cultures of Empire: Colonizers in Britain and the Empire in the Nineteenth and Twentieth Centuries* (2002); Catherine Hall, 'British Cultural Identities and the Legacy of the Empire' in David Morley and Kevin Robins (eds), *British Cultural Studies: Geography, Nationality, and Identity* (2001); Catherine Hall, 'Histories, Empires and the Post-Colonial Moment' in Iain Chambers and Lidia Curti (eds), *The Post-Colonial Question: Common Skies, Divided Horizons* (1996); Catherine Hall, 'Imperial Man: Edward Eyre in Australasia and the West Indies, 1833–66' in Bill Schwarz (ed), *The Expansion of England: Race, Ethnicity and Cultural History* (1996); and, Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History* (1992). Although Hall's influence has been widespread, particular authors who have drawn inspiration from her work include: Lester, *Imperial Networks*, above n 2; Julie Evans, *Edward Eyre, Race and Colonial Governance* (2005); David Lambert and Alan Lester, 'Introduction: Imperial Spaces, Imperial Subjects' in David Lambert and Alan Lester (eds), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (2006); Alan Lester, 'Humanitarians and White Settlers in the Nineteenth Century' in Norman Etherington (ed), *Missions and Empires* (2005).

8 Throughout this article the term 'comparative' history is used in the narrow sense to denote studies that focus primarily on attempting to compare particular dimensions of the historical experiences of different jurisdictions on a regional or national basis (for example, the comparative study of the development of criminal courts in two or more nineteenth century British colonies). Within the context of this article, the term 'transnational' history is used to denote the work of historians who have focused on attempting to draw connections between apparently similar historical developments that occurred across a number of different political and legal jurisdictions (for example, the incorporation of Indigenous people into the legal systems of all British white-settler colonies in the nineteenth century). 'World' history is employed in the same sense that it is used in Bayly, above n 5, 1, and as I outline in the following section of this article, to refer to historical work that takes as its focus of analysis 'the interconnectedness and interdependence of political and social changes across the world'.

and interdependence of political and social changes across the world well before the supposed onset of the contemporary phase of "globalization" after 1945'.[9]

At the heart of Bayly's thesis is the view that as 'world events became more interconnected and interdependent' in the nineteenth century, 'so forms of human action adjusted to each other and came to resemble each other across the world'.[10] Bayly pursues this line of argument in his book through drawing comparisons and tracing connections across a variety of states and jurisdictions ranging from China to India to Islamic states to the countries of Western Europe and their far-flung colonies. In particular, Bayly 'traces the rise of global *uniformities* in the state, religion, political ideologies, and economic life as they developed through the nineteenth century'.[11] It is significant that Bayly's study of rising global uniformities is entirely encompassing of what we would now call the modern political state and civil society. Indeed, he argues that the growth of uniformity in the nineteenth century 'was visible not only in great institutions such as churches, royal courts, or systems of justice', but also even in 'bodily practices'; or 'the ways in which people dressed, spoke, ate, and managed relations within families'.[12]

There are two additional points that need to be made about Bayly's thesis. The first is that the movement toward increasing global 'modernity' in the nineteenth century was by no means a 'progressive' one-way historical process that was uniformly embraced and participated in by everyone, and, in fact, for those, such as native or Indigenous peoples who refused to abandon their traditional cultural and socio-political and economic ways of life, the push toward modernisation was catastrophic and genocidal. In relation to this, Bayly argues that '[t]he deluge came between 1830 and 1890 when the massive expansion of settler populations from Siberia, through Australasia and southern Africa to the Americas expropriated native peoples' lands and forests to a large extent'. Rather than embracing Western modernity, he concludes that after 1870 the 'remaining populations' of the world's Indigenous peoples began to be 'visited by the agents of the state and or moral improvement' and were 'increasingly forced to adopt the dress, life-styles, and religion of the dominant populations, or they were corralled off into reservations

9 Bayly, above n 5, 1.

10 Ibid.

11 Ibid (emphasis in original).

12 Ibid. Bayly's argument regarding the world-wide impact of the spread of Western modernity can appreciated even better when one takes into account the rapid growth of the British Empire over the eighteenth and nineteenth centuries. As Maya Jasanoff points out in her book *Edge of Empire: Lives, Culture, and Conquest in the East, 1750–1850* (2005) 5–6, '[t]he century from 1750 to 1850 was a formative one for Britain and the British Empire'. While in 1750 'Britain was an island in a sea of empires' and 'Britain's colonial empire was comparatively modest', by 1850 'Britain had become the world's first and largest industrialized nation, with a population almost three times larger than in 1750' and the British Empire 'encompassed a quarter of the globe, stretching from Ottawa to Auckland, Capetown to Calcutta, Singapore to Spanish Town'. An estimated one in five people across the world were the subjects of Queen Victoria in 1850, with millions more living 'in states bankrolled and indirectly steered by Britain'.

and special homelands to be exploited as pools of labor for capitalist farms and mines'.[13] Although Bayly does not deal directly with the role of colonial law as an instrument for facilitating (or coercing Indigenous peoples into) the type of Western modernity that he writes about, it is not hard to seen how a legal historian might be able to extrapolate this from their work.[14]

The second point that needs to be made about Bayly's approach is that he is sensitive to the criticism of postmodern and postcolonial historians who have argued that the articulation of historical 'meta narratives', or macro-level causal explanations of historical change, silence the voices of those from less powerful subordinated groups (such as women and Indigenous peoples), and therefore are (that is, the meta narratives) arguably 'complicit with the very processes of imperialism and capitalism which they seek to describe'. Bayly, I think reasonably, responds to this criticism arguing that, while often making these claims, 'postmodernist and postcolonial historians make constant reference to the state, religion, and colonialism, [which are] all broad phenomena' and that, as such, all histories (including postmodern and postcolonial histories) 'are implicitly universal histories' that attempt to produce broader generalisations.[15] As I point to in the concluding part of this article, legal historians can also benefit collectively from being more open to accepting the value of transnational research that attempts to produce similar broader generalisations about the development of law in colonial societies.

B *Hall on 'Civilising Subjects' in the 'Metropole and Colony'*

In her path-breaking feminist and postcolonial theory-informed studies Catherine Hall has explored British colonialism and its effects *on both* the 'colonised', or primarily Indigenous peoples who came to be subjected to British rule, and on various colonisers, who themselves came to be transformed in many ways by their involvement in the colonising process.[16] In her book *Civilising Subjects: Colony and Metropole in the English Imagination, 1830–1867*, Hall attempts to reconstruct how colonialism was imagined and experienced across the metropole — in England — and in the colonies of Australasia and the West Indies. She does this in a number of ways. First (or in the first part of her book), through tracing (or mapping) the colonial career of Edward John Eyre, the British Governor of Jamaica in the 1860s, who had previously served as the Lieutenant-Governor of New Zealand (from 1847–53), and before that, had already became well-known for his exploits as an adventurer and explorer who in 1840–41 travelled overland

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13 Bayly, above n 5, 437.

14 In this regard, Bayly suggestively mentions that in the process that accompanied the expropriation of vast areas of land from Indigenous peoples '[p]hysical domination was accompanied by different degrees of ideological dependence. Social concepts, institutions, and procedures honed in the fierce conflicts and competition between European nations became controllers and exemplars for non-European peoples': Bayly, above n 5, 2–3.

15 Bayly, above n 5, 8–9.

16 Hall, above n 7.

across the 'Great Bight' from South Australia to Western Australia.[17] Also in the first part of her book, Hall exhaustively documents the efforts undertaken by Baptist missionaries in Jamaica, to convert Black slaves and free coloured people to Christianity in this period. In the second part of her book, Hall examines the unfolding of Jamaican history from 1830 to 1867 as it was likely perceived by the supporters of Baptist missionaries in England, and particularly in Birmingham, where they had their strongest roots. In doing so she also, in turn, creates a vivid and revealing picture of how personalities and events in England, Australasia and the West Indies melded together to influence developments that preceded and led to the Morant Bay Rebellion of 1865, which was crushed by under the leadership of Governor Edward John Eyre (after he declared martial law), at the cost of 439 lives and the flogging of over 600 men and women and the burning of over 1000 homes.[18] Although not taken up as an explicit theme in Hall's work, as we will see in the discussion to follow shortly, Edward John Eyre's 'careering across the empire', along with his personal shift from an attitude of liberal-humanitarianism to coercive-authoritarianism, followed a pattern that was similar to other colonial administrators who careered across the British Empire in the early to mid-nineteenth century.

At a more general theoretical level, Hall's study of *Civilizing Subjects* exemplifies the value of adopting a postcolonial approach to the study of nineteenth century British colonialism. Most importantly, this approach forces one to try to imagine how imperialism and colonialism were experienced and perceived both from the centre of the empire — the metropole — and its margins — or local contexts.

[17] Evans, above n 7.

[18] Ibid 136. The underlying causes of the Morant Bay Rebellion and the nature and consequences of the ensuing 'Governor Eyre controversy' have been analyzed by numerous historians over the years, which has given rise to a rich historiography of the incident. A recent example of this is Karuna Mantena's discussion of the implications of the Eyre controversy for the direction taken by the mid-nineteenth century 'crisis of liberal imperialism' and 'the growing divide between the proponents and critics of democracy'. Karuna Mantena, 'The Crisis of Liberal Imperialism' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (2007) 113, 122. In addition, Rande Kostal has recently completed an exhaustive legal-historical analysis of the implications posed by the Eyre scandal for British sensibilities about the rule of law and the legal accountability of local colonial and political officials who ruled over former British slave and existing white-settler colonies: Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (2005). I would like to thank the anonymous reviewer who brought Kostal's immensely relevant book to my attention. Somewhat differently, both Catherine Hall in *Civilizing Subjects*, above n 1, and Julie Evans in *Edward Eyre*, above n 7, examine Eyre's changing sensibilities about race and colonial governance over the course of his entire career, from his open-minded and sympathetic sensibility about Australian Aborigines as recorded in his correspondence and journals of the 1830s and 1840s, to his much more reactionary and openly racist views displayed while he was Governor of Jamaica in the 1860s. These studies, as we will see shortly, also complement other recent studies of 'imperial careering' across the British Empire in the nineteenth century.

Significantly, Hall is only one of a growing number of writers of colonial histories[19] that have come to adopt this type of postcolonial perspective.[20] This approach also forms part of the perspective I have adopted in my own recent substantive research and writing, which has been concerned with mapping the various contours and trajectories of British imperial policy with respect to the treatment of Indigenous peoples, and the nature of imperial legal connections that existed across various nineteenth century British slave and white-settler colonies, particularly Canada, Australia, New Zealand and the Cape Colony of southern Africa.[21] Before turning to a discussion of such research, however, it is important to outline other key themes and issues that arise out of examining recent literature that has helped contribute to the re-writing of British colonial and imperial history.

C *Liberalism and Empire*

> Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.[22]

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19 Who, in addition to historians, also include interlopers from other disciplines such as anthropology and sociology.

20 See also: Lester, *Imperial Networks*, above n 2; Lester, 'Humanitarians and White Settlers in the Nineteenth Century' above n 7; Lambert and Lester, 'Introduction: Imperial Spaces, Imperial Subjects', above n 7; Ann Laura Stoler and Frederick Cooper, 'Between Metropole and Colony: Rethinking a Research Agenda' in Frederick Cooper and Ann Laura Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (1997); John Comaroff, 'Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa' in Frederick Cooper and Ann Laura Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (1997); David Scott, *Refashioning Futures: Criticism After Postcoloniality* (1999); Antoinette Burton (ed), *After the Imperial Turn: Thinking With and Through Nation* (2003); David Washbrook, 'Orients and Occidents: Colonial Discourse Theory and the Historiography of the British Empire' in Robin Winks (ed), *The Oxford History of the British Empire, Vol. 5: Historiography* (1999).

21 Russell Smandych, 'Contemplating the Testimony of "Others": James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839–1849' (2006) 10 *Legal History* 97; Russell Smandych, 'To Soften the Extreme Rigor of Their Bondage: James Stephen's Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833' (2005) 23 *Law and History Review* 537; Russell Smandych, 'The Exclusionary Effect of Colonial Law: Indigenous Peoples and English Law in the Canadian West to 1860' in Louis Knafla and Jonathan Swainger (eds), *Laws and Societies in the Canadian Prairie West, 1670–1940* (2005); Russell Smandych, 'The Cultural Imperialism of Law' in Bernd Hamm and Russell Smandych (eds), *Cultural Imperialism: Essays on the Political Economy of Cultural Domination* (2005). The current article is a further extension of this on-going research programme, funded by the Social Sciences and Humanities Research Council of Canada (from 2006 to 2009) under the title, 'The Discursive Construction of Legal Subjects and Sensibilities in Four Nineteenth-century British Settler Colonies: Toward a Comparative Historical Sociology of Colonial Law'.

22 John Stuart Mill, *On Liberty* (1859), cited in Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (2005) 1.

One of the most prominent themes in current writing on the building of European empires over the 'long nineteenth century' is the question, or conundrum, of the role played by the ideology of liberalism as a justification for dispossessing Indigenous peoples of their land and forcing them to adopt 'Western' lifestyles and institutions, including legal institutions. According to Chris Bayly,[23] the ideology of 'Euro-American' liberalism spread increasingly across the world after 1815 along with the international spread of the 'Euro-American' ideologies of socialism and science. Despite its association with ideals including representative government, free trade, and legal equality and 'universal rights', Bayly notes that in the colonial context liberalism confronted a perennial internal conflict, which he describes as 'the conflict within liberalism between the ideals of universal rights and the idea of "moral independence", which limited [liberalism's] capacity to effect real political change'.[24] According to Bayly:

> This became particularly clear when it came to non-white populations. In the colonial world, the authorities had created a few, limited local councils. Yet even advanced liberals, headed by John Stuart Mill himself, broadly denied the capacity of Indians, Chinese, or Africans to rule themselves, on the grounds that their domestic life was defective, and that centuries of oriental despotism had inured them to autocratic rule.[25]

The existence of conflicting yet intimately connected metropole and colonial discourses that reflect 'the struggle between Liberty and Authority'[26] in British slave and white-settler colonies over the nineteenth century is also recognised by other British colonial historians.[27] Invariably, these discourses addressed the issue

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[23] Bayly, above n 5, 290.

[24] Ibid 304. Significantly, as I have already described, above n 18, in discussing Hall and Evans' work, this also seems to be precisely the type of conundrum faced by Edward John Eyre and many other colonial administrators who careered across the British Empire in the early to mid-nineteenth century.

[25] Ibid.

[26] John Stuart Mill, 'On Liberty', in Geraint Williams (ed), *John Stuart Mill: Utilitarianism, On Liberty, Considerations on Representative Government, Remarks on Bentham's Philosophy* (1993) 70.

[27] Jasanoff, above n 12; Uday S Mehta, 'Liberal Strategies of Exclusion' in Frederick Cooper and Ann Laura Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (1997); Uday S Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (1999); Andrew Bank, *Liberals and the Enemies: Racial Ideology at the Cape of Good Hope, 1820–1850* (PhD thesis, Cambridge University, 1995); Andrew Bank, 'Losing Faith in the Civilizing Mission: The Premature Decline of Humanitarian Liberalism at the Cape, 1840–60' in Martin Daunton and Rick Halpern (eds), *Empire and Others: British Encounters with Indigenous Peoples, 1600–1850* (1999); Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order* (1996); Elbourne, *Blood Ground*, above n 2; Elizabeth Elbourne, 'The Sin of the Settler: The 1835–36 Select Committee on Aborigines and Debates Over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire' (2003) 4 *Journal of Colonialism and Colonial History* <http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v004/4.3elbourne.html> at 24 September 2008; Duncan Bell, 'Empire and

of the extent to which colonised subjects of different races and other religions should be granted the same rights and freedoms as other 'British subjects'. In her book *Edge of Empire*: *Lives, Culture, and Conquest in the East, 1750–1850*, which re-examines the histories of British imperialism in India and Egypt, Maya Jasanoff contends that 'the central challenge for nineteenth-century Britain to survive as an empire, and as a nation, was to find ways of accommodating difference, especially overseas'. Jasanoff observes that while there were many paradoxes involved in this challenge, 'imperial expansion, Britishness, and cross-cultural inclusion were joined at the hip — and however awkward, stumbling, and painful their progress, they hobbled along together'.[28] This conundrum was also experienced in the West Indies and other slave and former-slave colonies (after the abolition of slavery in 1833), where colonial governors, magistrates, and Colonial Office officials in London, struggled over how colonial laws could, if at all possible, be reformed to make their application more equitable and humane.[29] It also entered the discourses of humanitarian liberals and their opponents across the nineteenth century British colonies of India, Africa, North America and Australasia.

In his detailed study of British liberal thought in the nineteenth century, Uday Mehta considers both 'the various responses of liberal thinkers when faced with the unfamiliarity to which their association with the British Empire exposed them' and the 'query' of 'the liberal justification of empire'.[30] By using the term 'unfamiliarity' Mehta does not impute ignorance, as all liberal writers of the period were 'knowledgeable about the parts of the empire on which they wrote'; but instead highlights the problem of 'not sharing in the various ways of being and feeling that shape experience and give meaning to the communities and the individuals who constitute them — in a word, not being familiar with what was experientially familiar to others in the empire'.[31] According to Mehta, '[t]he liberal association with the British Empire was extended and deep',[32] and by the mid-nineteenth century 'liberal and progressive thinkers such as Bentham, both the Mills, and Macaulay', despite their not being 'experientially familiar' with 'others in the empire', came to 'endorse the empire as a legitimate form of political and commercial governance' as well as to 'justify and accept its largely undemocratic and nonrepresentative structure'.[33] Mehta argues for the originality of his own analysis, noting that in spite of the central place of reflections on the British Empire in the writings of prominent nineteenth century liberal political and economic theorists, few books written by political theorists in the post-World War

International Relations in Victorian Political Thought' (2006) 49 *Historical Journal* 281; Sandra den Otter, ' "A Legislating Empire": Victorian Political Theorists, Codes of Law, and Empire" in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (2007) 89.

28 Jasanoff, above n 12, 11.

29 Smandych, 'James Stephen's Attempt to Reform the Criminal Slave Laws of the West Indies, 1813–1833', above n 21.

30 Mehta, *Liberalism and Empire*, above n 27, 1–2.

31 Ibid.

32 Ibid 4.

33 Ibid 2.

II era have dealt 'with sustained focus on the empire'.[34] In his attempt 'to redress the indifference of modern and historical scholarship to the extended link between liberalism and the empire' Mehta offers an in-depth examination of the ideas of political thinkers who 'reflected on British rule in India'. According to Mehta

> The conditions of that rule, and hence of those reflections, are one in which imperial power was exercised over people separated from Britain by thousands of miles and numerous other distances — as James Mill put it, the government was conducted 'by correspondence' from London; where the historical connection between these two peoples was limited, or rather almost wholly internal to the framework established by empire, and where moreover there were contrasting traditions, self-understandings, extant political and social practices, belief systems; in a word, diversities of experience and life forms across virtually every register of reckoning.[35]

In much the same way and with the same result described by Mehta and others, liberal-humanitarian 'metropolitan' and 'colonial' administrators also extended their influence and reach across the continent of Africa.[36] As in other parts of the British Empire, despite the prevalence and impact of liberal-humanitarian thinking in both the metropole and the Cape Colony in the 1830s and 1840s in shaping ideas and practices regarding the just treatment of Indigenous peoples, this influence was noticeably often fragile, contested, and relatively short-lived. In his book *Colonial South Africa and the Origins of the Racial Order*, Timothy Keegan provides a careful examination of the 'structuring forces … of imperialism and colonialism' that shaped the history of South Africa in the first half of the nineteenth century.[37]

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[34] Ibid 6.

[35] Ibid 8, (citations omitted). In case readers of the current article are still uncertain of how a consideration of nineteenth century political theorists of liberalism and empire is relevant to mapping imperial legal connections across the British Empire, it is worthwhile to foreshadow at this point that key political and legal officials who worked in the Colonial Office in the nineteenth century, like James Stephen Jr, were intimately familiar with, and in one way or another, personally influenced by the liberal-humanitarian ideals, as well as countervailing conservative thinking, reflected in the writings of contemporaneous political theorists and historians like Jeremy Bentham, James and John Stuart Mill, Thomas Babington Macaulay, and Thomas Carlyle. See Russell Smandych, 'Biography and Legal History: Reconstructing the Life of James Stephen, Jr, Legal Counsel to the Colonial Office, 1813–1847' (Paper presented in conjunction with honorary appointment as Distinguished Visiting Scholar, School of History and Politics, the University of Adelaide, 26 May 2008). This significant theme will also be returned to later in this article.

[36] In the same manner that Zoë Laidlaw, above n 3, has done, I use the term 'metropolitan administrators' to refer to British government officials in London (and particularly in the Colonial Office), while employing the term 'colonial administrators' to refer to officials who took up governmental-administrative appointments in the colonies.

[37] Timothy Keegan, *Colonial South Africa and the Origins of the Racial Order* (1996) viii.

One of these forces was the liberal-humanitarian outlook of British metropolitan and colonial administrators. According to Keegan, this outlook is particularly reflected in the 'philanthropic tendencies of British imperial policy, represented notably in the drive in the 1820s and 1830s to emancipate the coloured servile class [the Khoisan peoples] and the slaves, and to extend legal equality to all persons of colour'.[38] However, Keegan points out that there were also 'rival faces of imperialism', typically in the form of reactionary governors and other colonial administrators, whose sensibilities and priorities were 'far closer to those of the settlers than the philanthropists'.[39] Thus, in Keegan's view, the early nineteenth century white-settlement of South Africa under British rule reflected two major conflicting or 'rival impulses' of imperialism, 'the forces of the frontier and the forces of humanitarian imperialism'.[40] Of these impulses, in his study Keegan attends mainly to an analysis of humanitarian imperialism, and within this to 'the contradictions inherent in the whole liberal humanitarian project of the first half of the nineteenth century'.[41] Regarding these contradictions, Keegan notes that:

> Early-nineteenth-century liberalism was profoundly ambiguous. Its rhetorical commitment to the legal formalities of equality and freedom was in sharp contrast to its fundamental compatibility with cultural imperialism, class domination and, ultimately, racial subjugation. And it could be argued that these were not just failings, but were a function, direct or indirect, of the role of liberal ideology in sustaining the hegemony of class and culture in the rapidly developing economic order of free-trade capitalism.[42]

A similar view of the place of liberalism in the settlement of the Cape Colony is offered in other recent revealing studies of the efforts undertaken by Cape missionaries and their supporters in Britain, with the backing of sympathetic metropolitan and colonial administrators, to educate and 'civilise' Indigenous peoples.[43] For example, in her detailed study of Protestant missionaries in the Cape of Good Hope, Elizabeth Elbourne points to the mixture of evangelical religious and liberal humanitarian forces operating in Britain and the Cape Colony, and in many other parts of the British Empire, that pushed for the more effective protection of Indigenous peoples from the ravages of aggressive and uncontrolled land dispossession and frontier settlement, particularly after the abolition of slavery

38 Ibid 5. Keegan uses 'the terms Khoi and Bushman to describe the Cape's indigenous peoples': ibid ix. Collectively, the Khoi (or Khoe) peoples, who were traditionally pastoralists, and the Bushman (or San) peoples, who were traditionally hunter-gatherers, are commonly referred to in historical literature on South Africa as indigenous Khoisan (or Khoesan) peoples. See, eg, Elbourne, *Blood Ground*, above n 2; Lester, *Imperial Networks*, above n 2.

39 Kegan, above n 37, 5.

40 Ibid. 6.

41 Ibid 13.

42 Ibid.

43 See, eg, Elbourne, *Blood Ground*, above n 2; Lester, *Imperial Networks*, above n 2; Bank, *Liberals and the Enemies*, above n 27; Bank, 'Losing Faith in the Civilizing Mission', above n 27.

across the British Empire in 1833.[44] In her subsequent article on 'debates over virtue and conquest' in early nineteenth century British white-settler colonies, in which she extends her research to include a comparison of 'liberalising impulses' in the Cape Colony, New South Wales and the Canadian colonies, Elbourne notes more generally that:

> Liberalism raised with particular force the question of law and citizenship. Were settlers citizens and how much say should they have over their own affairs? Logically, however, this raised the further question of whether, if settlers were citizens, indigenous peoples must also be seen as citizens, or at a minimum as equal subjects of the British crown. Could the citizenship and equal liberty of settlers and indigenous peoples co-exist, or were they mutually exclusive?[45]

Elbourne's insightful transnational research closely complements Alan Lester's examination of *Imperial Networks: Creating Identities in Nineteenth-Century South Africa and Britain*,[46] in that both of them explore the motives behind the actions of metropolitan and colonial evangelicals and liberal humanitarians to take up the cause of the protection and civilisation of Indigenous peoples.[47] Like Keegan, both Elbourne and Lester also point to the later growing disillusionment, on the African continent and elsewhere across the British Empire, that came about with the perceived failure of colonised peoples 'to learn the lessons of freedom and of civilization' that humanitarian reformers expected they could be taught.[48] In his study of 'the ideological conflict between early liberals at the Cape of Good Hope and their enemies in both the western and eastern districts of the colony' that was played out mainly between 1820 and 1850, Andrew Bank similarly concludes that even 'the most zealous and outspoken champions of the African's potential for civilisation in the 1820s came to doubt their own mission by the 1840s'.[49] Bank further observes that:

> By the middle of the nineteenth century the early optimistic liberalism of the abolitionist era had been eclipsed by a new harder-minded liberalism of

44 Elbourne, *Blood Ground*, above n 2.

45 Ebourne, 'The Sin of the Settler', above n 27.

46 Lester, *Imperial Networks*, above n 2.

47 Among the most prominent metropolitan personalities discussed by both Elbourne and Lester are Thomas Fowell Buxton (in Parliament) and James Stephen, Jr (in the Colonial Office), while among the most influential Cape liberal humanitarians they identify are Dr John Philip (of the London Missionary Society), and Sir Richard Bourke (the Governor of the Cape Colony from 1826 to 1828). In his more recent chapter on 'Humanitarians and White Settlers in the Nineteenth Century' in Norman Etherington (ed), *Missions and Empire* (2006) 64, Lester extends his research to Australia and New Zealand.

48 Lester, *Imperial Networks*, above n 2, 139; Elbourne, *Blood Ground*, above n 2, ch 8. See also, the similar analysis of the mid-nineteenth century crisis of liberal imperialism offered by Mantena, above n 18.

49 Bank, *Liberals and the Enemies*, above n 27, 1, 3.

> political economy with a far more hostile attitude towards African culture. The crystallisation of racism among anti-liberals therefore coincided by mid-century with the decline of the humanitarian liberalism of earlier decades, accommodating a wide mid-Victorian intellectual consensus at the Cape.[50]

Despite its relevance to the study of British colonial legal history, the role of the ideology of liberalism in the subjugation of Indigenous peoples in the nineteenth century has rarely been explicitly addressed by legal historians. One exception to this is the work of P G McHugh. In his recent monumental book *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*,[51] McHugh argues that across all British white-settler colonies and more generally throughout the British Empire: '[a]s the nineteenth century progressed, … [an] emerging and increasingly prevalent liberalism heavily influenced the approach towards relations with and governance of non-Christian peoples'. According to McHugh, '[l]iberalism — like the Enlightenment — was no coherent doctrine or programme so much as a disposition or tendency. As with Christianity, it encompassed a variety of heterogeneous positions and developed over a long period of social upheaval and political change'. However, he points out that, '[a]bove all liberals believed that human nature was intrinsically the same everywhere, and that it could be totally and completely transformed, if not by revelation, as the evangelicals envisaged, then by the workings of law, education, and free trade'.[52] Despite this, McHugh concludes:

> If there was one area where liberal values with their emphasis upon the individual's capacity for improvement were relatively unopposed in England it was in their applicability elsewhere. All Englishmen agreed that the uncivilized non-Christian peoples under British dominion were demonstrably inferior and in need of improvement.[53]

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50 Ibid 3.

51 Displayed both in its substantial length of more than 600 pages and its vast breadth of analysis of both the development of native policies and laws that affected Aboriginal peoples across the United States and throughout the British colonial world over a period of roughly three hundred years.

52 P G McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (2004) 124.

53 Ibid. Other legal historians who acknowledge the influence of liberalism on the development of colonial law across different nineteenth century British white-settler colonies include: Julie Evans et al, *Equal Subjects, Unequal Rights: Indigenous Peoples in British Settler Colonies, 1830–1910* (2003); Sidney Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (1998); Philip Girard, 'Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920' in John McLaren, A R Buck and Nancy White (eds), *Despotic Dominion: Property Rights in British Settler Societies* (2005); and Tina Loo, *Making Law, Order, and Authority in British Columbia, 1821–1871* (1994). In addition, Martin J Wiener has recently completed a comparative study of cases of interracial homicide across seven late-nineteenth and early twentieth century British colonies in which he specifically explores the contradiction between prevailing liberal notions of legal equality and the rule of law and the frequent 'authoritarian rule' exerted over non-

Like his Cambridge University colleague Chris Bayly, McHugh gives considerable attention to developments that occurred over the course of the long nineteenth century, and, also paralleling Bayly's analysis, one of his themes is the increasingly uniform manner in which the common law came to be applied to Aboriginal peoples across a range of different white-settler societies as the nineteenth century progressed.[54] While far from offering a single essentialist explanation of this developing legal uniformity, McHugh highlights the significant influence of the spread of liberal ideology as an important contributing factor. However, in McHugh's view, the humanitarian liberalism of mid-nineteenth century colonial governmental and legal officials was short-lived and invariably eventually gave way to political and legal developments that resulted in Indigenous peoples both being dispossessed of their lands and treated as unequal to their white-counterparts in the legal system. He also shows that while by the 1830s the Marshall court decisions in the United States had led to an acceptance of 'a doctrine of residual tribal sovereignty', '[t]he British rejected that approach and lurched from episode to episode in the second quarter of the nineteenth century towards a more absolutist and thoroughgoing concept of Crown sovereignty over tribal peoples', and that '[t]his process came about mostly through the need to define more precisely the Crown's criminal jurisdiction over the tribes as British settlement spread in the post-Napoleonic period'.[55] Ultimately, McHugh claims, once 'tribes' (or Indigenous peoples)

> had been physically vanquished in the great mid-century wars and dispossessions, all jurisdictions set about erecting legal regimes for the dissolution of the tribalism that both impeded the progress of settler society

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Europeans by a relatively small colonial 'ruling British elite': Martin J Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935* (2009), 1, 4. I would like to thank the anonymous reviewer who brought Wiener's fascinating and timely book to my attention. However, while touching to varying degrees on the theme of law, liberalism and empire, none of the above noted authors, including Wiener, develop their analysis to the extent undertaken by McHugh.

54 McHugh, above n 52, 129, develops his concept of 'uniformity' from his reading of the work of James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (1995), and specifically from what Tully referred to as 'the Empire of Uniformity' to denote the general 'tendency towards a centralizing and absolute model of sovereignty'. According to McHugh:

> This 'Empire' has a disposition towards homogenizing constitutional history into a 'monologic' of a signal-voiced sovereign, ruling over a culturally undifferentiated polity. This is certainly a good way of describing the misery-ridden experience of aboriginal peoples in the North America and Australasian jurisdictions from the late nineteenth century. Each jurisdiction, highly conscious of its sovereign self and not thinking of its relations with aboriginal peoples in any way other than as an aspect of that sovereignty, imposed its own 'Empire of Uniformity'.

For an extended review of McHugh's book which points in more detail to its remarkable depth of research and thoughtful analysis, see Mark Walters, 'Histories of Colonialism, Legality, and Aboriginality' (2007) 57 *University of Toronto Law Journal* 819.

55 McHugh, above n 52, 117.

> and challenged its constitutional authority. For tribal peoples the end of the nineteenth century saw the onset of the 'Empire(s) of Uniformity'.[56]

McHugh's analysis is greatly significant for what it implies about the potentially fruitful directions of future comparative and transnational research in the field of colonial legal history, and will thus be returned to in later sections of this article. However, it is first worthwhile to draw attention to significant studies, which, even more so than McHugh's monumental work, call for a broadly-based historical analysis of the development of European imperial policy with respect to treatment of Indigenous peoples in colonised territories and the transcending influence of liberal ideology even beyond the British Empire.

The potential for developing a broader comparative and transnational historical sociology of colonial law is also pointed to, at least indirectly, in recent publications by the sociologist George Steinmetz on German imperialism and the fashioning of 'native policy' with respect to subject populations in parts of Africa and Asia that fell under German colonial rule during the long nineteenth century.[57] Specifically, in these studies Steinmetz examines the discursive construction of German colonial 'native policy' from the 1780s to 1914, and the specific determinants that affected the varied manner in which it was applied across a range of late-nineteenth century German colonies in southwest Africa, Samoa, and Qingdao (China). While Steinmetz does not deal specifically with colonial law, he raises fundamental sociologically-informed questions about the nature of the colonial state and colonial rule, including the key questions: '[h]ow can we understand the colonial state?'; and '[s]pecifically, what explains variation in "native policy," the cornerstone of colonial rule?'[58] In his attempt to begin to answer these questions, Steinmetz identifies five main determinants that apparently played a role in shaping the colonial state and native policy in different German colonies. Among these he includes: '(1) precolonial ethnographic representations; (2) colonial officials' competitive jockeying with one another for cultural distinction; (3) colonial officials' psychic processes of imaginary identification with the colonized; (4) practices of collaboration and resistance by the colonized, and (5) the structure of the colonized state as a determinant of its own policies.' Arguably, the specific determinants identified by Steinmetz are less important than the fundamental transnational (or at least trans-German colonial) question he addresses in his study, which is the intriguing research question of '[h]ow can we make sense of the dramatically different forms of native policy that were pursued in Imperial Germany's overseas colonies?'[59] More so than the work of McHugh, Steinmetz's

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56 Ibid 118.

57 George Steinmetz, 'Precoloniality and Colonial Subjectivity: Ethnographic Discourse and Native Policy in German Overseas Imperialism, 1780s–1914' in *Political Power and Social Theory* (2002) vol 15, 135; and George Steinmetz, ' "The Devil's Handwriting": Precolonial Discourse, Ethnographic Acuity, and Cross-Identification in German Colonialism' (2003) 45 *Comparative Studies in Society and History* 41.

58 Steinmetz, 'Precoloniality and Colial Subjectivity', above n 57, 135.

59 Ibid 135–6.

line of questioning evokes more nuanced parallel questions about how the colonial state and native policies developed across different British white-settler colonies in the nineteenth century, and about how might we be able to explain these similarities and differences empirically and theoretically? Steinmetz's research also suggests the value of linking the historical study of colonial law to the more general, yet foundational, study of the articulation of metropolitan 'native policy', and the variable manner in which it was implemented across a wider range of both different British and other European-controlled white-settler colonies.

In relation specifically to this theme, it is significant to note that the growing reach of the ideology of 'Euro-American' liberalism in the nineteenth century[60] was by no means restricted to the British Empire. This point is made particularly well in Jennifer Pitts' revealing comparative study of *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France.*[61] According to Pitts, in both Britain and France, the early nineteenth century witnessed a transformation in the nature of liberal thinking, from an approach that was contemplatively critical of European expansion — represented in work of writers like Adam Smith and Edmund Burke (in Britain) and Denis Diderot and Benjamin Constant (in France) — to one, which Pitts refers to as 'liberal imperialism', that embraced and justified European expansion and imperialist projects as a positive civilising force — argued for in the work of authors like James and John Stuart Mill (in Britain) and Alexis de Tocqueville (in France).[62] Like Metha[63] and other students of nineteenth century British colonialism, Pitts recognises how the 'liberal imperialism' that became dominant in both Britain and France by the 1830s 'provided some of the most insistent and well-developed arguments in favor of the conquest of non-European peoples and their territories'.[64] Thus, an approach to the study of the historical development of colonial law that transcends focusing solely on the British Empire would seem to be valuable for the insights it might further reveal about the connections between law, liberalism, and empire. In the following section, I turn to examining a final important related theme: how British colonial historians have gone about researching and explaining the nature of imperial connections and networks of communication that developed across the British Empire during the long nineteenth century.

D *Establishing Imperial Connections*

As I have already alluded to in a number of different contexts, in my view, one of the most important contributions being made today by British colonial historians that is of relevance to the study of colonial legal history is the increasing attention they are giving to examining the various ways in which colonial and metropolitan officials developed their careers and communicated with others across the British

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60 Bayly, above n 5.

61 Pitts, above n 22.

62 Ibid 2.

63 Whom Pitts, above n 22, 63, acknowledges for his persuasive argument in this regard.

64 Pitts, above n 22, 2.

Empire.[65] These kinds of studies are important, first, for the lessons they offer legal historians on how they may be able to approach the task of beginning to map legal imperial connections across the Empire, and more substantively, for the rich comparative and longitudinal data they provide on the careers of British colonial administrators, some of whom took up positions across a number of different colonies in the course of their long careers. Illustrative of these contributions are the recent studies of Zoë Laidlaw, on 'the information revolution and colonial government' from 1815 to 1845 and the career of Richard Bourke,[66] and Leigh Dale on the administrative career of Sir George Grey,[67] in addition to the already discussed significant work of Catherine Hall and Julie Evans on Edward John Eyre.[68] Notably, while they cannot be viewed strictly as 'legal' administrators or judicial officials, as a number of these authors show, governors were nonetheless also routinely central figures in the development and implementation of colonial law.

Laidlaw's analysis of the changing character of 'colonial connections' and networks of communication in the first half of the nineteenth century, primarily across the three sites of Britain, the Cape Colony and New South Wales, is intended, at least in part, to overcome some of the perceived shortcomings of previous work in British imperial history that has tended to either take the form of rather parochial 'single colony studies', or alternatively, has taken an overly one-sided 'metropolitan perspective — usually focusing on the Colonial Office'.[69] The problem with studies that have 'focused on single colonies', Laidlaw points out, is that they have often been 'quite parochial in outlook, more often falsely identifying colonial practices as exceptional than identifying what it was that made each colony different'.[70] On the other hand, Laidlaw argues that studies of the Colonial Office, which have tended to conclude that its operation did not change significantly until 1836 — 'when James Stephen assumed the permanent under-secretaryship of the department, bringing with him a "bureaucratic revolution" which ended "Old Corruption" ' — 'while containing much of interest, display a limited appreciation of the broader colonial sphere'.[71] Drawing on the insights of Alan Lester[72] and others who

65 Hall, above n 1; Elbourne, above n 2; Elizabeth Elbourne, 'Indigenous Peoples and Imperial Networks in the Early Nineteenth Century' in Philip Buckner and R Douglas Francis (eds), *Rediscovering the British Empire* (2005); Lester, above n 2; Lester, 'Humanitarians and White Settlers in the Nineteenth Century', above n 7; Evans, above n 7; Laidlaw, above n 3; Zoë Laidlaw, 'Richard Bourke: Irish Liberalism Tempered by Empire' in David Lambert and Alan Lester (eds), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (2006); Leigh Dale, 'George Grey in Ireland: Narrative and Network' in David Lambert and Alan Lester (eds), *Colonial Lives Across the British Empire: Imperial Careering in the Long Nineteenth Century* (2006).

66 Laidlaw, above n 3; Laidlaw, above n 65.

67 Dale, above n 65.

68 Hall, above n 1; Evans, above n 7.

69 Laidlaw, above n 3, 4.

70 Ibid (citation omitted).

71 Ibid (citation omitted).

72 Lester, above n 2.

have employed the concepts 'of "networks" or "webs" to illuminate both critical connections and structures of empire',[73] Laidlaw offers a detailed and revealing analysis of how personal and official networks of communication between Britain, the Cape Colony and New South Wales operated and changed over the period from 1815 to 1845. In general, Laidlaw contends that '[d]espite the extreme distance and isolation of the colonies — and the latitude this sometimes allowed — colonial governance in the period to 1845 was characterised by imperial appointments and metropolitan centrality'.[74] However, while throughout this period London was a central 'hub of imperial activity and imagination', the ideas, attitudes and personnel tied to administering the British Empire flowed both 'out to the colonies' and 'back to the metropolis'.[75] Within this broader colonial context, Laidlaw identifies and describes specific personal and official networks of communication that linked Britain, the Cape Colony and New South Wales. While the bulk of her attention is focused on examining the official network of colonial governance or 'web of connections' that linked these three sites, Laidlaw also identifies related 'extensive and important networks' including what she refers to as 'the Peninsular, the humanitarian and the scientific' networks, along with other 'professional, family and political networks that had a significant influence on colonial governance'.[76] One of the themes pursued in some depth by Laidlaw is that of whether James Stephen's appointment as the permanent under-secretary in 1836 marked the beginning of a revolution in colonial governance which ended 'a period of stagnation … marked by Colonial Office inefficiency, confusion and corruption'.[77] While acknowledging that many of the operational reforms introduced by Stephen — such as prohibiting personal correspondence between colonial and metropolitan administrators and initiating the practice of adding marginal notes, or minutes, to received incoming correspondence — were an important legacy of his office,[78] according to Laidlaw, the argument that his administration overall marked a radical departure from the previous rather disorganised and corrupt practice that prevailed during the tenure of Stephen's predecessor Robert Hay, is based mainly on the inaccurate biases of earlier historians who have overly-eulogised Stephen's career. Against this line of interpretation, Laidlaw's study of correspondence of the 1820s and 1830s shows that both 'Hay and Stephen shared an appreciation of the problems of the Colonial Office, a broader metropolitan preoccupation with centralising government, and a desire to collect information from (and therefore to control) the colonial empire'.[79]

In her more recent chapter on Governor Richard Bourke, Laidlaw undertakes a more explicit attempt to situate the career of this key colonial administrator of the period within a wider transcolonial context. She notes that while earlier studies of

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[73] Laidlaw, above n 3, 4.

[74] Ibid 17.

[75] Ibid.

[76] Ibid 21. Here Laidlaw also notes that, of the professional networks she identifies, 'the legal and ecclesiastical particularly deserve greater scholarly attention': at 21.

[77] Laidlaw, above n 3, 50.

[78] Ibid.

[79] Ibid 52.

Bourke's career 'treated the British empire as a series of discrete colonial sites',[80] her goal is to consider the British Empire, and Bourke's career across the parts of it that he travelled, 'as an interconnected whole'.[81]

Bourke was born in Dublin in 1777, and educated at Westminster School and Oriel College, Oxford. He joined the Grenadier Guards in 1798 and served in the Netherlands, South America and the Iberian Peninsula, rising to the rank of colonel by 1814. After returning to Ireland where he spent ten years on his Limerick estate, he was appointed to serve as acting Governor of the Cape Colony (from 1826–28) and Governor of New South Wales (1831–37). According to Laidlaw, Bourke 'identified himself variously as British, Irish, a Whig, a Liberal, an Anglican and a Christian'.[82] In addition, Laidlaw notes that Bourke was perceived by the settlers he governed in both the Cape Colony and New South Wales 'as a Whig sympathiser and a man of "*liberal* principles"'. Indeed, Laidlaw shows that his 'reputation in the press of the Eastern Cape colony, as a governor whose humanitarian attitudes towards the Khoi people left him unconcerned with settler rights, was picked up and reinforced by the New South Wales' newspapers even before Bourke arrived in that colony'.[83]

While serving as acting Governor and Lieutenant Governor of the Easter Cape, in 1828, Bourke introduced Ordinance 50, which recognised the Khoisan people as free people who deserved the full protection of English law. While Ordinance 50 'went some way in asserting — on paper at least — the legal equality of the indigenous Khoi people to European settlers', Bourke was also responsible for introducing a conjoint Ordinance 49, which 'imposed stricter pass laws on Xhosa and other Africans who entered the colony in search of work'; rationalising that both ordinances would help 'to protect indigenous peoples from more powerful settlers'.[84]

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[80] Specifically, Laidlaw cites Hazel King, 'Sir Richard Bourke and His Two Colonial Administrations: A Comparative Study of the Cape Colony and NSW' (1964) 49 *Journal of the Royal Australian Historical Society* 360, and King's subsequent book-length biography of *Richard Bourke* (1971): Laidlaw, above n 65.

[81] Laidlaw, above n 65, 113.

[82] Ibid 115.

[83] Ibid 116.

[84] Ibid 124–5. More detailed complementary accounts of Bourke's role in the enactment of Ordinances 49 and 50 are provided by Elbourne, above n 2, and Lester, above n 2. According to Elbourne, 'Bourke was himself sympathetic to Khoisan concerns before coming to the Cape, and while there had been further influenced by the proposals of Andries Stockenstrom for the reform of Khoisan status': at 254–5. She notes that the cumulative effect of Ordinances 49 and 50 was 'the abolition of de facto vagrancy legislation, whether it affected labourers trying to enter the colony or farmers attempting to tie their labourers to themselves in perpetuity', and that these legislative initiatives by Bourke were 'very much in line with the metropolitan drive to abolish vagrancy legislation in England itself'. Elbourne, above n 2, 257, also notes that it was soon after this that Bourke left the Cape Colony, 'having earned the opprobrium of settlers for Ordinance 50'. In his similar account of the passage of Ordinance 50, and its later ratification by the British Parliament, Lester, above

In New South Wales, Bourke was also subject to the odium of settlers for his adherence to liberal principles. Specifically, Laidlaw shows that because of the reputation that preceded him, 'Bourke's perceived humanitarian stance towards one colony's indigenous peoples was easily translated into a hostile comment on his support for convicts and emancipated convicts in another', and that 'Bourke's Irishness was also a reason for hostile comment'. More specifically, Laidlaw notes that in New South Wales, 'Bourke's advancement of Catholic lawmakers, like solicitor general Roger Therry and attorney general John Plunkett, and his plans for non-denominational schools, were attributed by Protestant elites to the Governor's Irishness'.[85] Bourke's tenure as Governor of New South Wales was also made difficult because he was identified as having close ties to Colonial Office officials in London, and because he was known to hold a similar humanitarian view of the treatment of Indigenous peoples. According to Laidlaw, Bourke fitted

> within the paternalistic and humanitarian tradition represented by James Stephen in the Colonial Office and other moderate evangelicals. Bourke did not think about indigenous peoples primarily in terms of 'race', but instead by their degree of difference — like the poor of Ireland, or the convicts transported to New South Wales — from himself. Bourke, like many of his contemporaries, understood 'race' in cultural rather than biological terms and possessed an essentially optimistic view of indigenous peoples: they, like others below him on the scale of class or nation, were amenable to improvement, and could be 'civilised' (which would eventually entail conversion to Christianity).[86]

In essence, Laidlaw shows the continuity in Bourke's approach to dealing with Indigenous peoples during his governorships in both the Cape Colony and New South Wales. More specifically, she notes that

> Bourke's view of indigenous peoples did not change significantly between 1826 and 1838, although his optimism about their capacity to be "civilised" diminished. Consistently, his concern was to minimise the threat of disharmony, while creating the conditions in which settlers could thrive and indigenous peoples — whether Khoi, Xhosa, or Australian Aborigines — could be protected and improved by contact with Christian missionaries and fair-minded government officials.[87]

The life led by Sir George Grey also exemplifies the immense interpretive value of viewing colonial careers across the British Empire as part of 'an interconnected

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n 2, 34, notes that the ordinance in effect 'abolished the pass laws and released the Khoesan from the legal requirements which bound them and other free blacks to serve … colonists' and that it furthermore 'explicitly recognized their right to own land'.

85 Laidlaw, above n 65, 116.

86 Ibid 123.

87 Ibid 130.

whole'.[88] Leigh Dale's chapter on Sir George Grey is only the latest account of many that have been written about the famous one-time Governor of South Australia, New Zealand and the Cape Colony.[89] However, Dale's analysis differs significantly from previous accounts in that she focuses substantially on attempting to re-examine and explain contradictions and inconsistencies in the colonial policies and governing practices Grey supported over the course of his long career as a controversial British colonial administrator. Central to Dale's analysis is her reassessment of the effect of Grey's early experience as a military officer serving with the 83rd Foot Regiment 'Royal Irish Rifles', which involved him in undertaking periods of service at different postings across both the south and north of Ireland between 1830 and 1834. As a junior officer in the British 'occupying army in Ireland',[90] these postings included Grey being assigned to be 'on guard at nationalist political meetings' and to escort 'church officials to collect tithes' from the Irish;[91] experiences which, Grey's later favourable biographers were to claim he found morally disturbing and consequently helped him to develop his personal 'radical' liberal-humanitarian views on how the British government should treat colonised Indigenous peoples. From her re-examination of Grey's time in Ireland, Dale contests the view that it was because of the brutal political and religious oppression he saw there that he resigned from the army and later took up a career as a renowned 'liberal' colonial civil administrator.[92] Indeed, Dale points to evidence, both from his time in Ireland, and his later exploits as an explorer of western Australia and famed colonial Governor, of Grey's 'single-minded ambition', 'ruthlessness', and 'his authoritarianism, and his willingness to seek and to deploy patronage in furthering his own career and interests'.[93] For example, while early in his career, as the resident magistrate in Albany in the late 1830s, and as Governor of South Australia after 1841, Grey frequently 'sought the patronage of known evangelicals such as James Stephen and Lord John Russell at the Colonial

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88 Ibid 113.

89 Dale, above n 65. Earlier biographies of Sir George Grey include: Edmund Bohan, *To be a Hero: Sir George Grey, 1812–1898* (1998); and James Rutherford, *Sir George Grey, KCB, 1812–1898: A Study in Colonial Government* (1961). Biographical accounts of Grey can also be found in: Mark Francis, *Governors and Settlers: Images of Authority in the British Colonies, 1820–60* (1992); James Cameron, 'Agents and Agencies in Geography and Empire: The Case of George Grey' in Morag Bell, Robin Butlin and Michael Heffernan (eds), *Geography and Imperialism, 1820–1940* (1995); and James Gump, 'The Imperialism of Cultural Assimilation: Sir George Grey's Encounter with the Maori and the Xhosa, 1845–1868' (1998) 9 *Journal of World History* 89.

90 Dale, above n 65, 145.

91 Ibid 158–9.

92 Specifically, Dale, above n 65, 145, shows that Grey probably spent between three-and-a-half or four years in Ireland, rather than the six years claimed in previous biographies, and that rather than resigning from the army at the end of his posting in Ireland, '[h]e returned to the Senior Military Academy at Sandhurst for further study'. Moreover, she suggests that, rather than his experience in Ireland having forged any sort of fervent humanitarian-liberalism, 'during this period he learned the political philosophies, and the rhetorical and material strategies of domination, that would inform his viceregal rule'.

93 Ibid 155.

Office', Dale notes that this does not mean 'that Grey himself could be categorised as an evangelical Christian' as 'aspects of his self-presentation showed a singular flexibility'.[94] According to Dale, as a colonial administrator

> Grey did not so much adapt in response to particular situations — take with him lessons from one place to another — as he claimed to have done, but rather … he laid over each colonial place the ideas about 'native peoples' that were part of his general philosophy of the relationship between society and the individual, views which gave primacy to instilling a rudimentary version of middle-class notions of self-help.[95]

By developing this type of more nuanced character profile of Grey, Dale helps to shed light on apparent contradictions and inconsistencies in the colonial policies and governing practices Grey supported, and the frequent controversies that surrounded him as Governor. While Grey was Governor of New Zealand (from 1845 to 1854 and 1861 to 1867) 'he managed to please and antagonize almost every sector of the population from missionaries to the New Zealand Company', and while professing to be a friend of the Maori, in his first eight years as Governor, he negotiated the purchase of 'nearly 30 million acres of Maori land in the South Island and about 3 million acres in the North Island'.[96] As Governor of the Cape Colony (from 1854 to 1859 and 1860 to 1861), Grey's reputation was again 'made and unmade', often through decisions and reforms he made that irritated both 'liberal' and 'hardline' colonists. As Dale notes:

> He reduced the expenditure that the colony had absorbed in previous decades through a series of devastating wars, and significantly improved the colony's civic and industrial infrastructure, but was derided by liberal and hardline colonists alike for what was seen either as uncompromising brutality towards or excessive accommodation of indigenous peoples.[97]

Moreover, at least in the later part of his career, Grey also managed to antagonise his political superiors in the Colonial Office, as in 1859 when he was recalled 'for disobedience in prematurely (albeit prophetically) advocating the union of the English and the Boer republics, but subsequently reappointed … before successfully pleading to return to New Zealand in 1861'.[98]

As I have attempted to illustrate through the above examples, the research of noted recent British colonial historians who have undertaken the study of imperial connections and networks of communication across the British Empire provides a rich body of comparative and longitudinal data on the careers of important nineteenth century metropolitan and colonial administrators as well as

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94 Ibid 161.

95 Ibid 174.

96 Ibid 147 (citing Rutherford, above n 89).

97 Ibid 149.

98 Ibid.

methodological lessons for legal historians on how they may be able to approach the task of beginning to map legal imperial connections across the Empire. In the next part of this article, I review some of the important work now being done by legal historians who have already begun venturing into this field of research.

III Approaches to Mapping the Development of English Colonial Law

> There is, indeed, no engine of civilisation more powerful than the equitable administration of wise laws.[99]

It is only relatively quite recently that Anglo-American and British legal historians have begun to advocate explicitly comparative and transnational approaches to the study of colonial legal history.[100] Despite the still rather embryonic state of research

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[99] John Rosselli, *Lord William Bentinck: The Making of a Liberal Imperialist, 1774–1839* (1974), cited in Andrew Porter, 'Trusteeship, Anti-slavery, and Humanitarianism' in Andrew Porter (ed), *The Oxford History of the British Empire: The Nineteenth Century* (1999) vol 3, 201.

[100] See, eg, Lauren Benton, 'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State' (1999) 41 *Comparative Studies in Society and History* 563; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002); John Comaroff, 'Colonialism, Culture, and the Law: A Foreword' (2001) 26 *Law and Social Inquiry* 305; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in Georgia and New South Wales, 1788–1836* (PhD thesis, Columbia University, 2007); Hamar Foster, Andrew Buck and Ben Berger (eds), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (2008); Barry Godfrey, Clive Emsley and Graeme Dunstall (eds), *Comparative Histories of Crime* (2003); Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999); Andrew Graybill, *Policing the Great Plains: Rangers, Mounties, and the North American Frontier, 1875–1910* (2007); Louis Knafla and Susan Binnie, 'Beyond the State: Law and Legal Pluralism in the Making of Modern Societies' in Louis Knafla and Susan Binnie (eds), *Law, Society, and the State: Essays in Modern Legal History* (1995); John McLaren, 'Reflections on the Rule of Law: The Georgian Colonies of New South Wales and Upper Canada, 1788–1837' in Diane Kirkby and Catherine Coleborne (eds), *Law, History, Colonialism: The Reaches of Empire* (2001); John McLaren, 'The Judicial Office... Bowing to no Power but the Supremacy of the Law: Judges and the Rule of Law in Colonial Australia and Canada, 1788–1840' (2003) 7 *Australian Journal of Legal History* 177; John McLaren, 'The King, the People, and Law... and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Upper Canada' in Jonathan Swainger and Constance Backhouse (eds), *People and Place: Historical Influences on Legal Culture* (2003); John McLaren, 'Men of Principle or Judicial Ratbags? The Trials and Tribulations of Maverick Judges in British Colonies in the Nineteenth Century' (Paper presented to the University of Toronto Legal History Group, 2006); John McLaren, 'The Early British Columbia Judges, the Rule of Law and the "Chinese Question": The California and Oregon Connection' in John McLaren, Hamar Foster and Chet Orloff (eds), *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (1991); John McLaren, A R Buck, and Nancy E Wright (eds), *Despotic Dominion: Property Rights in British Settler Societies* (2004); Peter Karsten, *Between Law and Custom: 'High'*

of this kind, significant theoretical, methodological, and substantive contributions have been made by scholars working in this field. While the analytical approaches and substantive foci of individual authors are diverse and not easy to categorise, the burgeoning comparative and transnational legal-historical scholarship relevant to understanding (or mapping) various patterns of development of English colonial law in the nineteenth century has been undertaken in primarily three different, but overlapping, ways: first, through the study of the personal biographies of legal administrators and judicial officials who 'careered across the empire'; secondly, through the comparative study of the development of legal institutions and practices (such as colonial policing and the application of colonial criminal law to Indigenous peoples); and thirdly, and more uniquely, through the approach of attempting to explore and document the challenges faced by Colonial Office officials in England (like James Stephen, Jr) who sought to fashion and implement a system that would produce relative uniformity in the manner in which English law was applied across all of Britain's nineteenth century slave and white-settler colonies. In the following section of this article, I provide illustrative examples of each of these types of research to draw out the manner in which they may be seen to collectively contribute to advancing the broader project of mapping different imperial legal connections across the British Empire.

A *Legal Careering Across the Empire*

Just as Zoë Laidlaw and others have shown in their work on governors and other colonial bureaucrats who spent a good part of their lives careering across the Empire, colonial judicial officials and legal administrators also often had similar transnational, or at least inter-colonial, careers. While there is an abundance of national-biographical literature on the lives of colonial judges in different

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and 'Low' Legal Cultures in the Lands of the British Diaspora: the United States, Canada, Australia and New Zealand, 1600–1990 (2002); Greg Marquis, 'Policing Two Imperial Frontiers: The Royal Irish Constabulary and the North-West Mounted Police' in Louis Knafla and Jonathan Swainger (eds), *Laws and Societies in the Canadian Prairie West, 1670–1940* (2005); McHugh, above n 52; David Philips, 'William Augustus Miles (1796–1851): Crime, Policing, and Moral Entrepreneurship in England and Australia' in Jonathan Swainger and Constance Backhouse (eds), *People and Place: Historical Influences on Legal Culture* (2003); Jeannine Purdy, *Common Law and Colonised Peoples: Studies in Trinidad and Western Australia* (1997); Jane Samson, *Imperial Benevolence: Making British Authority in the Pacific Islands* (1998); Jane Samson, 'British Voices and Indigenous Rights: Debating Aboriginal Legal Status in Nineteenth-Century Australia and Canada' (1997) 2 *Cultures of the Commonwealth* 5; Smandych, 'The Exclusionary Effect of Colonial Law', above n 21; Smandych, 'Contemplating the Testimony of "Others"', above n 21; Smandych, 'The Cultural Imperialism of Law' above n 21; Damen Ward, *The Politics of Jurisdiction: 'British' Law, Indigenous Peoples and Colonial Government in South Australia and New Zealand, c 1834–1860* (PhD thesis, University of Oxford, 2003); Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia' (2003) 1 *History Compass* 1; Damen Ward, 'Constructing British Authority in Australasia: Charles Cooper and the Legal Status of Aborigines in the South Australian Supreme Court, c 1840–1860' (2006) 34 *Journal of Imperial and Commonwealth History* 483; Wiener, above n 53.

nineteenth century British colonies,[101] with the exception of the widely-respected and continuing work of John McLaren, little however has been written on the lives of judges who, sometimes voluntarily, and sometimes by necessity, moved from one colony to another over the course of their legal careers. McLaren's corpus of work includes comparative studies on: judges and the rule of law in colonial Australia and Canada, with a particular focus on New South Wales and Upper Canada;[102] the influence of Irish lawyers on colonial debates over constitutionalism and law;[103] the disciplining of maverick judges in British colonies in the nineteenth century;[104] and the 'ideological similarities' reflected in the manner in which judges in British Columbia, California and Oregon, viewed 'the role of the courts in the constitutional process', as revealed in their decisions in late-nineteenth century anti-Chinese discrimination cases.[105] Although the geographical and temporal scope of McLaren's research is wide-reaching, there are a number of themes that may be seen to underscore much of his comparative work. These include the careful and sensitive attention he has given to issues of the fluidity of the concept of 'the rule of law' and the fragility of the concept of judicial independence in colonial settings. McLaren's work is also important for what it reveals about the lives of individual judges, such as Forbes, Thorpe, Willis, and Gorrie, who through either their own volition, or to escape unpleasant political and legal quagmires into which they were sinking, either sought other career opportunities in other colonies or returned to Britain.[106] McLaren's novel and richly-detailed studies of the careers of

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[101] Recent examples of this include: J M Bennett, *Sir Charles Cooper: First Chief Justice of South Australia, 1856–1861* (2002); Alex Low, 'Alfred Stephen and the Reform of the Court System in Van Diemen's Land' (2005) 9 *Australian Journal of Legal History* 19; Louis Knafla and Richard Klumpenhouwer, *Lords of the Western Bench: A Biographical History of the Judges of Alberta* (1997); Roderick G Martin, 'Macleod at Law: A Judicial Biography of James Farquharson Macleod, 1874–94' in Jonathan Swainger and Constance Backhouse (eds), *People and Place: Historical Influences on Legal Culture* (2003); Roderick G Martin, 'The Common Law and Justices of the Supreme Court of the North-West Territories: The First Generation, 1887–1907' in Louis Knafla and Jonathan Swainger (eds), *Laws and Societies in the Canadian Prairie West, 1670–1940* (2005); David Williams, 'Fame and Infamy: Two Men of the Law in Colonial New Zealand' in Ben Berger, Andrew Buck and Hamar Foster (eds), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (2008) 135.

[102] McLaren, 'Reflections on the Rule of Law' above n 100; McLaren, 'The Judicial Office', above n 100.

[103] McLaren, 'The King, the People, and Law', above n 100.

[104] McLaren, 'Men of Principle or Judicial Ratbags?', above n 100.

[105] McLaren, 'The Early British Columbia Judges, the Rule of Law and the "Chinese Question"', above n 100, 244.

[106] Francis Forbes was born and educated in Bermuda, where he also served for a time as Attorney-General before being appointed as Chief Justice of the Supreme Court of Newfoundland in 1816, and as Chief Justice of the Supreme Court of New South Wales in 1823, Robert Thorpe was born in Ireland and educated at Trinity College before being appointed as Chief Justice of Prince Edward Island in 1801, Judge of the Court of King's Bench of Upper Canada in 1805, and Chief Justice of the Vice-Admiralty Court in Sierra Leone in 1808. John Walpole Willis was removed from office as Justice of the Court of King's Bench of Upper Canada in 1828, before

colony judges both exemplify and attest to the importance of this type of research for advancing the collective project of mapping diverse forms of imperial legal connections across the British Empire. In the following section, I turn to reviewing recent work bearing on the comparative study of the development of colonial legal institutions and practices, including the institution of colonial policing and the application of colonial criminal law to Indigenous peoples, which further reveal the value of transcolonial research.

B *Developing Legal Institutions and Practices*

Colonial policing and the application of colonial criminal law to Indigenous peoples were just two of the myriad ways in which Europeans asserted their sovereignty and rule over colonial lands. Nevertheless, both were instrumentally and symbolically important mechanisms for crushing the resistance of, and establishing authority over Indigenous peoples. However, as in the case of histories of the colonial judiciary, while there is a substantial regional and national-historical literature on these topics,[107] there is relatively little published or ongoing research that approaches the study of colonial policing and the application of English law to Indigenous peoples across the British Empire from an explicitly comparative perspective. In the following discussion, I highlight a few exceptions to this trend that again may be seen to collectively contribute to advancing the broader project of mapping different imperial legal connections across the British Empire.

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being appointed as Vice-President of the Court of Civil and Criminal Justice of British Guiana in 1831, and Judge of the Supreme Court of New South Wales in 1837. John Gorrie was a Scottish trained lawyer who went to Jamaica (as a journalist and lawyer) after 1865 to investigate 'Governor Eyre's massacres', and who later in turn become a judge in Mauritius and Chief Justice of Fiji, the Leeward Islands and Trinidad and Tobago: McLaren, 'Men of Principle or Judicial Ratbags?', above n 100, 7. Gorrie's emblematic career is also the subject of an extensive biography by Professor Bridget Brereton of the University of the West Indies, St Augustine, Trinidad: Bridget Brereton, *Law, Justice and Empire: The Colonial Career of Sir John Gorrie 1929–1892* (1997). I would like to thank the anonymous reviewer who brought this book to my attention.

[107] The well-trodden history of the Royal Canadian Mounted Police (RCMP) and its predecessor, the North-West Mounted Police (NWMP), is a good example of this, in connection with historiographies of colonial policing. See, Keith Walden, *Visions of Order: The Canadian Mounties in Symbol and Myth* (1982). There are also voluminous regional and national legal-historical literatures retelling stories of the treatment of indigenous peoples in individual Anglo-American and British-colonial legal systems, much of which McHugh, above n 52, distills in his impressive work on the topic. Significant regional and national studies of colonial policing in Australia and New Zealand include: Mark Finnane, *Police and Government: Histories of Policing in Australia* (1994); Richard Hill, *Policing the Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767–1867* (1986); Amanda Nettelbeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (2007); and Jonathan Richards, *The Secret War: A True History of Queensland's Native Police* (2008), although Richard's book also includes a significant attempt at comparing colonial policing across jurisdictions.

1 *Colonial Policing*

Recognising the heuristic value of studying colonial policing from a comparative perspective is not entirely new, as there are a few notable examples of early research carried out along these lines, particularly in the North American (Canadian–United States) context,[108] and also in relation to North America and Australia.[109] However, it is only relatively recently that criminal justice and legal historians have begun to undertake more broadly-based and detailed comparative studies of nineteenth century Anglo-American and British colonial policing.[110] One example of this is the work of Mathieu Deflem, which examines the fundamental characteristics of colonial police organisations and policing activities in the former British colonies of Nyasaland (Malawi), the Gold Coast (Ghana), and Kenya.[111] In a manner similar to Deflem, Randall Williams explores conditions in Ireland that served as the basis upon which new conceptions of modern policing, repression and exclusion began to spread throughout the British Empire, arguing that coercive paramilitary police forces have always been a primary method by which Indigenous structures of law and justice have been actively undermined in British colonies.[112] Greg Marquis also recognises the formative influence of the colonial policing of Ireland and the Royal Irish Constabulary (RIC) as a model for other colonial police forces, including the Canadian North West Mounted Police (NWMP). Marquis argues that like the RIC, the NWMP was an armed paramilitary force created

108 Desmond Morton, 'Cavalry or Police: Keeping the Peace on Two Adjacent Frontiers, 1870–1900' (1977) 12 *Journal of Canadian Studies* 27; Robin Fisher, 'Indian Warfare and Two Frontiers: A Comparison of British Columbia and Washington Territory during the Early Years of Settlement' (1981) 50 *Pacific Historical Review* 31.

109 Paul Sharp, 'Three Frontiers: Some Comparative Studies of Canadian, American, and Australian Settlement' (1955) 24 *Pacific Historical Review* 369.

110 Graybill, above n 100; Marquis, above n 100; Philips, above n 100; Richards, above n 107; Mathieu Deflem, 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' 17 *Journal of Police Studies* 45; Mitchel Roth, 'Mounted Police Forces: A Comparative Study' (1998) 21 *Policing: An International Journal of Police Strategies and Management* 707; Randall Williams, 'A State of Permanent Exception: The Birth of Modern Policing in Colonial Capitalism' (2003) 5 *Interventions: International Journal of Postcolonial Studies* 322. I am indebted to Fadi Ennab for his research assistance and for his permission for me to base part of my following discussion of recent comparative research on colonial policing on his current work in progress for his University of Manitoba sociology Master's thesis on 'Violence on the Western Canadian Frontier: A Socio-Historical Study'.

111 Deflem, above n 110, examines 'the organization of the colonial police forces' and 'the way they operated within the wider realm of political and economic colonial rule, as well as their functions and changing nature overtime'. He concludes that in all three African countries colonial policing was initially paramilitary in nature and aimed at subjugating Indigenous people through coercive control, and that in each of the colonies early police forces consisted of both 'imposed control units' routinely lead by European military-trained officers and 'tribal law enforcement forces' who were typically native police officers 'who did not serve in their own region of origin or residence'.

112 Williams, above n 110, 343.

to assert sovereignty and impose central-government control over a potentially troublesome 'Imperial frontier'. However, he shows that while the two colonial police forces often shared much in common 'in terms of recruitment, training, promotion, conditions of service, and relations with the public', they also reflected 'fundamental contrasts' in the nature of colonial policing across different Imperial frontiers.[113] Most recently, in the Anglo-American context, Andrew Graybill has produced a richly-textured comparative study of policing the north and south 'Great Plains' of western Canada and the State of Texas, drawing out commonalities and contrasts in the role played by the NWMP and Texas Rangers in 'subjugating indigenous groups', 'dispossessing peoples of mixed ancestry', 'defending the cattleman's empire', and 'policing the industrial frontier'.[114]

Arguably the most significant recent addition to the secondary literature on colonial policing is Jonathan Richards' study of the history of native police in Queensland. Richards' study builds on earlier Australian regional and national studies of colonial policing that have highlighted the important role played by native police forces, while at the same time he argues the need for more attention to the transcolonial dimensions of native policing across the British Empire.[115] Richards shows that 'Queensland's Native Police' force, which consisted of constables who were mainly recruited from outside Queensland and who usually operated under orders from non-native senior officers, 'was clearly modeled on other formations of Indigenous armed forces', and that '[s]imilar groups were raised in the West Indies, Africa and North America'.[116] Moreover, he points out that '[i]n other

[113] Marquis, above n 100, 187, 205. Marquis argues that the main contrast between the two forces was that while the imperial policing mandate of the NWMP 'was mostly depoliticized and therefore successful in the long run', the mandate of the RIC was 'overtly political' and perceived on all sides to be partisan. Finnane, above n 107, also elaborates on the connection between the Irish experience and the development of colonial policing in Australia. For more detailed studies of policing in pre-independence Ireland, see: Stanley Palmer, 'The Irish Police Experiment: The Beginnings of Modern Police in the British Isles, 1785–1795' in Ian O'Donnell and Finbarr McAuley (eds), *Criminal Justice History: Themes and Controversies from Pre-Independence Ireland* (2003); and Ian Bridgeman, 'The Constabulary and the Criminal Justice System in Nineteenth-Century Ireland' in Ian O'Donnell and Finbarr McAuley (eds), *Criminal Justice History: Themes and Controversies from Pre-Independence Ireland* (2003).

[114] Graybill, above n 100.

[115] Richards, above n 107.

[116] Ibid 184. Although in the end, in the Canadian west the NWMP were not constituted as a native police force, Marquis points out that prior to the resistance led by the Métis to the Canadian government's assertion of sovereignty over western Canada in 1869–1870, the NWMP was 'envisioned as a Native force' and initially 'Prime Minister Macdonald had thought of the Mounted Police as largely Métis or mixed-blood, following the British practice of India, the West Indies, and Africa, where security forces were officered by Europeans but recruited from the local population': Marquis, above n 100, 188. Also, it is significant that while they were not formally incorporated into the rank-and-file of the NWMP, 'native scouts' and native-language interpreters played an indispensable role in the policing of the Canadian west. See, eg, Hugh Dempsey, *Charcoal's World: The True Story of a Canadian*

parts of Australia, in other British colonies and in other European empires, armed Indigenous forces performed similar functions to the Native Police of Queensland, using almost identical tactics'.[117] Richards also notes the transcolonial backgrounds of non-native officers, showing that 'a number of officers in the Native Police were former members of British armed forces, and fought in other parts of the Empire', while others 'were the sons of army officers'.[118] As Amanda Nettelbeck and Robert Foster have similarly documented in their recent study of native policing in South Australia,[119] Richards argues that under the tutelage of European officers, the native police of Queensland participated in a campaign of 'racial violence' that was 'largely accepted and widely practised on the Queensland frontier'.[120] However, Richards also generalises more broadly that while 'colonialism washed across Australia, [and] racial violence took place all along the frontier … [v]iolence and terror against Indigenous people' were also 'central components of European imperialism everywhere'.[121]

2 *The Application of Colonial Criminal Law to Indigenous Peoples*

As noted earlier in this article, P G McHugh has perceptively argued that although by the 1830s the Marshall court decisions in the United States had led to an acceptance of 'a doctrine of residual tribal sovereignty', the British rejected this approach and instead 'lurched from episode to episode in the second quarter of the nineteenth century towards a more absolutist and thoroughgoing concept of Crown sovereignty over tribal peoples'. McHugh also specifically notes that this process of the gradual assertion of Crown sovereignty 'came about mostly through the need to define more precisely the Crown's criminal jurisdiction over the tribes as British settlement spread in the post-Napoleonic period'.[122] Consequently, it would appear from McHugh's argument that the study of how English criminal law came to be applied to Indigenous peoples across different British white-settler colonies may be considered to be centrally important in attempting to determine how legal and governmental authority was asserted over Indigenous peoples across the British Empire. Not surprisingly, over the years numerous British colonial legal historians have examined the development of criminal law jurisdiction over Indigenous

Indian's Last Stand (1998); Rodger Touchie, *Bear Child: The Life and Times of Jerry Potts* (2005).

117 Richards, above n 107, 9.

118 Ibid 7.

119 Nettelbeck and Foster, above n 107.

120 Richards, above n 127.

121 Ibid 15. It bodes well for future research on this theme that the pre-eminent historian of New Zealand policing, Professor Richard Hill of the Stout Research Centre at the University of Victoria Wellington, has recently been awarded a prestigious Marsden Fund award to undertake a multi-year comparative study of policing indigenous peoples across the British and French empires in the nineteenth and twentieth centuries: personal communication, November 2008.

122 McHugh, above n 52, 117.

peoples separately in different nineteenth century British white-settler colonies.[123] However, as in the case of legal-historical research on colonial judges and colonial policing, to date few of these studies have been explicitly comparative in nature. In the following discussion, I again highlight exceptions to this by reviewing the work of the few authors who, in addition to McHugh, have undertaken relevant comparative research.

Lauren Benton's work provides an essential starting point for re-examining the manner in which Indigenous peoples across a range of European empires were

[123] On Canada, see, eg, Harring, above n 53; Kathryn Bindon, 'Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839–54' in David H Flaherty (ed), *Essays in the History of Canadian Law,* (1981) vol 1; Hamar Foster, '"The Queen's Law is Better Than Yours": International Homicide in Early British Columbia' in Jim Phillips, Tina Loo, and Susan Lewthwaite (eds), *Essays in the History of Canadian Law: Crime and Criminal Justice* (1994) vol 5; John Pratt, 'Aboriginal Justice and the Good Citizen: An Essay on Population Management' in Kayleen Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (1995); Mark Walters, 'The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the Shwanakiskie Case (1822–26)' (1996) 46 *University of Toronto Law Journal* 273.

On Australia, see, eg, Barry Bridges, 'The Extension of English Law to Aborigines for Offences Inter Se, 1829–1842' (1973) 59 *Journal of the Royal Australian Society* 264; Alex Castles, *An Australian Legal History* (1982); Susanne Davies, 'Aborigines, Murder and the Criminal Law in Early Port Philip, 1841–1851' (1987) 22 *Australian Historical Studies* 313; Julie Evans, 'Colonialism and the Rule of Law: The Case of South Australia' in Barry Godfrey and Graeme Dunstall (eds), *Crime and Empire 1840–1940: Criminal Justice in Local and Global Context* (2005); Ann Hunter, 'The Boundaries of Colonial Criminal Law in Relation to Inter-Aboriginal Conflict ("Inter Se Offences") in Western Australia in the 1830s and 1840s' (2004) 8 *Australian Journal of Legal History* 215; Bruce Kercher, 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824–1836' in A R Buck, John McLaren and Nancy E Wright (eds), Land and Freedom: Law, Property Rights and the British Diaspora (2001); Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995); S D Lendrum, 'The "Coorong Massacre": Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26; Alan Pope, *Aborigines and the Criminal Law in South Australia: The First Twenty Five Years* (PhD thesis, Deakin University, 1998); Nancy E Wright, 'The Problems of Aboriginal Evidence in Early Colonial New South Wales' in Diane Kirkby and Catherine Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (2001).

On New Zealand, see, eg, Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847* (1977); John Pratt, *Punishment in a Perfect Society: The New Zealand Penal System, 1840–1939* (1992); Robert Joseph, '*The Government of Themselves': Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852* (2002).

On the Cape Colony, see, eg, Wayne Dooling, *Law and Community in a Slave Society: Stellenbosch District, South Africa, c 1760–1820* (1992); Richard Elphick, *Khoikhoi and the Founding of White South Africa* (1985); H R Hahlo and Ellison Kahn, *The South African Legal System and its Background* (1968).

made subject to laws enacted for colonial states, including criminal laws.[124] In her book on *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*, Benton argues that throughout European history law has 'worked both to tie disparate parts of empires and to lay the basis for exchanges of all sorts between politically and culturally separate imperial or colonial powers'.[125] Impressively, her research covers legal regimes ranging from those that existed in early Catholic and Islamic empires, to those put into place by European colonisers in Bengal, West Africa, the Cape Colony and New South Wales, and Uruguay. In the course of this sweeping comparative historical analysis, she manages to offer a number of intriguing generalisations. Benton contends that world history in the period from 1400 to 1900 witnessed a shift from the 'multicentric law of early modern empires to the state-centered law of high colonialism'. Somewhat like McHugh, she contends that whereas in the early modern world 'the special legal status of cultural and religious minorities provided institutional continuity across empires',[126] the development of European-controlled colonial regimes in the nineteenth century embodied a movement toward the more uniform treatment of Indigenous peoples and 'cultural others' which was achieved increasingly through the formal creation and application of 'state-centred law'. At the heart of Benton's thesis is the argument that the development of colonial legal regimes in the nineteenth century occurred at least 'in part as a response to conflicts over the legal status of indigenous subjects and cultural others'.[127] Specifically, she contends that from the late eighteenth century on increased attention was 'focused in particular on debates about the legal status of indigenous peoples and, especially, the definition of roles for cultural and legal intermediaries', and in the course of these debates, '[l]egal actors played upon these tensions in crafting legal strategies that often involved appeals to state law, even before the colonial state had articulated claims to sovereignty'.[128]

Benton employs this legal-pluralist approach to ground a comparative-historical analysis of apparent changes in the status and treatment of Indigenous peoples over time and in a range of different European-controlled colonial regimes. In doing so, particular attention is given to the experience of Indigenous peoples as 'subjects and witnesses' in the colonial criminal courts of the Cape Colony and New South Wales.[129] From her study of these two jurisdictions, Benton concludes that 'colonial legal politics produced substantially different outcomes'. Whereas in the Cape Colony 'establishing British hegemony over Dutch-descended settlers involved the strategic acceptance of indigenous Khoi as legal witnesses and litigants', in New South Wales 'the conflict over the legal status of convict settlers encapsulated debates about the legal standing of Aborigines and reinforced their systematic exclusion as legal actors'; the result being that in New South Wales, Aborigines

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[124] Benton, 'Colonial Law and Cultural Difference', above n 100; Benton, *Law and Colonial Cultures*, above n 100, 3.

[125] Benton, above n 100, *Law and Colonial Cultures* 3.

[126] Ibid preface.

[127] Ibid.

[128] Ibid 6.

[129] Ibid ch 5.

never achieved the same legal status as whites.[130] Despite these different politically influenced outcomes, Benton maintains that in broader structural terms the two cases (of the Cape Colony and New South Wales) were similar in that they both represented a shift from a form of 'weak' to a form of 'strong' legal pluralism, in which state law became dominant.[131]

While Benton has produced an exemplary study and useful model upon which to base future transnational research, her specific comparative analysis of the Cape Colony and New South Wales is arguably open to criticism. In my own research on debates over the admissibility of Aboriginal evidence in the criminal law courts of New South Wales, Western Australia, and South Australia, I criticise Benton for the selective use of New South Wales in her comparative analysis, noting that a possible weakness of her study is that she chose either the wrong jurisdictions, or too few jurisdictions, to include in an adequate comparative study of the application of English criminal law to Indigenous peoples across different nineteenth century British colonies.[132] One reason for this is that even within Australia the experiences of different settler colonies were unique. Whereas it was not until 1876 that legislation was passed in New South Wales to make the unsworn testimony of Aboriginal peoples readily admissible in courts of law,[133] local ordinances to this effect were enacted under different circumstances in Western Australia and South Australia in the 1840s. In addition, I argue that Benton does not give careful enough attention to other evidence of the increasing appearance of Aborigines in criminal court proceedings in New South Wales in the 1830s and 1840s, which points in the opposite direction of the courts beginning to treat Aborigines as full legal actors for criminal trial purposes, except for their inability to provide direct testimony in court. The questionable adequacy of the jurisdictional scope of Benton's comparative study is also suggested in more broadly-based research I have undertaken on the prosecution of *inter se* offences,[134] and in particular on the question, or conundrum, of how colonial judges, such as Adam Thom, the first legal-trained recorder of Rupertsland, then under the jurisdiction of the Hudson Bay Company, came to decide they had the power to try the *inter se* offence of murder, and pronounce the death sentence on those who were convicted.[135] In this study, an examination of evidence including legal opinions and court decisions from Rupertsland, Upper Canada, and Australia, shows that in order to answer this question we need to undertake comparative studies that look closely at how the legal reasoning of judges like Adam Thom on 'the application of English criminal

[130] At least throughout the nineteenth century.

[131] Benton, *Law and Colonial Cultures*, above n 100, 169–70.

[132] Smandych, 'Contemplating the Testimony of "Others" ', above n 21.

[133] Ibid; Wright, above n 123.

[134] Russell Smandych and Rick Linden, 'Co-existing Forms of Native and Private Justice: An Historical Study of the Canadian West' in Kayleen Hazlehurst (ed), *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia, and New Zealand* (1995); Russell Smandych and Karina Sacca, 'The Development of Criminal Law Courts in Pre-1870 Manitoba' (1996) 24 *Manitoba Law Journal* 201.

[135] Smandych, 'The Exclusionary Effect of Colonial Law' above n 21.

law to indigenous peoples was consistent with the thinking of colonial judges in other parts of colonial North America and elsewhere in the expanding British Empire'.[136] In addition, I conclude that the apparently widespread 'move toward including indigenous peoples in the colonial justice systems developing in British North America, Australia, and elsewhere in the late 1830s and 1840s' needs to be examined 'within the context of British colonial policy regarding the treatment of Aborigines', and guidance and instructions that 'were given to colonial judges by the British government and [officials in] the Colonial Office'.[137]

Other legal historians have also recently begun to offer more nuanced comparative and transcolonial accounts of how English criminal law was applied to Indigenous peoples and other non-Europeans who gradually came to be defined as falling within the jurisdiction of evolving colonial British and Anglo-American legal systems.[138] For example, in his comparative work on New Zealand and South Australia, Damen Ward draws critically on Benton's insights on legal pluralism and the recent work of imperial historians like Laidlaw to argue for a broad 'imperial perspective' that enables one to analytically tie 'the importance of transcolonial and imperial networks to issues of indigenous status and settler identity'.[139] Specifically, Ward 'consciously attempts to treat New Zealand and South Australia as parts of a wider "imperial history" where networks and exchanges between different parts of the British Empire (not just colony and metropole) influenced local issues';[140] and in particular 'the relationship between claims about settler Britishness and claims about the legal rules or systems to be applied to indigenous peoples, and the status of indigenous peoples in the colonial constitution'.[141] Like other historians who have investigated the development of colonial legal institutions and practices from a wider imperial framework, Ward notes that 'New Zealand and South Australia were part of a web of imperial experiences and attitudes' illustrated, for example, in the fact that '[t]he early legal figures of these colonies had experience of law in Canada, Sierra Leone, New South Wales, Western Australia, Ireland, and England'.[142] In his study, Ward gives particular attention to comparing New Zealand and South Australian developments and debates over criminal law and the extent Indigenous peoples fell under the jurisdiction of common law criminal courts, arguing, like Benton, that disputes over criminal jurisdiction 'have been central to the formation of the colonial state', and that conflicts over the legal status of Indigenous peoples versus white settlers 'were critical in encouraging imperial powers to construct … hegemonic state-centred systems of law'.[143] However, unlike

[136] Ibid 129.
[137] Ibid 134.
[138] McHugh, above n 52; Samson, *Imperial Benevolence*, above n 100; Samson, 'British Voices and Indigenous Rights', above n 100; Ward, *The Politics of Jurisdiction*, above n 100; Ward, 'A Means and Measure of Civilization', above n 100; Wiener, above n 53.
[139] Ward, *The Politics of Jurisdiction*, above n 100, 18.
[140] Ibid 3.
[141] Ibid 11–2.
[142] Ibid 20 (citation omitted).
[143] Ibid 18.

Benton, whom he argues 'understates the importance of ideas of "civilisation" to debate about jurisdiction',[144] Ward also focuses on drawing out the manner in which differences in New Zealand and South Australia in white-coloniser's assessments 'of the relative state of "savagery" or "civilisation" of indigenous communities were central to debates about how colonial legal systems might apply to indigenes'.[145] It is also encouraging to find that in his recent book on the prosecution and trial of interracial homicide cases across seven different late-nineteenth and early twentieth century British colonies, Martin J Wiener develops a similar broad imperial perspective. Wiener argues that as the nineteenth century progressed colonial judges, like governors, became 'centripedal actors in the Empire, moving frequently from colony to colony, their loyalty fixed on the Empire as a whole and the more-or-less uniform imperial criminal law';[146] and in turn, he offers the contentious conclusion that over this period the 'tensions and fissures' in the administration of criminal justice caused by the attempt to apply liberal precepts of legal equality and the rule of law in the colonial context 'did in fact diminish the "coerciveness" of British imperialism'.[147]

C *Fashioning Colonial Law and Legal Subjects from London*

> Oh Canada! What wrongs have I done thee that thou thus pursuest me in my house and my office, my walks and my dreams?'[148]

Zoë Laidlaw is only one of the most recent of a vast number of British colonial historians who have recognised that for much of the first half of the nineteenth century it was officials in the Colonial Office who essentially ruled over the British Empire. Indeed, the Colonial Office has been the subject of scholarly attention from British-based 'metropolitan' and colonial 'settler-colony' historians from at least the early 1900s, which has produced many useful 'single colony studies' and others that have taken a more 'metropolitan perspective — usually focusing on the Colonial Office'.[149] However, despite this long history of scholarly attention to

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[144] Ibid.

[145] Ibid 1.

[146] Wiener, above n 53, 12.

[147] Ibid 4.

[148] Letter from James Stephen to Jane Stephen, 8 December 1837, in *James Stephen Papers: A Journal of Copied Letters: Letters to His Wife, 1816–1845* (Cambridge University Library, Add 7888) vol 11, 50, cited in Caroline E Stephen, *The Right Honourable Sir James Stephen: Letters with Biographical Notes by His Daughter Caroline Emelia Stephen* (1906) 48.

[149] Laidlaw, *Colonial Connections*, above n 3, 4. The secondary literature that could be cited in this regard is not surprisingly vast, but the following noted studies are particularly good examples: Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830*–1847 (1977); Peter Burroughs (ed), *The Colonial Reformers and Canada, 1830*–1849 (1969); Peter Burroughs, *The Canadian Crisis and British Colonial Policy, 1828–1841* (1972); John Cell, *British Colonial Administration in the Mid-Nineteenth Century: The Policy-Making Process* (1970); Henry Hall, *The Colonial Office: A History* (1937); Paul Knapland, *The British Empire: 1815–1939* (1941); A H McLintock, *Crown Colony Government in New Zealand* (1958); W P

the Colonial Office, until recently few researchers have endeavoured to examine the history of the Colonial Office and its role in the British Empire as part of a broader unfolding 'global' history,[150] or attempted to reconstruct in detail how colonialism was reciprocally imagined and experienced across the 'metropole' and in the colonies,[151] and relatedly determine how personal and official 'networks' or 'webs' of communication developed and played a role in facilitating the transfer of ideas and practices relating to governing colonies across the British Empire[152] and beyond.[153]

In addition to benefiting from a broader world-history or global approach, research on the Colonial Office can also benefit from incorporating a postcolonial perspective. In relation to the specific study of how various strands of early to mid-nineteenth century metropolitan and colonial thinking about legal rights and race difference worked together in different British slave and white-settler colonies to affect the legal status and treatment of Indigenous peoples and 'cultural others', recent postcolonial-informed analyses[154] evoke specific research questions. For example: How did officials working in the Colonial Office view the British Empire, and how did they view its place among other European and non-European imperial powers? How did they attempt to effect the development of 'native policy' and law across British slave and white-settler colonies? To what extent were metropole (Colonial Office) and local (settler-colony) sensibilities about the application of English law to Indigenous peoples different, and how, over the long run, did this clash of sensibilities result in the development of state and national legal systems that allowed Indigenous peoples to be treated as not fully-deserving of the protections offered by such lofty 'liberal' legal principles as due process and the rule of law?[155] The study of how colonial law and legal subjects were discursively fashioned by Colonial Office officials in London must necessarily involve an analysis of the varied and competing discourses on native policy and colonial law that flowed both 'out to the colonies' and 'back to the metropolis'[156] surrounding the concepts of civilisation, protection, the rule of law, and the amenability of Indigenous peoples to English law. My own recent and ongoing research aims at

Morrell, *British Colonial Policy in the Age of Peel and Russell* (1930); R H W Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and* 1840s (1974); R C Snelling and T J Barron, 'The Colonial Office and its Permanent Officials, 1801–1914' in Gillian Sutherland (ed), *Studies in the Growth of Nineteenth-Century Government* (1972); D B Swinfen, *Imperial Control of Colonial Legislation, 1813–1865: A Study of British Policy towards Colonial Legislative Powers* (1970); D M Young, *The Colonial Office in the Early Nineteenth Century* (1961).

150 Bayly, above n 5; Bell, above n 18.

151 Hall, *Civilizing Subjects*, above n 1.

152 Laidlaw, *Colonial Connections*, above n 3; Lester, *Imperial Networks*, above n 2; Lambert and Lester, *Colonial Lives Across the British Empire*, above n 4.

153 Pitts, above n 22; Steinmetz, above n 57.

154 Like those of Hall, *Civilizing Subjects*, above n 1, and Steinmetz, above n 57.

155 And that today are still not evenly enjoyed by First Nations and Aboriginal peoples in many former British white-settler societies.

156 Laidlaw, *Colonial Connections*, above n 3, 17.

making a contribution in this area through the approach of attempting to explore and document the challenges faced by Colonial Office officials in England (like James Stephen, Jr) who sought to fashion and implement a system that would produce relative uniformity in the manner in which English law was applied across all of Britain's nineteenth century slave and white-settler colonies. This research is pitched primarily at two levels of analysis: the organisational level of 'the Colonial Office and the Empire'; and the individual-level analysis of the personal biographies of Colonial Office officials, and in particular that of James Stephen Jr.

1 *The Colonial Office and the Empire*

It is important to appreciate that unlike many national government departments today the Colonial Office of the early to mid-nineteenth century was a relatively small operation. As Cole Harris[157] notes in his vivid description of how the day-to-day activities of the Colonial Office were conducted during this period:

> It comprised two houses close to the prime minister's residence on Downing Street which contained desks for most of the some thirty people who worked in them, and a 'library' which kept a few maps and books but was principally a depository for official papers. For years the waiting room for visiting dignitaries and others with appointments was a tiny twelve-by-thirteen-foot space, which could expand into standing room in a hallway. The secretary of state for the colonies, who presided over this domain, held a cabinet position. Under him was a permanent undersecretary, at least one other undersecretary, and some twenty clerks. The most senior of the latter were, in effect, policy advisors (some were considerable scholars), and the most junior were simply copyists. Every communication from the Colonial Office was reproduced in triplicate, and much incoming material was copied or précised, mostly still by hand. There was a librarian, also for a time a geographer (responsible for maps), and there were a couple of porters, a couple of house managers, and messengers as required. That, in effect, was the Colonial Office, the nerve centre of much of a global empire (India was handled by a different office). Dispatches came in and, depending on their importance, were minuted, précised, and variously circulated. Replies were drafted, commented on, finalized, and copied. An astonishing volume of correspondence – the reports, requests, and instructions on which the managing of an empire depended – passed through this small office. In a given week each of the undersecretaries and senior clerks characteristically dealt with events in quite different parts of the world. The whole system turned on the memories and judgments of a small group of exceedingly able men.

For much of the period described by Harris, James Stephen Jr and his close friend and colleague Henry Taylor,[158] were at the centre of this colonial system, while

[157] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (2002) 4.

[158] Sir Henry Taylor, *Autobiography* (1885).

their political superiors, that is the succeeding Secretaries of State for the Colonies, entered and left office on a regular basis and therefore depended heavily on these permanent officials to provide them with the 'special knowledge' they needed in order to make important policy decisions.[159] The task of researching how permanent Colonial Office officials came to formulate their own ideas on colonial native policy and law and influence the policy directives issued by succeeding Colonial Secretaries is challenging and requires a broad transcolonial approach that taps in to the 'astonishing volume of correspondence'[160] that entered and was replied to from the Colonial Office.[161] So far, the findings of research I have carried out which has involved making use of these records, along with the similar findings of a number of other British colonial legal historians,[162] point to the intimately-linked and reciprocal yet often fundamentally-contradictory 'metropole' and 'settler-colony' arguments on the degree to which Indigenous peoples and 'cultural others' (such as slaves) were amenable to English colonial law. In addition, these studies similarly show that with the move toward colonial self-government in the 1840s and 1850s, initially influential evangelical and liberal views on the need for the equal legal treatment of Indigenous peoples, espoused by 'metropolitan' lobbyists (like Thomas Fowell Buxton) and Colonial Office officials like James Stephen Jr, came to be frequently contested by colonial governors and judges who held more on-the-ground practical, and typically more punitive, views of how Indigenous peoples should be treated under the law. Arguably, this may be interpreted to reveal that as long as they continued to wield at least some power over the colonial governments and the fashioning of colonial law and legal subjects, metropolitan administrators like James Stephen Jr attempted to employ law — in a sense as a 'double-edged' sword — to both pacify and dominate white-settlers and Indigenous peoples alike. Ultimately, however, in the longer term, with the demise of any pretence of 'centralised' Colonial Office control in British white-settler colonies on the road to self-government, the fate of the legal rights and status of Indigenous peoples was increasingly left to be decided by typically less sympathetic 'local' colonial lawmakers and courts.

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159 James Fitzjames Stephen, 'Biographical Notice of Sir James Stephen' in Sir James Stephen, *Essays in Ecclesiastical Biography*, New Edition (1868) xi.

160 Harris, above n 157, 4.

161 Fortunately, due to the long-time British Public Record Office practice of entering into agreements with Commonwealth countries to microfilm and make accessible Colonial Office records, along with more recent technologies that are now making it possible to access and search British Parliamentary records over the internet, it is possible over time to obtain and examine systematically far more of this correspondence than it was feasible for earlier (pre-internet) researchers to undertake.

162 McHugh, above n 52; Ward, *The Politics of Jurisdiction*, above n 100; Ward, 'A Means and Measure of Civilisation' and 'Constructing British Authority in Australasia', above n 100; Ann Hunter, 'A Different Kind of "Subject": Aboriginal Legal Status and Colonial Law in Western Australia, 1829–1861' (PhD thesis, Murdoch University, 2007).

2 *Biography and Colonial Legal History: The Example of James Stephen Jr*

While much can be learned about the fascinating history of law in colonial societies through examining official correspondence and documents, I would also argue that biographical research is necessary in that it aids greatly in helping to understand the diverse personal and political, and cultural and religious, beliefs that shaped the actions of colonial and metropolitan legal personnel who either 'careered across the Empire' or who remained in the 'mother-country' and attempted to fashion colonial law and legal subjects from London. The life of James Stephen Jr, who of course fell into the latter category, provides an amazingly rich example attesting to the value of this type of biographical research. In 1809, Stephen, then a twenty year old student at Trinity Hall, Cambridge, busy at the study of law, wrote a letter to his friend Thomas Edward Dicey, in which he said:

> It is not ordinary proof of my good conduct that I actually spend 8 hours out of every four & twenty in learning to draw a bill in Chancery. If I did it with goodwill, it would be a proof of intolerable stupidity. Besides this, I do nothing; for though there are 16 other hours, in half of which I am neither engaged in eating or sleeping, yet they are all frittered away by some of the numberless trifles in which we waste half our lives. Among these, however, are not to be counted any occupations, however little laborious, which tend to preserve and cultivate kindness. Of the number of these is letter writing. So you need not fear the want of an apology if you feel inclined to imitate me in scribbling away half an hour in expressing the first ideas which occur to you.[163]

Throughout the rest of his life, which lasted to 1859 when he died at age of seventy, Stephen was an incessant writer, who not only wrote and dictated tens of thousands of pages of official correspondence while working as legal counsel and Permanent-Undersecretary in the Colonial Office from 1813 to 1847, but also thousands of personal letters to family, friends and acquaintances throughout Britain and across the British Empire.[164] What is most revealing about this correspondence is how candidly Stephen writes about his personal life (growing up in the

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163 Letter from James Stephen to Thomas Edward Dicey, 1 December 1809, in *James Stephen Papers: A Journal of Copied Letters: Various, 1807–1839* (Cambridge University Library, Ad 7888) vol 9, 1–3.

164 Examples of sources of this private correspondence, which I have examined personally, include the James Stephen family papers held at Cambridge University (*Sir James Stephen: Papers,* MS Add 7888; *Stephen Family: Letters and Papers*, MS Add 7349; *Stephen Family: Notebooks and Diaries*, MS Add 8381); Stephen's letters to the editor of the *Edinburgh Review* held in the British Library (*Macvey Napier Papers*, British Library); Stephen's extensive correspondence with Governor Sir George Arthur held in the Mitchell Library, State Library of New South Wales (*Sir George Arthur Papers: Correspondence with James Stephen, 1823–1854*); Stephen's correspondence edited and published by his daughter, Caroline E Stephen, *The Right Honourable Sir James Stephen: Letters with Biographical Notes by His Daughter Caroline Emelia Stephen* (1906); and Stephen's correspondence with Henry Taylor, in E Dowden (ed), *The Correspondence of Henry Talyor* (1888).

evangelical 'Clapham Sect' and the anti-slavery movement),[165] his family life and acquaintances, and his work in the Colonial Office.[166] It shows, among other things, that Stephen was intimately familiar with, and, in one way or another, personally influenced by both the liberal-humanitarian ideals, as well as countervailing conservative thinking, reflected in the writings of prominent political theorists, writers, and historians of the day like Jeremy Bentham, James and John Stuart Mill, Thomas Babington Macaulay, Thomas Carlyle, Samuel Taylor Coleridge, and John Austin, all of whom he knew personally while living in London, and many of whose writings he had read.[167] It also shows that in many ways Stephen found his work in the Colonial Office stressful and unsatisfying, which accounts for his attempt to escape it, at least mentally, by taking up a second part-time vocation as an anonymous writer for the Whig-leaning *Edinburgh Review* in the early 1840s, which resulted in the publication of a number of articles on subjects in ecclesiastical history which he spent hours researching in the British Museum and 'scribbling' away on at home.[168] While Stephen wrote dozens of letters to Macvey Napier when he was editor of the *Edinburgh Review*, one in particular stands out which shows that for much of the late 1830s and early 1840s Stephen was so caught up in colonial affairs that it is only by strict perseverance that he managed to complete the research needed for his *Edinburgh Review* articles. In a letter he wrote to Napier in March 1840, he complained: 'I do not think that among the 365 days of the year, I have on an average two on which I can go to Booksellers shops; and of late I have found it impossible to make my way to the British Museum, which, as you know, is the only respectable Library in London.' Elaborating on the colonial affairs that kept him busy for most of the other days of the year, he said:

> If I had any reasonable command of my own time, and if, like other people, I have now and then a month's holidays, I should soon make you cry out for a remission of my contributions, for I am but too well disposed to turn

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165 Smandych, 'James Stephen's Attempt to Reform the Criminal Slave Laws of the West Indies' , above n 21.

166 Smandych, above n 35.

167 Ibid.

168 These essays were later published under Stephen's name in a collection entitled *Essays in Ecclesiastical Biography*, *in Two Volumes* (1849) and republished a number of times in new editions. Other than two personal accounts of 'The Clapham Sect' and 'William Wilberforce', the essays dealt mainly with personalities and subjects in religious history, including: 'Hildebrand'; 'Saint Francis of Assisi'; 'The Founders of Jesuitism'; 'Martin Luther'; 'The French Benedictines'; 'The Port-Royalists'; 'Richard Baxter'; and 'The "Evangelical" Succession'. As described by his son James Fitzjames in the 'Biographical Notice' he wrote as a preface to a later edition of Stephen's collected essays, he typically 'used to write them early in the morning and late at night, or during the occasional holidays which his official occupation afforded. These holidays were, however, very uncommon. For many years he never left London for a month together, and though this was not the case during the last five years of his official life, he transacted business during the summer in the country, with exactly the same regularity as in London'. Consequently, James Fitzjames concludes, the essays, in effect, 'merely show the amount of literary exertion of which he was capable, whilst the powers of his mind were principally directed to other pursuits': Stephen, above n 159, xv.

> aside from Canadian, West Indian, and Australian pursuits, to amuse myself with topics the most unlike these. But it was only last night that Lord John announced his Canadian policy, and I have on my table an Act of Parlt in draft which reaches already to nearly a hundred sections each pregnant with points of law … and my function is to keep my Lord accurately informed on all these matters and to look out for traps and pitfalls. This is in addition to my daily routine of business, so that I suspect it would be presumptuous in me to make a contract for July.[169]

IV Elements of a Comparative Historical Sociology of Colonial Law

A goal of this article has been to weave together elements of a comparative and transnational historical sociology of colonial law. Another objective has been to persuade legal historians, through providing reasoned arguments and illustrative examples, that this is an endeavour that is worthwhile for us to pursue individually, as part of our own research programmes, and collectively, as a community of scholars. An important point that I have not yet made in my discussion — and which may help convince even some legal historians who are still sceptical of this argument to join in this cause — is that I do not any in way foresee the day when we can dispense with carefully-researched regional and national-level studies that raise new questions and probe further into extant primary sources relevant to developing additional knowledge about 'local' histories that reflect unique trajectories of the development of colonial law and its effects on the lives of 'colonial subjects', including Indigenous peoples and white-settlers themselves.[170] While not downplaying the valuable knowledge that has been gained over the years from more traditional studies 'focused on single colonies',[171] the movement reflected in recent secondary literature toward more explicit transnational and theoretically-informed historical analyses, often drawing on concepts and perspectives derived from the interdisciplinary field of postcolonial studies, brings with it fresh insights and an arguably new critical starting point for historical

169 Letter from James Stephen to Macvey Napier, 24 March 1840, in *Macvey Napier Papers* (British Library, Add 34621). The background context of this quotation in connection to Canada was the passing of the Act of 1841 that created Canada East (Quebec) and Canada West (Ontario) out of the provinces of Upper and Lower Canada, which also set the new combined Province of Canada on the road to achieving a system of responsible government seven years later, in 1848. Stephen was intimately involved in these Canadian affairs. As James Fitzjames Stephen said of his father: '[I]t may be said that it fell on his lot to assist in two of the most remarkable transactions of this century. The first was the abolition of slavery, and the second was the establishment of responsible government in Canada': Stephen, above n 159, xiii.

170 While reviewing studies of this type is a topic for another paper, a few outstanding recent examples include: Nettelbeck and Foster, above n 107; Hunter, above n 162; Tony Roberts, *Frontier Justice: A History of the Gulf Country to 1900* (2005); Skye Krichauff, 'The Narungga and Europeans: Cross-Cultural Relations on Yorke Peninsula in the Nineteenth Century' (MA thesis, University of Adelaide, 2008).

171 Laidlaw, *Colonial Connections*, above n 3, 4.

research aimed at unravelling the complexities of law and colonialism; both in the context of the British experience and that of other European, and even non-European, imperial powers.[172]

Although it would be presumptuous to prescribe a recipe for future studies carried out along these lines, in my view such an approach might usefully include the following key elements. One, transnational research that involves the study of the discursive construction of metropole and colonial sensibilities about colonial law and its application to colonial subjects, including Indigenous peoples and colonial settlers themselves, across three or more colonial settings.[173] Two, research programs that attend, at least in the European context, to examining both the contradictions and tensions of Empire inherent in mid-nineteenth century liberal thought, and the colonial conundrum of the construction of racial difference.[174] Three, research programs that attempt to add a more explicit sociologically-informed perspective to the study of colonial native policy and law administration by pursuing research agendas aimed at investigating the nature of 'imperial legal connections' that may also have been linked to evolving sensibilities about colonial law and the colonial legal subject across a broad range of British, continental-European, and even other important non-European colonies.[175] While I still adhere to the argument that specific closely comparable historical settings and jurisdictions, like the nineteenth century British colonies that made up Australia, still offer 'one of the many possible fascinating historical laboratories for the study of comparative common law legal history',[176] I hope that in this article I have been able to persuade at least some legal historians to also collectively recognise the complementary heuristic value of undertaking more far-reaching comparative and transnational studies that help to more accurately capture the potential 'global' dimensions and scope of 'local' (including metropolitan and colonial) sensibilities about law, liberalism and Empire.

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172 The literature on this point is substantial. Beyond the important authors already cited previously in this article see, eg, Smandych, 'The Cultural Imperialism of Law', above n 21; Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (2000); Peter Fitzpatrick, *Modernism and the Grounds of Law* (2001); Peter Fitzpatrick and Eve Darian-Smith, 'Laws of the Postcolonial: An Insistent Introduction' in Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Postcolonial* (1999); and Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (2000).

173 To help transcend problems of lack of generalisability associated with single-jurisdiction and two-jurisdiction comparisons.

174 The relevance of which, for the writing of colonial legal histories, is made especially clear in the work of P G McHugh, above n 52.

175 The potential value of this type of research being most clearly pointed to in the work of Steinmetz, above n 57, and Benton, above n 100.

176 Smandych, 'Contemplating the Testimony of "Others" ', above n 21, 143.