Emptying the Den of Thieves: 
International Fugitives and the Law in British North America/Canada, 
1819-1910

by

Bradley Miller

A Thesis submitted in conformity with the requirements for the Degree of 
Doctor of Philosophy, 
Graduate Department of History, 
in the University of Toronto

© Copyright by Bradley Miller, 2012
This thesis examines how the law dealt with international fugitives. It focuses on formal extradition and the cross-border abduction of wanted criminals by police officers and other state officials. Debates over extradition and abduction reflected important issues of state power and civil liberty, and were shaped by currents of thought circulating throughout the imperial, Atlantic, and common law worlds. Debates over extradition involved questioning the very basis of international law. They also raised difficult questions about civil liberties and human rights. Throughout this period escaped American slaves and other groups made claims for what we would now call refugee status, and argued that their surrender violated codes of law and ideas of justice that transcended the colonies and even the wider British Empire. Such claims sparked a decades-long debate in North America and Europe over how to codify refugee protections. Ultimately, Britain used its imperial power to force Canada to accept such safeguards. Yet even as the formal extradition system developed, an informal system of police abductions operated in the Canadian-American borderlands. This system defied formal law, but it also manifested sophisticated local ideas about community justice and transnational legal order.

This thesis argues that extradition and abduction must be understood within three overlapping contexts. The first is the ethos of liberal transnationalism that permeated all levels of state officials in British North America/Canada. This view largely prioritised the erosion of domestic barriers to international cooperation over the protection of individual liberty. It was predicated in large part on the idea of a common North American civilization. The second
context is Canada’s place in the British Empire. Extradition and abduction highlight both how
British North America/Canada often expounded views on legal order radically different from
Britain, but also that even after Confederation in 1867 the empire retained real power to shape
Canadian policy. The final context is international law and international legal order. Both
extradition and abduction were aspects of law on an international and transnational level. As a
result, this thesis examines the processes of migration, adoption, and adaptation of international
law.
ACKNOWLEDGMENTS

As this project comes to an end I feel very lucky for the overwhelming support of my friends, fellow students, teachers, and family.

I would first like to express my gratitude for the generous financial support provided by the Department of History at the University of Toronto for fellowships and travel grants, the Social Sciences and Humanities Research Council for a Canada Graduate Scholarship Doctoral Award, and the Osgoode Society for the R. Roy McMurtry Fellowship in Legal History.

The roots of this project are in three places: Ottawa, Cambridge, and Halifax. A decade ago when I began work on the Department of Justice History Project, Wendy Burnham asked me to find out a little bit about extradition and to write her a short report. Apparently the issue stuck. A while later, when I was working in the Squire Law Library at Cambridge University the widespread interest among the librarians, graduate students, and faculty members in international law convinced me to re-visit the issue of international fugitives and to make something more of it. I am especially grateful to Lesley Dingle and Sir Eli Lauterpacht for giving me the opportunity to explore international law issues even though I had no earthly idea what I was doing. Finally, this project took shape in the Dalhousie History Department where I wrote my M.A. thesis. Dal was a transformative experience, and I can’t say enough by way of thanks to the people there, especially Jerry Bannister, Shirley Tillotson, and Philip Girard. All three have been very kind to me. Philip has also continued to be a great help with a range of projects and proposals since I left Dal, and I have benefited greatly from his advice.

I’ve also been very lucky to have friends in other universities who have helped shape this project. Tony Freyer at the University of Alabama and Lyndsay Campbell at the University of Calgary were kind to invite me into their borderlands collection, and were wonderful editors. Jeffrey McNairn, likewise, shaped conference papers, essays, chapters, grant proposals, and cover letters. I don’t know where he finds the time to do what he does, but I am very grateful to him and I am excited to become his post-doctoral supervisee in January 2012. Finally, Jeffers Lennox has been a constant source of friendship and fun. In my M.A. acknowledgements I described him as “friend, mentor, and landlord.” Unfortunately our rental relationship has ended, but Jeffers continues to be a friend and mentor extraordinaire.

One of the best things about my time at UofT has been the Toronto Legal History Group. Being a part of the group has been a five year-long lesson in how to read, think, and discuss. I am
especially grateful to Balfour Halevy, Mary Stokes, Philip Girard, and Paul Craven, each of whom have supported me with all kinds of references, documents, and kind words.

Many fellow students in the UofT History Department have contributed ideas and support to this project. Nadia Jones-Gailani, Jared Toney, Vanessa McCarthy, Peter Mersereau, Candace Sobers, and I all started together in 2006, and it has been a pleasure talking through the rigours of courses, comps, research, and writing with them. A few years ago John Dirks suggested a microfilm resource that opened up new avenues for my research and gave this thesis a depth it would not otherwise have had. Ariel Beaujot, Julie Gilmour, and Denis McKim all provided stellar examples to follow, and gave me their friendship and support as I struggled to follow their leads. Finally, Julia and Jeremy Rady-Shaw have been wonderful friends to Josh and I. I am grateful to them and, while disappointed that their newborn son Henry has not been named Deputy U.S. Marshal Raylan Givens, I am honoured and excited that Josh and I are going to play a role in his life anyway.

I have also been very fortunate to have incredible teachers at UofT. Allan Greer, Ken Mills, and Dan Bender all enriched my year of course work, and Allan was a generous comps field supervisor as well. I am also grateful to Karen Knop, both for acting as internal examiner and for her help with prior projects. A few years ago she spent an entire afternoon with me answering questions like “please explain what international law is,” and the way she did so made me want to learn more and to take the issue up as a focal point of my research. I am honoured that John Weaver agreed to act as external examiner, and his advice has enriched both the final version of this thesis and my plans for the next stage of my research. I am also grateful to Ian Radforth for supervising a comps field for me, for his feedback and encouragement on my thesis, and for the many words of wisdom from which I’ve benefited over the last few years. Likewise, Steve Penfold has been incredibly generous during my time at UofT. In my first Ph.D. year he gave me two pieces of advice which I’ve kept in mind ever since: “Don’t be a dick” (just about teaching, I think), and “follow the question, wherever it goes” (about doing transnational history). For that, and for the hours and hours and hours of guidance and feedback he’s given me since then I can’t thank him enough. Finally, this project would simply not have been possible if it weren’t for Jim Phillips. In the last five years I’ve learned so much from him, and he has been unfailingly generous with his time, ideas, and friendship. Every time I’ve had a new idea, problem, or question my first instinct has been to run it past Jim, and every time I came away
from his office feeling lucky that he was my supervisor. I really don’t know how to thank him adequately.

In the last five years my family has offered me unconditional support. Lora, Christopher, Carter, and Jack could lift anyone’s spirits, and they have certainly have boosted mine many times. Likewise, my Mom has contributed much to this thesis just by being herself. Since my Dad passed away in 2005 she has built a new life for herself, and even found a great new husband, all while remaining passionately devoted to her kids and grandkids. In other words, she’s been an inspiration. I still miss my Dad every day, but it has been wonderful to welcome Wayne into our family.

Finally, Josh Cramer, who for almost ten years has been the love of my life. There’s a lot to thank him for, but I’ll stick to this: he’s made me a better, smarter, more thoughtful person, often by beating me in debates and more generally by setting an inspiring example. It’s ten years in and I’m still smitten. That’s a good sign, I think, and this thesis is dedicated to him.
CONTENTS

Chapter One:
Introduction ......................................................................................................................... 1

Themes and Approaches ....................................................................................................... 3

Historiographical Contexts ................................................................................................... 6

Canadian Historiography ..................................................................................................... 6

Canadian Legal History ....................................................................................................... 13

The History of International Law ......................................................................................... 18

Dissertation Timeline and Structure .................................................................................... 22

Chapter Two:
“Under no authority but the arbitrary”: Extradition, Executive Power, and International Law to 1842 ................................................................................................................................. 26

Extradition and International Society in Legal Literature and Jurisprudence .................. 29

After Kent: The Obligation to Extradite and American Law ............................................. 38

Statecraft and the Extradition Question ............................................................................. 44

The End of Comity ............................................................................................................... 53

Conclusion ......................................................................................................................... 62

Chapter Three:
“The joy of the fugitive for ages past”: Refugees, Asylum, and Extradition in British North America, 1833-1865 ....................................................................................................................... 64

Fugitive Slaves and British Justice, 1833-1843 ................................................................. 67

John Anderson, Natural Law, and Upper Canadian Courts, 1860-1861 ......................... 81

International Law and Confederate Soldiers in British North America, 1863-1865 .......... 96

Conclusion ......................................................................................................................... 107
Chapter Four:
“In the Interest of Civilization on this Continent”: Extradition Law and Imperial Power in Canada, 1865-1883

Refugees, Liberalism, and the British View of Extradition

“A Free Trade in Criminals”: Canadian Attitudes to Extradition

“A Very Involved Operation”: Canadian Courts and Imperial Law

The Genesis of the Extradition Act of 1877

Imperial Power and the Extradition Bill

Conclusion

Chapter Five:
Developing the Transnational Rule of Law: Extradition Jurisprudence, 1865-1910

“Lots of Money and... Lots of Law”: An Overview of the Extradition Jurisprudence

Domestic Courts and the Formation of an International Extradition System

Defendants, Civil Liberties, and Challenges to Extradition in the Courts

Conclusion

Chapter Six:
“They did not care for Queen Victoria or me”: Legal Orders and Cross-Border Police Abductions, 1820-1910

An Overview of the Abduction Cases

“The Reciprocity Principle”: Customs, Tactics, and Kidnapping

 Debating the Abductions as International Law Events

Conclusion
Chapter Seven:
Conclusion.................................................................................................................................236

Bibliography..............................................................................................................................242
Chapter One: Introduction

In October 1893 a prisoner in Newcastle, New Brunswick, wrote directly to the local county court judge. James McCoy told the judge that he had been in the town jail for four months without a trial, that he had written letters protesting his detention, and that nothing had been done to free him. “I am entangled in the meshes of the law without justice or fair play,” he wrote. “In the name of justice in the name of the law in the name of humanity I petition your honor to take the necessary steps towards doing me justice.”¹ The judge forwarded what he called McCoy’s “pathetic appeal” to the federal government, noting that McCoy had no money to hire a lawyer and asking whether anything could be done for him.² More than three months later the local lawyer (and not yet politician) R.B. Bennett wrote to Ottawa saying that the prisoner was still incarcerated, that he was acting in the case pro bono, and that they would be filing for habeas corpus to have McCoy released.³ It is not known what became of the case. But we do know that the crime with which McCoy was charged had not been committed in Newcastle, or in New Brunswick, or even elsewhere in Canada. Rather, McCoy stood charged with horse theft in the United States, and the trial for which he was waiting could only take place once the American president invoked a decades-old treaty, and the Canadian government issued an executive order extraditing McCoy. In other words, the legal order in which McCoy was unhappily enmeshed was local, national, and international all at once.

This thesis examines that legal order. It explores how the law dealt with international fugitives in British North America/Canada, focusing primarily on extradition between Canada and the United States but also on cross-border kidnappings carried out by police in both countries. Extradition has always raised an array of important questions about civil liberties, human rights, global law enforcement, and international law. In recent years, and especially in the decade of the ‘war on terror’ since 2001, public attention has been drawn again and again to questions surrounding extradition and international fugitives: will an extradited person be tried unfairly (or tried at all?), tortured, subjected to capital punishment, or given a wildly disproportionate sentence? Even more troubling have been “extraordinary renditions” in which terrorism suspects are transferred outside of the legal system entirely, and moved between

² Wilkinson to the Deputy Minister of Justice, 31 October 1893, Ibid.
³ R.B. Bennett to the Deputy Minister of Justice, 7 February 1894, Ibid.
countries with no opportunity to challenge their detention in court or assert their rights under domestic or international law.

We often think of criminal justice as an implicitly local or national phenomenon – indeed often as central to the monopoly on violence at the core of territorial sovereignty. However, this project focuses on how crime and criminal law transcended national borders and enveloped Canada in systems of international law meant to create a kind of borderless jurisdiction in which criminals would be caught, prosecuted, and punished wherever they fled. As a result, it highlights the multiple meanings of the border in law and policy. While the nineteenth-century Canadian-American border was clearly permeable and porous for ordinary people, it does not follow that it was insignificant. Indeed, the international boundary was probably most important not as a barrier to people but as the terminus of each country’s state power. People could mostly cross freely, but each country’s law lost its legitimacy at the boundary line. Sovereignty thus underlay every way in which we conceive of the border’s official role – in tariffs and immigration restrictions, for example. Yet because people (including criminals) moved between countries so easily, policymakers, jurists, diplomats, and local officials sought ways to extend the reach of their power and their country’s law past the border. Their efforts were grounded in a deference to territorial sovereignty and so affirmed the significance of the border which marked out its limits, but the results of both extradition and abduction were to erode what newspapers often called the “den of thieves” which purportedly existed on either side of the border when formal justice could not reach between countries.

The process of internationalizing criminal justice was not straightforward or simple, as this thesis demonstrates. Over the course of the nineteenth and early twentieth centuries difficult and enduring debates raged over important aspects of the law surrounding extradition and abduction. Early in the nineteenth-century, policymakers and jurists in North America and Europe debated the basic legal framework on which formal extradition stood – was it the outgrowth of a customary or naturalist conception of the law of nations, or should it rest entirely on positive enactment of international treaties? Likewise, once the latter position won out, lawyers and judges struggled to administer the system which the treaty created, facing tough questions about procedure and chafing at the narrow limits of the international agreement, which allowed for extradition on only seven crimes. As this system was taking shape, questions remained about who should be exempted from extradition and whether the widespread but murky notion of a refugee had any legal force in such cases, a debate that took decades to resolve and
arrive at a coherent policy. Finally, alongside this formal system, cross-border abductions of fugitives by police and other state officials continued. These too raised tricky legal and political questions as local officials and elite diplomats and policymakers struggled to maintain law and order while affirming the ideological underpinnings of sovereign rights. As a result, in the nineteenth and early twentieth-centuries, as in the twenty-first, international fugitives raised issues at the core of state power and individual freedoms.

Themes and Approaches

This project reflects three intertwined methodological and thematic approaches. The first is the focus on the transnationalism of law and legal ideas. It examines how legal customs and practices transcended borders and how legal ideas migrated between jurisdictions. In particular it stresses the enduring interconnections between Canadian and American law. Historians have long seen law as a dividing point between Canada and the U.S. in the nineteenth-century. They have emphasized the sense of superiority felt by many Canadians who saw America as lawless and bereft of the orderly peace secured by British justice. Yet this thesis shows a powerful consensus in the opposite direction, towards legal continentalism. It shows that many Canadian jurists and policymakers at all levels thought that the two countries shared common legal values and traditions and that the U.S. was an inherently trustworthy jurisdiction as a result. In fact, they were willing to do everything possible to facilitate the cooperation of Canadian and American legal regimes. That transborder ethos shapes the methodological approach of this project. It presupposes that Canadian law cannot be understood in a strictly domestic context. Instead, I examine how Canadian laws and policies were shaped by ideas and events across North America and Europe and trace the lineage of these ideas to British, American, and European debates. Canada’s place in the British Empire and Britain’s continuing power as a supervisor of colonial law was crucial in this, as British legal norms were implanted in Canada through Britain’s imperial power or through the pervasive adoption of British ideas by Canadian jurists. But it is also necessary to appreciate contexts beyond the imperial. Canadian law grew to embody ideas that were not particularly British at all, and that often ran directly contrary to those

---


expounded by the imperial authorities. From seventeenth-century Dutch treatises on the law of
nations to customary arrangements between police officers on either side of the early twentieth-
century Canadian-American border, transnational legal influences were key.

As a result, a focus on the intellectual history of extradition and abduction, and on the
ideas, ideologies and often details embodied within them, is the second main methodological
approach underlying this thesis. Part of this attention is to understand the broad concepts that
underlay the law. The most important of these was the liberal transnationalism espoused by most
major Canadian jurists and policymakers, and often reflected in the actions of local officials
involved in cross-border abductions. In this view, the law should take a “liberal” approach by
eroding domestic barriers to international cooperation. (This use of the term liberal is thus in
stark contrast to its modern usage in criminal justice as mostly an indicator of concern for
prisoners’ rights.) But we do not fully understand the power of such general concepts if we do
not examine them in practice. As a result, I explore how the law developed in both very broad
and quite specific and technical ways. Getting into legal technicalities helps us understand the
real power of the ideas that were often taken up as rhetorical mantras by judges and
policymakers. Looking in detail at the intra-imperial negotiations over extradition statutes, for
example, provides key insights into the post-Confederation power of the imperial government,
just as examining the development of Canadian case law shows us the ways in which
continentalist ideology mattered or did not matter in practice.

The final main approach is the focus on the relationships between law and individual
rights. This project examines an enduring tension between civil liberties and international order,
highlighting how often the former was subjugated to the latter. As societies increasingly enforced
one another’s criminal laws through extradition (or through kidnappings conducted at the local
level) they made powerful statements about law and order on an international scale. But as this
project demonstrates, it is important to remember that this growing mesh of treaties and customs
carried implications for the individuals who were alleged to be criminals, and who sometimes
claimed to be what we would now call refugees. These individuals were detained, brought before
a judge with often little chance of seriously challenging their detention, and routinely extradited
to jurisdictions hundreds of miles away if not more. But even some jurists who believed deeply
in the international enforcement of criminal law were wary of the extent to which the law was
streamlined to favour extradition. As the extradition system developed during the nineteenth and
early twentieth centuries concern for various types of refugees and for civil liberties generally
prompted far-reaching debates in Canada, Britain, and the U.S. which sometimes shaped the law in fundamental ways. As a result, this project attempts to map the development of both the extradition and abduction systems and the implications for individuals accused of crime.

In taking up these themes, this project draws from a wide array of primary sources. These include official correspondence, legal treatises, and judicial decisions from Canada, Britain, the United States, and Europe. Archival material for this project is drawn from four main sources. At Library and Archives Canada I worked most frequently with the Department of Justice Canada files, which contain invaluable insights into the role law played in Canadian state formation generally, and how extradition and abduction were handled by the federal government in particular. At the Archives of Ontario I consulted a range of pre- and post-Confederation file groups, especially the Canadian Executive Council fonds, the Upper Canada sundry files, and the Edward Blake personal papers. Most importantly, the archive’s diffusion copies of the Colonial Office records made a sweeping array of imperial government documents available. These latter records illustrate perhaps better than any other the role of both the British government and international law ideas in shaping British North American/Canadian law. Finally, at the U.S. National Archives I examined the records of the State Department, focusing on extradition files. These were expertly catalogued by the nineteenth-century State Department lawyer and international law expert John Bassett Moore, and historians of extradition are thus able to pluck extradition-related letters from the hundreds of microfilm reels in the various State Department groups. The National Archives has also copied its series of despatches from U.S. consuls in foreign countries and so made them available to researchers around the world. The series of despatches from consuls in Canada, available at Robarts Library at the University of Toronto, provides almost unparalleled insights into nearly every aspect of Canadian-American interaction, from the highest diplomatic negotiations and government policies, to reports on local livestock diseases. These despatches should be much more frequently used than they are. Fortunately for this project, the consuls paid much attention to extradition and cross-border abduction.

Historians of law and politics in Canada are fortunate that a great deal of primary material on these subjects has been published. This project draws especially from reported judicial decisions, published correspondence, and legal treatises. I use court decisions extensively, especially in examining the pre-1842 extradition system and in assessing the post-1865 emergence of Canadian extradition jurisprudence. Similarly, I found hugely important correspondence in the British and Foreign State Papers, British Parliamentary Papers,
American *Foreign Relations*, and *Congressional Serial Set* series, as well as the Canadian legislative journals and *Sessional Papers* publications. This volume of published correspondence made the process of examining debates over extradition and abduction much simpler than it might otherwise have been. Finally, legal treatises occupy an important role in this thesis, particularly as evidence of intellectual cosmopolitanism in British North America/Canada and as artefacts of broad international law debates brought to bear on colonial/Canadian policy. In international law matters treatises were more than simply evidence of what the law was thought to be, they were sometimes sources from which it sprang. Canadian legal historians are fortunate as a result for the collections of treatises in Canadian libraries (especially, for my purposes, in the Bora Laskin and Osgoode Hall law school libraries, as well as the Osgoode Hall Great Library), and for the emergence of websites such as Gale’s “The Making of Modern Law,” which has made hundreds of such works easily searchable online.

**Historiographical Contexts**

This project draws from and contributes to three principal, interrelated fields of historiography: Canadian political history, Canadian legal history, and the history of international law. It examines the influence of local, national, and transnational/international legal forces and ideas. As a result, this project situates Canada in overlapping and multi-jurisdictional frameworks: North America and the British Empire, as well as the common law and Atlantic Worlds. It also highlights what Daniel Margolies has recently called the “spaces of law” in fields such as politics, state formation, and international affairs which are often treated by historians without reference to legal ideas. Thinking about these convergences of local and international and legal and political forces can help enrich our understandings of the ways in which governments exercised the powers of sovereignty in a world that was already much more interconnected than we sometimes assume.

**Canadian Historiography: Politics, Liberalism, Empire, and Foreign Policy**

It is often observed that Canadian political historiography is experiencing a kind of rebirth. Just what constitutes “new” political history can sometimes be nebulous, as can how it

---

differs from “traditional” scholarship. Yet given the growing prominence of political history writing, the presence of political topics in Canadian history conferences, and the recent formation of the Political History Group within the Canadian Historical Association it is clear that some kind of resurgence and re-thinking is taking place. In some ways the transition from old to new is marked by engagement with other aspects of historical scholarship. For example, in his *The Art of Nation-Building*, H.V. Nelles weaves together spectacle, pageantry, and commemoration, with imperialism, nationalism, and nation-building. In other ways new political history is about using novel analytic perspectives to re-examine familiar issues. A good example of this is Jeffrey McNairn’s analysis of Upper Canadian constitutional development, which he argues was shaped by a popular social shift – the emergence of a public sphere that encouraged intellectual and political engagement on the part of ordinary citizens.

One of the most interesting developments in political history has been the rise of the state formation literature. As Allan Greer and Ian Radforth argued in 1992, political history had long treated the state as merely the prize of partisan political success. “With their noses pressed up so close to the window of politics, historians seemed unable to perceive the edifice of the state itself. The state was assumed rather than studied,” they write. Since then, much work has appeared charting the nature and growth of nineteenth-century state power in Canada, on issues ranging from primary schools to the mechanisms of the census. Law and criminal justice have been a key part of this literature. Work on policing, for example, has examined how organized police forces emerged in response to periods of colonial, national, and transnational turmoil.

---


This literature also provokes several important questions for this thesis about what the growth of state power meant to concepts of law, liberty, and community. First, historians Susan Houston and Alison Prentice asked in their work on nineteenth-century Ontario schools what was lost when the central state imposed formal, regulated, and publicly funded institutions; they point to the decline of teacher independence, community involvement, and parental choice. Second, scholars such as Donald Fyson have pushed historians to re-examine the criteria by which they assess state power. As Fyson has shown, Lower Canada was policed by many overlapping authorities long before the rise of a salaried and uniformed ‘professional’ force. These questions – about what formal systems supplanted and how historians evaluate state power – are central to this thesis, particularly in its focus on the declining role of international law in the late 1830’s and the enduring place of cross-border police abductions which were primarily local but relied heavily on state power.

Alongside state formation, Ian McKay’s liberal order framework has also helped reinvigorate Canadian political history. In an influential 2000 article, McKay argued for the re-conceptualization of Canada as a “project of rule” in which the liberal values of liberty, equality, and especially property came to be dominant. In McKay’s view, law had a central role in the liberal revolution – one of his seven “arresting moments,” for instance, is the codification of civil and criminal law which he says reified the abstract principle of legal equality. His article has sparked a vigorous debate in which historians such as Jerry Bannister, Philip Girard, and Elsbeth Heaman have used law and legal concepts to discuss and challenge McKay’s ideas. Drawing from two Rebellion-era treason trials, Bannister points to a powerful loyalist order in British North America and to the intersection of liberalism with other currents of thought in the imperial and Atlantic worlds.

Similarly, Girard argues that important “counter-currents,” particularly enduring ideas of community and intergenerational family stewardship continued to shape land law throughout the nineteenth-century, and to forestall the commodification of property on which

---

14 Houston and Prentice, Scholars and Schooling.
17 Ibid., 633-634.
the liberal order in part relies. Heaman, meanwhile, argues that “rights talk” in nineteenth-century British North America centred on concepts of rights that were collective, social, and historical. This discourse was distinctly un-radical and so very different from the universal liberal rights ideas circulating elsewhere in the western world.

These conflicting currents point to the problem of defining liberalism and the liberty said to be at its core. McKay’s liberalism focuses on individualism and property, but as Michel Ducharme has recently noted, different ideas of liberty circulated in nineteenth-century British North America. He distinguishes between modern liberty (or post-1688 English constitutionalism) and republican liberty (which stressed social equality). Philip Girard has recently argued that the constitutionalist model was a powerful force in colonial legal culture as well. Girard maintains that modern liberty subjected individual rights to political controls, rather than considering them to be natural or pre-political in origin. These controls gave rise to a “creative tension” between individual and community rights and interests. As Girard writes, defining liberalism solely in terms of individualism overlooks “the constant conjugation of individual liberty with order (or public welfare) and pluralism in Canada as opposed to its embrace as a free-standing natural right.” This tension is even more complicated in the area of criminal justice, where individual rights concerns accrued on both sides. Extradition and abduction show this creative tension operating both domestically and internationally. Indeed, contemporary legal scholars still disagree over the basic meaning of liberalism in the context of extradition. For example, Gary Botting has attacked treatise-writer and former Supreme Court of Canada Justice Gerard LaForest for stressing a liberal approach to the law in his work as a scholar and judge. Botting argues that this approach in fact embodies an illiberal, pro-government bias because it minimizes the rights of the accused. Yet LaForest’s view is more

23 Ibid., 205.
akin to the approach of nineteenth-century jurists, who saw liberalism as a key intellectual underpinning of extradition. As this thesis shows, liberalism was not simply a powerful ideology within nations but also between them, and it was a liberalism that often minimized the individual for the sake of both national and international communities.

The historiography of British imperialism in Canada also raises important issues for this thesis. The role of the imperial government was long a feature of Canadian colony-to-nation narratives in which issues and personalities were dissected primarily as indicators of or obstacles to Canada’s emerging autonomy as a self-governing dominion. As Canadian historians moved beyond the colony-to-nation theme, the focus on imperialism waned, and in 1993 Phillip Buckner notably argued that scholars should take it up again, especially as an aspect of identity in nineteenth-century Canada.\(^25\) Since then, the empire’s role in Canadian social history has received a great degree of scholarly attention, with Nancy Christie among others calling for a re-examination of the decisive transatlantic connections between Britain and Canada and the ways in which Canada was shaped fundamentally by its place in the empire.\(^26\) Likewise, scholars have examined the ways in which imperialism shaped gender, race, and class in Canada, helping to illustrate how the British connection went far beyond the narrowly political bent of what used to be called simply “imperial relations.”\(^27\) This thesis draws from that recent work in emphasizing the role of Britain in disseminating ideas and practices to the colonies, treating the imperial connection not simply as an issue of political history but of intellectual history as well. In contrast to scholars such as Paul Romney and Robert Vipond, who have minimized Britain’s role in Canadian affairs by the time of Confederation, I argue that the empire retained its constitutional clout after 1867.\(^28\) As this thesis shows, the rapid development of the international system in the nineteenth-century ushered countries into new or evolving types of relationships and Britain had a key global role in this both as a world power in its own right and in controlling


its colonies and ensuring a uniform approach to international law. Thus the history of the imperial connection in nineteenth-century Canada is bound up with other types of emerging global connections.²⁹

While the historiography of politics and imperialism in Canada has been revived to a great extent, the same cannot be said for the historiography of foreign relations, at least that dealing with the nineteenth-century. Here the standard work remains the first volume of C.P. Stacey’s Canada and the Age of Conflict, a book that reflects both the virtues and vices of “traditional” foreign relations scholarship – an attentiveness to details and the role of key personalities, but also a too-rigid adherence to narrative, and an absence of substantive analysis of the issues that sparked diplomatic debate.³⁰ In Stacey’s work as in most others, there is also little attention to the role and power of international law in world affairs, which as this thesis demonstrates, is a serious gap. The historiography has failed to assess the ways in which law structured international relations and instead often treats diplomacy as solely about tactics, charismatic statesmen, and power politics. Moreover, much of the work that does include the nineteenth or early twentieth-century often provides little more than a gloss on the pre-1914 period and suggests that Canada’s meagre interaction with the world was conducted solely through the British embassy in Washington. As R.A. Shields shows, the reality was much more complex. His work provides a greater focus on the ways in which Canadian policymakers attempted to engage in an emerging international network of trade relations, including with countries beyond Britain and the U.S., and the ways in which the bonds of the imperial relationship intensified or loosened in response.³¹


There is also an important literature on cross-border influences and relations between Canada and the U.S., that can be distinguished from the diplomatically-focused foreign affairs histories. Mapping the influence of American ideas and policies on Canada has long been and remains a feature of the Canadian historiography.\(^\text{32}\) In recent years, the borderlands methodology popularised by American scholars has shifted the focus of many historians back to transnational questions, especially the movement of people, ideas, goods, and social and cultural norms across borders and within transnational regions.\(^\text{33}\) Over the last two decades borderland and transnational approaches have challenged the tradition analytic unit of historians – the nation-state – and directed more attention to the role of local communities who lived alongside the border and whose lives often bisected it.\(^\text{34}\) As Reginald Stuart has recently argued, “transnationalism renders problematic the border as a barrier or line that marks sharp differences, despite its political and at times economic significance.”\(^\text{35}\) But this literature has often concluded that in many cases the border meant little for cultural, social, and economic forces, which possessed a large degree of cross-border fluidity, while presupposing that it mattered much more for law and politics.\(^\text{36}\) But exactly how the border mattered for law and politics – and when it did not – remains very much to be seen, since law and legal ideas and the political forces that shaped them have been nearly absent from the Canadian-American borderlands literature. In particular, despite some excellent work on smuggling and cross-border counterfeiting, we know

---


very little about the border as a “criminal boundary,” a phrase that invokes the widespread use by criminals of the border as both a shield from prosecution and as a business opportunity.\(^{37}\)

This thesis takes up this newer focus on transnational and transborder questions to examine national issues that often centre on formal international relations. That is, it examines how legal ideas that migrated between countries shaped underlying approaches to both national policy and international relations instead of assuming that Canada, Britain, or the U.S. acted out of inherently different and politically determined positions. It emphasizes the diffusion of legal ideas and highlights the role that sub-sovereign state and colonial/provincial/dominion governments played in generating regional perspectives on international law within both the British Empire and the American republic. It also argues that the formal instruments of diplomacy were not the sole means of official transborder cooperation, because local authorities in both countries joined together in much less formal systems of law enforcement.

**Legal Thought and Criminal Justice in Canadian Legal History**

Just as Canadian political history has been re-developed in the last two decades, so too has the field of Canadian legal history. For the most part the little Canadian legal history scholarship produced prior to the late 1970’s was about high court decisions and legal doctrine. It was often tucked into the front of law review articles and monographs as brief sections intended as short historical backgrounds to the modern law rather than being a scholarly focus in its own right. There was constitutional history, of course, and work by jurists such as W.R. Riddell who produced a long series of useful articles on nineteenth-century law, including several about slaves and slavery that were published in the then-new *Journal of Negro History*.\(^{38}\) But as Philip Girard has shown, the generation of post-1945 legal scholars who might have begun modernizing

---


the discipline was motivated by legal nationalism and saw legal history as leading inexorably back to the British tradition from which they were trying to escape.\(^{39}\)

That changed in the late 1970’s. At that time, scholars in the U.S. and Britain were taking up legal history in new ways and asking provocative questions not simply about the origin of this or that statute or legal norm, but about the fundamental relationship of law to society, and about the connections between law and other intellectual, social, and cultural histories.\(^{40}\) Canadian scholars soon did the same, and as Jim Phillips has shown, what emerged is now often referred to as the “new” legal history, “socio-legal history,” or “external legal history,” demonstrating the extent to which the field has moved away from simply charting internal doctrinal developments handed down by high court judges.\(^{41}\) As Margaret McCallum has noted, much of this work fits comfortably into other categories of historical writing, while Brian Young has argued that legal history is central to the “larger history of social relations.”\(^{42}\) In fact, in recent years legal historians have authored important works of broad historical significance on race, gender, and sexuality, among other topics.\(^{43}\) The result has been not simply to tell us more about society, but also to provide a much more nuanced picture of the law itself and to change the discipline of legal history. In this respect, socio-legal history has exerted a pressure on scholars to revisit what might be called “institutional” legal history using new perspectives. For instance, many legal historians have gone beyond the traditional sources of “high law,” such as reported high court


cases, to investigate law as practiced in magistrates’ courts, or by local police constables, or as deployed and understood by everyday people – the so-called “low law.”

The issue of international fugitives affords an opportunity to mingle high and low law questions. Legal doctrine, statute law, and reported decisions, after all, really are important to the legal system and cannot be dispensed with when attempting to understand how that system worked, and particularly so when the subject is international in nature. Likewise, examining how doctrines emerged and how statutes were framed gives us a clearer picture of the concepts underlying law. As Brian Young has argued, statutes often both shape and reflect broad social and cultural currents as well as ideas of legal order. Similarly, Blake Brown has recently shown that examining the development and re-development of formal legal institutions such as the jury provides revealing insights into ideas of constitutional freedom and the rule of law. Meanwhile, the persistence and power of ‘low law’ practices such as cross-border kidnapping helps us understand local legal norms and patterns of community law enforcement. As Fyson has shown, everyday law offers visions of legal order starkly at odds with those gleaned from examining the formal system.

In particular, this thesis engages with two prominent areas of legal historiography. The first is criminal justice history, which is in many ways the aspect of legal history that may interest non-legal historians most. For instance, it is likely the area of law that most engages with state power, offering the most graphic examples of the state’s coercive authority. As noted above, criminal justice institutions such as police forces and prisons are often used as metrics of state formation. Criminal justice is also often a measurement not simply of the reach of the state but also of its underlying claims to sovereignty. Indeed, historians such as Alan Taylor, Richard White, and Hamar Foster have used the surrender and subjugation of aboriginal defendants to

---


Young, *Politics of Codification*.

Brown, *Trying Question*.

Fyson, *Magistrates, Police, and People*. 
Euro-American criminal law to demonstrate a threshold of white colonial control over First Nations people. Likewise, criminal justice was always at the centre of the pantheon of “British liberties” so often touted in nineteenth-century British North America. As Heaman has shown, “rights talk” in the colonies continually invoked habeas corpus, trial by jury, and the viva voce examination of witnesses, which were said to be guaranteed by the British constitution. In other words, criminal justice helps us understand the very basis of jurisdiction and also the ways in which individuals felt themselves protected within it. Issues surrounding international fugitives likewise help show both the circulation of such concepts within the imperial, common law, and Atlantic worlds, and how competing claims of legal order and individual rights transcended sovereign borders and became matters for international debate.

The other chief aspect of legal historiography with which this thesis engages is legal thought. Here scholars focus not simply on the outcomes of cases but on the methodologies jurists used in thinking about law, their patterns of reasoning in doing so, and the sources from which they drew their ideas. Constitutional thought is an especially prominent area of this research, as shown by the work of scholars such as R.C.B. Risk, Robert Vipond, and Jack Saywell. Historians of constitutional thought have mapped important shifts in the way judges engaged with the British North America Act. They have shown a transition from what one calls the “judicial statesmanship” of the immediate post-Confederation period to what another has labelled the “plodding imperial formalism” of the late Victorian period and early twentieth-century, heavily influenced by the Judicial Committee of the Privy Council. As William Lahey argues, judicial statesmanship was marked by an appreciation of context, the use of non-judicial sources such as government despatches, and an attempt to apply what the courts felt were the

49 Heaman, “Rights Talk.”
purposes of the founders. By contrast, the formalism which came gradually to dominate Canadian constitutional thought shunned context and was deeply wary of legislatures and legislative intent in particular and democracy in general.

There were also important transitions in legal thought outside of the constitutional arena. Blaine Baker and Bernard Hibbitts have argued that there was a kind of re-colonization of Canadian legal thought in the latter half of the nineteenth-century. Baker, for example, describes an early “legal pantheism” in which Upper Canadian lawyers were engaged with wider international and colonial intellectual trends. He points out that the Law Society’s library had extensive holdings on foreign law, that early legal academics taught both common and civil law, and that the profession reached out to Quebec lawyers and to civil law writings. Likewise, Hibbitts revisits the career of the allegedly arch Tory Sir John Beverley Robinson and finds evidence of what he calls “legal continentalism” in which Robinson, like many American jurists, took an instrumentalist view of law’s role in order to aid the developing colonial economy and so was not simply a subservient applier of common law rules. Likewise, Robinson and other jurists of the period took a “pre-classical” approach to the common law, using it pragmatically and even evasively, seeing it less as a body of binding rules settled by authority than as evidence of abstract principles. As Hibbitts shows, judges often decided cases without precedent using reason and social context. These currents of pantheism and continentalism were among those that were largely lost as formalism took hold in the late Victorian period.

This thesis explores the way Canadian jurists and policymakers thought about extradition and international law. It highlights how ideas circulated from seventeenth-century naturalist legal philosophers to nineteenth-century judges, for example, and how broad concepts such as the idea of a refugee came to be adapted and reified in Canadian law. It also examines the sources from which Canadian jurists drew their ideas, including foreign and international law treatises, and argues that there was more continuity than change in this respect. Indeed, in some ways the

---

52 Lahey, “Constitutional Adjudication.”
liberal transnationalism discussed above, which was such a core component of legal thought on extradition, prompted an increasing though not unqualified use of foreign sources at a time when other aspects of law were being re-colonized by British ideas. As a result, it points to the conflicting intellectual currents that probably typified much of nineteenth and early twentieth-century Canadian legal thought.

Law Beyond Borders: The History of International Law

The final body of historiography which influences this thesis is the history of international law. Historians and legal scholars have long acknowledged the crucial role that the law of nations played for centuries in international affairs, domestic statecraft, and imperialism and colonialism. Yet its history has been little studied. Unlike political and legal historiography where scholars have revived the fields with “new” scholarship, it is arguable that the first serious wave of international law history is only just being written. With some notable exceptions, until quite recently international law had not received much by way of systematic historical examination.56 In the last two decades that has changed – the *Journal of the History of International Law* has been founded, international law history articles now routinely appear in law reviews, and several monographs and edited collections on the subject have appeared. Yet despite the prominence of scholars such as Ronald St. J. Macdonald (who co-founded the *J.H.I.L.*), we know very little about the role of international law in nineteenth-century British North America/Canada, except regarding the colonization of aboriginal lands.57 This thesis offers one of the first such sustained examinations, and it draws heavily from the work of European and American scholars.

In the field of international law history, the work of Martti Koskenniemi is probably unparalleled. His sweeping 2001 book *The Gentle Civilizer of Nations* has become a standard

---

starting-point for scholars and a hall-mark of the emerging discipline.\(^{58}\) Koskenniemi examines international lawyers in Europe and the U.S., focusing in part on the Institut de Droit International, founded in 1873, and the lawyers, academics, and treatise writers who made up its membership. For the most part, as he shows, the Institut manifested a pervasive, centrist, liberal reformism that placed profound faith in the civilizing power of Western states and their laws. As a result, he shows how international lawyers explained and justified imperialism even as many of them laid out rules for a regime of global human rights and for humanitarianism in the conduct of war. In many ways, Koskenniemi’s work typifies the emerging field of international law history. By mainstream historical standards, it is almost pure intellectual history – little is said about the development or application of specific doctrines of law, and next to nothing about the role of law in world affairs or about the way international law was shaped by diplomats, policymakers, or domestic judges. Rather, he focuses on global legal order as envisioned by academics and international lawyers, and on the debates between them as they elaborated upon its rules in treatises, questioned its scope, and contested its origins. Given the especially amorphous nature of international law before the U.N., this focus is understandable and has done much to provide a bedrock for future scholars, but it is far from a complete picture of the role and significance of the law of nations.

Koskenniemi’s focus on international lawyers is echoed by many other scholars in the field. It is important to remember that in international law, treatise writers (or publicists as they were often called) had an incredibly powerful role – not simply as explainers of the law but as sources of it in their own right, an issue examined in chapter two. As a result, treatises are key sources for historians of the law of nations and they must be assessed as ideological documents in themselves rather than as pure reflections of what the law then was. On this front, Amanda Perreau-Saussine has done much to highlight the different intellectual currents that animated treatise writers in nineteenth and early twentieth-century Britain.\(^{59}\) She argues in a recent essay that among British publicists there were fundamental differences over what made a rule of international law authoritative and thus over where international law came from. For some, religion or ancient philosophy was key. For others state practice and positive law were central.


Still others saw the potential for an international legal system and were willing to lie about history in order to bring it to life.\textsuperscript{60}

This emphasis on treatise writers provides a vital part of international law history. Yet it should be remembered that international law was also part and parcel of both statecraft and political philosophy. As Charles Covell has shown, political and legal philosophies were intertwined by many of the seminal European writers.\textsuperscript{61} This mingling of treatise literature and statecraft is also key to Mark Janis’s work, especially his brief but sweeping 2010 book *American and the Law of Nations, 1776-1939*. Janis traces the transatlantic intellectual heritage of American publicists like Henry Wheaton and James Kent, but also examines how an American tradition of international law shaped approaches to specific cases and controversies such as *Dred Scott*, Lincoln’s famous General Order 100, and the *Alabama* arbitration.\textsuperscript{62}

Alongside Janis, other American scholars are increasingly exploring how international law was applied in practice. Among these works, several focus on the role of the law of nations in constitution-building in the early republic.\textsuperscript{63} In a recent article David Golove and Daniel Hulsebosch even argue that the fundamental purpose of the constitution was to usher the new republic into the organized system of civilized states to which international law applied.\textsuperscript{64} They argue that deference to the law of nations and a desire to ensure that the U.S. obeyed its rules decisively shaped the American constitutional order. “The United States’ founding instrument is best understood, in historical perspective, as a fundamentally international document,” they write.\textsuperscript{65}

Recent historians of international law, then, are increasingly mingling publicists and legal doctrine with an examination of how specific aspects of law applied to statecraft and national and international governance. Stephen Neff’s work on the law of war is a good example of this approach, offering probably the first sustained historical examination of a particular area of


\textsuperscript{65}Ibid., 934.
international law. In three recent books (published in 2000, 2005, and 2010), Neff charts the way the law of war was conceived of, adapted, and applied. The scope is impressive – two of his books range from the medieval and early modern period to the twentieth-century while the third is a focused examination of law in the U.S. Civil War.66 The books are about legal doctrine, to be sure, but they make a compelling case for the importance of legal ideas to much wider spheres of world affairs. Neff also examines the malleability of law according to political context. His book on the Civil War argues in part that the Union government chose to operate within varying legal regimes: sometimes it invoked belligerent rights grounded in international law, which entailed treating the South as a lawful opponent; at other times it relied on sovereign rights to treat Confederates as simply rebellious citizens of the U.S.67 As a result, his approach highlights the opportunities available in using single areas of law to examine issues of political and intellectual history as well as legal history.

It is worth noting that all of the scholars discussed in this section are legal scholars. By and large historians have not taken up international law history. One exception is Lauren Benton, who, while not dealing primarily with international law, has authored pioneering books on imperialism, sovereignty, and global legal order.68 In many ways Benton focuses on the fringes of international law. She shows how pluralistic “global legal regimes” provided an institutional structure in the imperial world before the rise of international law.69 But her recent examination of the uneven nature of imperial sovereignty and control and the centrality of what she calls “anomalous legal zones” to imperial expansion has done much to highlight the importance of law in world history.70 She shows that the orthodox model of sovereignty – a single law and legal order for all people within defined and inviolable borders – was just one of many in the imperial world. As a result, Benton’s work has drawn new attention to the ideas of sovereignty and to the

67 Ibid., Justice in Blue and Gray.
interplay between imperialism and international law as rival but related modes of global governance.\footnote{Ibid., 8.}

\textit{Dissertation Timeline and Structure}

This project examines the period from 1819 to 1910. Its starting point is an influential New York State judicial decision on extradition and international law, and its ending point is a controversial British diplomatic proposal regarding cross-border police abductions along the Canadian-American border. These dates help highlight how Canadian policy must be understood in the context of wider international and imperial currents. This period also straddles several important political events in Canadian history which often serve as dividing lines in historical writing – the 1841 union of Upper and Lower Canada which created the Province of Canada, for example, as well as Confederation in 1867, which brought together Canada, Nova Scotia, and New Brunswick in the Dominion of Canada, and which soon included Manitoba, British Columbia, and Prince Edward Island. For the ease of readers not familiar with these developments, and since this thesis spans these political changes, I often refer to British North America/Canada when my comments transcend a single pre-Confederation colony or post-Confederation province. Although much of the material examined for this project is centred in Ontario and Quebec, I have tried to illustrate how the problem of international fugitives stretches across the colonies and provinces and continued throughout the ninety years studied here, irrespective of jurisdiction.

This thesis proceeds in five main chapters. In some it moves primarily chronologically, assessing change over time, while in others the focus is on thematic analysis. Chapters two and four chart specific changes over time that led to outcomes in policy and law in the form of the 1842 Ashburton Treaty and the 1877 Canadian Extradition Act respectively, while chapter three examines changing ideas about the legal status of refugees using three main instances of debate, though these debates did not result in a new legal framework. On the other hand, chapters five and six span longer periods but pay less attention to chronology. Their focus is less on a long-sought outcome than on examining aspects of cross-border law enforcement that endured for decades.
Chapter two examines the long debate over the relationship between extradition and international law. In the seventeenth, eighteenth, and nineteenth centuries many publicists, jurists, and policymakers argued that the law of nations required governments to extradite international fugitives and that these governments had the inherent executive power to detain and surrender such people. But this view was not universally held. Both the British and American governments denied that any such obligation existed, and both believed that absent an international treaty or domestic statute no power existed to arrest a person not charged with a crime in their jurisdiction nor was there a power to turn such a person over to a foreign government. Yet both the British North American colonies and some U.S. states took a different view and felt themselves bound or at least able to surrender fugitives, forming a kind of distinct legal region in this respect. During the late 1830’s the tension between these two approaches came to a head and the region of law between the colonies and the northern states dissolved for various legal and political reasons. The issue of extradition was then removed beyond the power of state and colonial authorities by an Anglo-American treaty. As a result, this chapter shows colonial jurists adopting and adapting legal concepts gleaned from around the world and operating within what they understood to be a near-global legal order.

Extradition and the transnational enforcement of criminal law always raised humanitarian concerns. Particularly before the abolition of American slavery and during the U.S. Civil War, many British North Americans thought that extradition cooperation with America would lead to the surrender of people who should be protected as refugees. Chapter three examines three instances of this enduring debate, two involving fugitive slaves and one centred on Confederate States of America combatants. It shows that while the idea of a distinct legal status for refugees was widespread in Europe and North America, what that meant in law and how a person claiming to be a refugee could obtain immunity from extradition was far from certain in pre-Confederation British North America. In fact, each of these three waves of debate each presents very different views of this question, relying on British constitutionalism, natural rights, and international law respectively. Consequently this chapter highlights the implications of international cooperation for civil liberties and human rights and also how the ideas that shaped the concept of refugee status transcended the British colonies and even the larger context of the British Empire.

The long debate over refugees did not end with the U.S. Civil War. In fact, the uncertainty in the refugee cases reflected an ongoing debate in Europe and North America about
who qualified as a refugee and what rights such a person had against extradition. Over time this debate came to be focused primarily on how best to protect what were called political offenders, those who were targeted by their governments because of their political beliefs or activities. Chapter four examines this debate and shows how specific protections for political refugees were implanted in Canadian law by the imperial government which was itself decisively influenced by continental European ideas. As this chapter shows, that was not a smooth process. At the very moment when Britain wanted to complicate extradition by codifying these protections, many Canadians wanted to simplify extradition with the U.S. in order to ensure that fugitives could be, as was constantly said, “liberally” traded by the two governments. Canadian exponents of the latter approach fielded legislative proposals and pushed reforms to the law to achieve this liberalization, but Britain’s imperial authority remained strong enough after Canadian Confederation to block all of these until Canada acquiesced to every British demand. As a result, this chapter emphasizes how international law was intertwined with imperial power in the nineteenth-century empire.

While extradition was a key issue for policymakers, diplomats, and treatise-writers it was also a matter for Canadian courts. Chapter five shows how, as a Canadian extradition case law emerged after the end of the U.S. Civil War, it embodied the liberal transnationalism that had infused British North American/Canadian policy for decades. After 1865 courts were forced to craft a jurisprudence from nearly nothing and as they did so they faced difficult questions. These often very technical debates reflect broader issues of state formation, international order, and individual rights. This case law, in fact, constitutes the emergence of a key set of rules governing an important aspect of Canadian state power and the transborder law enforcement relationship with the U.S. But as this chapter argues, as the courts crafted this system of law, judges were forced to confront arguments about civil liberties and to map out how effectively prisoners could challenge their detention in the courts. As it shows, judges often prioritized the liberal interpretation and emphasized international order over civil liberties.

This formal extradition system was not the only one in operation. Chapter six shows that during the entire period studied here cross-border police abductions of wanted fugitives remained relatively common on both sides of the Canadian-American border. It argues that these kidnappings were far from evidencing lawlessness and that in fact they functioned as a kind of “low law” alternative to the formal system, which often severely limited which crimes were subject to extradition. As officials reported on abductions and as kidnappers explained their
actions we can see an ethos similar to the liberalism expounded by policymakers and judges, as well as a keen awareness of domestic and international law and a deep belief in the role of the abductions in maintaining law and order. This chapter examines how these abductions took place, how police tactics reflected this kind of “low law,” but also how diplomats and other elite officials dealt with them once they became “high law” incidents subject to the norms and customs of international law. Once this happened, diplomats deployed an array of rituals to mediate the international tension. The focus of these rituals, however, was not to vindicate the rights of the abducted prisoner but rather to ensure that the ideals of sovereignty were affirmed and protected. As police conducted these abductions and diplomats resolved them they again demonstrated that the reach of the law extended well past the border.
Chapter Two:
“Under no authority but the arbitrary”: Extradition, Executive Power, and International Law to 1842

Introduction

This chapter examines the way ideas of international law shaped extradition between the British North American colonies and the United States from the 1820’s to the early 1840’s. It focuses on a protracted debate among legal scholars, judges, and policymakers over whether governments should or even could detain fugitives, deny them *habeas corpus*, and then turn them over to a foreign state when there was no treaty between to the two countries to that effect. Some writers argued states had responsibilities in this regard: that basic precepts of international law and the demands of civilization compelled sovereigns to seize and surrender foreign criminals. Others argued that no such responsibility existed, and indeed that the executive branch did not have the power to enforce the laws of other countries by detaining individuals not charged with a crime in that jurisdiction and handing them over to a foreign government as a fugitive for trial. These questions went to the core of state sovereignty, executive power, and the international order. As policymakers and judges assessed the law and dealt with extradition cases all along the American border, they understood the issues at play not simply in a domestic context, but also according to broader regional and transnational norms and philosophies of international law.

Consequently, understanding Canadian extradition in this period means exploring the common pool of ideas from which jurists across the Atlantic world drew. As a result, this chapter takes a transnational approach. Using judgments, legal treatises, and official correspondence from British North America and across the Atlantic world, it emphasizes how the North American debate reflected important cleavages in the way law worked on an international scale. Recent scholars of imperialism, law, and constitutionalism have emphasized this kind of transnational approach. In particular, historians such as Lauren Benton have explored the growth, migration, and adaptation of legal ideas in jurisdictions throughout the imperial world.72 Her work has pointed both to compelling legal commonalities between disparate peoples and nations and to the diversity of legal ideas and structures even within empires and states. Clearly, as

---

Benton has shown, imperial and international networks were crucial but not necessarily determinative.\textsuperscript{73} Likewise, as this chapter will illustrate, both the British North American colonies and some American states took approaches to extradition starkly at odds with those of the imperial and federal governments. In so challenging the imperial and federal views, the colonies and states were influenced by the geographic realities of the border and by ideas of international law gleaned from different jurists and schools of legal thought going back centuries. Thus these sub-polities amounted to a distinct and cosmopolitan region of law within the British Empire and American Union, albeit one with its own internal divisions and uncertainties.

This chapter is thus about how international law was practiced in North America. It traces the lineage of the debate over this aspect of extradition from its origins until 1842, when a new Anglo-American treaty (the famous Webster-Ashburton Treaty) fundamentally changed the legal basis for Canadian-American extradition. As Onuma Yasuaki has noted, the historiography of international law has long been pre-occupied with the concept of international law.\textsuperscript{74} That is, in exploring the past scholars have frequently also circled back to the foundational question of whether there can truly be law among sovereign states\textsuperscript{75}. This question was a focus of intense debate in the period under study here and is central to this chapter. As Michael Lobban has argued, every Victorian English treatise-writer on international law (or publicist, as they are often known) had to grapple with the ideas of philosopher John Austin, who famously declared that there could be no international law because there was no sovereign source from which it might emanate.\textsuperscript{76} Over the course of the century this debate turned decisively and the idea of a naturalist international law – one of inherent rules laid out by nature and discernible by reason, and one that bound sovereign states to extradite fugitives – faded. Although the transition was uneven and incomplete, what largely emerged was what legal scholars call positivism, a vision of law in which sovereignty was sacrosanct and states were bound only by the rules to which they consented, through treaties or custom that had been accepted as binding by governments.

This shift was of course much larger and encompassed far more issues than extradition. Indeed the naturalism/positivism transition is one of the key themes of the international law historiography. But the debates over the surrender of fugitives cannot be understood outside of

this context of colliding ideologies. Indeed, imperial, colonial, and American officials were keenly aware of the debate, and in their writings, judgments, and diplomatic positions helped to draw it to a close. This highlights how international law was a vital force in nineteenth century North America, an issue which has received too little scholarly attention generally and almost none from Canadian historians. As this chapter shows, policymakers, military officials, and judges all perceived themselves to be bound by a system of law that structured foreign relations and existed beyond colonial, imperial, state, or federal law. They invoked international law frequently, quoting from European publicists and discussing with sophistication the ideas developed by these writers. They also applied and adapted these ideas to the business of governance, believing the law of nations to be one which bore directly on them. In the two decades prior to the Ashburton Treaty officials dissected the challenges of foreign relations, and extradition in particular, not simply according to tactical or diplomatic politics, but within a changing legal order. That legal order is the focus of this chapter.

This chapter proceeds in four main parts. First it examines the ideas of the jurists who believed in an international law obligation to extradite, highlighting the lineage of this argument in the work of seventeenth and eighteenth-century European scholars. Second, it explores the arguments of those who did not believe in such an obligation. This too had a long intellectual lineage and was an increasingly powerful view in early nineteenth-century America. Next it focuses on how extradition was handled in practice by imperial, colonial, federal, and state policymakers, showing how questions of American federalism re-shaped the debate. Finally, it focuses on the decline of the Canadian-American extradition system which had been based in part on the idea of an international law obligation. This occurred during a period of deep Anglo-American tensions – the so-called ‘crisis’ period following a decade of boundary disputes and years of cross-border animosity in the wake of the Canadian Rebellions of 1837-1838. The extradition debate is thus linked to this wider diplomatic context but also raised distinct questions about the role of international law in North American statecraft.

77 A recent exception is Rainer Baehre, “Diplomacy, International Law.”
Extradition and International Society in Legal Literature and Jurisprudence

In the two decades before the Ashburton Treaty, questions of international law and order came to a head again and again in the debate over extradition. The debate centred on a question fundamental to international order: how did states decide what the law of nations was? In Britain, the colonies, and the United States different ideas emerged, and different traditions of legal thought clashed, over whether governments must, or even could, surrender fugitives without a treaty compelling them. This debate was taken up by some of the most important legal thinkers of the nineteenth century, reacting to some of the foundational European ideas of the early-modern and modern periods. This section examines the ideas of those scholars and judges who argued that extradition was a duty imposed by international law.

At the core of this position was a view about the way states were responsible for the international maintenance of law and order. Perhaps the most influential thinker for those who believed that states were under an obligation to extradite was Hugo Grotius, author of the 1625 treatise *De Jure Belli ac Pacis Libri Tres* (*On the Law of War and Peace*). Grotius has long been known as the ‘father of international law,’ and his theories of natural rights and the law of nations have been profoundly influential.80 Two hundred years after its publication, his treatise was still the starting point for early nineteenth-century jurists and officials arguing for the obligation to extradite, and many other issues besides. Simply put, Grotius argued that a sovereign should not screen offenders from justice.81 For him, international law in this area worked as a system of rights. The right to punish or forgive crimes within a national community rested with the state, but when crimes affected other independent states or sovereigns – when the subjects of one committed crimes in another or criminal refugees fled to a foreign country – that exclusive authority no longer applied. When this happened, the other sovereign had the right to require either the surrender of the fugitive or their trial in the country of refuge. Grotius called this “a right essential to the dignity and security of all governments.”82

---

82 Ibid., II, XXI, III, 258.
While Grotius remained influential in legal circles, by the early nineteenth-century he had been replaced as the benchmark in international law writing by the Swiss jurist Emerich de Vattel. However, as in many other areas of law, Vattel’s landmark 1758 treatise took a similar approach to the subject of fugitive criminals. His starting point was that natural law gave a state no power to punish except in its own defence and safety against an offender who had broken its law. Like Grotius, though, Vattel argued that this aspect of sovereignty was limited, and that those who committed serious crimes such as murder or arson, “violate all public security, and declare themselves the enemies of the human race.” In these cases, the offenders could be punished wherever they were seized, making them subject to a kind of universal jurisdiction. Moreover, if the sovereign whose laws had been broken applied for their extradition, they ought to be surrendered to the government “principally interested” in punishing their crime.

This idea of an obligation had important proponents among eighteenth-century English legal authors. In large part, this was because of the continuing influence of Grotius in international law thought, as evidenced by the work of Thomas Rutherforth. His Institutes of Natural Law was comprised of a set of lectures on Grotius given at Cambridge in the 1750’s and in it he drew out the idea of a system of rights which compelled states to extradite fugitives. But Rutherforth actually went further than Grotius, declaring that the country to which a fugitive fled had no right to punish for offences committed outside its jurisdiction, thus negating the choice of extradition or prosecution. The only option was extradition, and Rutherforth was clear that “the injured nation” had a right to demand surrender. Edward Wynne made a similar point in his 1768 treatise Eunomus. He contended that “from the very nature of society” subjects were answerable to their own governments and that when they fled, that government had a right under international law to demand their surrender.

---

85 Ibid., I, XIX, s. 230, 228.
86 Ibid., I, XIX, s. 230, 228.
88 Ibid., II, IX, 496.
These arguments reflect a broader vision of international order. Grotius famously posited the existence of an “international society” composed of sovereign states with sovereign rights, who were nonetheless part of a larger law-abiding community. Rutherford described this order as the unification of civil societies, each of which was “a distinct and entire body,” into “a collective person” by a “social compact.” Likewise, Wynne described nations as “individuals… in a state of nature.” For Grotius and his successors, then, the sovereign’s responsibility to ensure the punishment of fugitives by extradition or prosecution was a reflection of this dynamic of community in which the rights of jurisdiction came with responsibilities of governance. This responsibility over criminals was also about maintaining order, domestically and internationally. When Grotius noted that the right of expecting either extradition or prosecution was “a right essential to the dignity and security of all governments” he was envisioning a reciprocal system in which states protected one another from criminals and so were themselves protected. Wynne took up this idea, drawing together the notions of national and international community, writing that domestic order could not be achieved without this cooperation between countries. “The interests of society itself, in general,” he wrote, “are so deeply involved in this respect, that it can never be the real interest of one country to nourish an impious criminal in its bosom, who flies there for refuge against the justice of his own.” Nations were bound to assist one another in promoting the ends of justice, he wrote, and by doing so ensured their own preservation.

In this line of thinking, states had a responsibility to enforce the law in an international context. It also meant that states could themselves become criminals or delinquents within international society. Grotius, for example, maintained that states could become responsible for the actions of their citizens against other states if they cooperated in the crime, knew about it advance, or shielded the offender from punishment. Likewise, Robert Ward argued in his 1795 history of the law of nations in Europe that granting protection “to those who have offended the peace of other Communities, is itself little less than the same sort of crime.” Rutherford and Wynne agreed that not surrendering a fugitive made the sovereign an accessory to that person’s

---

91 Rutherford, Institutes of Natural Law, II, IX, 494.
92 Wynne, Eunomus, III, 209.
93 Ibid., III, 208.
94 Ibid., III, 211.
crime. But they both went further, and contended that refusing extradition gave the requesting country a just cause for war.\footnote{Rutherforth, \textit{Institutes of Natural Law}, II, IX, 493-496; Wynne, \textit{Eunomus}, III, 210.}

Tracing the adoption of these ideas in practice and their transplantation to North American jurists is not straightforward. There were only scattered comments in English case law to support the idea of an obligation under international law. Although there were cases of prisoners fighting their surrender to Ireland in the seventeenth and eighteenth centuries, and losing before the courts, these were within the same sovereign realm and so do not necessarily reveal much about attitudes to the international question.\footnote{Colonel Lundy’s Case, 2 Ventris 314; R. v. Kimberley, 2 Strange 848;} In at least one seventeenth century case, a prisoner unsuccessfully contested his extradition to Portugal, but this may have fallen under the obligations of a 1654 treaty negotiated by Oliver Cromwell, and there is no comment in the case report giving the court’s reasons.\footnote{R. v. Hutchinson, 3 Keble 785 (E.R. 84, 1011); Paul O’Higgins, “The History of Extradition in British Practice, 1174-1794,” \textit{Indian Yearbook of International Affairs}, 13(2), 1964, 98-99.} The Court of Exchequer came closer to addressing the issue in a 1749 case in which the judge observed that the government may surrender persons to foreign countries to answer for a crime “that he may not involve his country, and to prevent reprisals,” possibly echoing Wynne and Rutherforth on non-extradition being a just cause for war.\footnote{East India Company v. Campbell, 1 Ves. Sen. 247.} Here again, though, there was little by way of explication.

Perhaps the most frequently cited English judge on this question, by those arguing for an obligation, was Justice John Heath of the Court of Common Pleas. In the 1811 case \textit{Mure v. Kaye}, Heath observed that criminals were punishable according to the law of the country in which they committed the crime. This, he wrote, “has always been the law of all civilized countries.”\footnote{Mure v. Kaye and Another, 4 Taunt 44.} But Heath also wrote that fugitives were surrendered by the comity of nations, leaving the question open of whether he considered that an actual legal obligation existed.\footnote{Ibid., 43.} Moreover, this case also involved an arrest in Scotland, so Heath’s comments were not even directly relevant, and he was the only one of four judges who wrote decisions in the case to mention the issue. Still, Heath’s comment had resonance. The English lawyer Joseph Chitty included the substance of it in his famous 1816 \textit{Practical Treatise on Criminal Law}, in which he seems to have taken the point as settled law.\footnote{Joseph Chitty, \textit{A Practical Treatise on the Criminal Law}. Vol. I. (London: A.J. Valpy, 1816), 16.} In fact, it survived into several American editions...
of Chitty’s work, and appeared in his 1826 edition of Sir William Blackstone’s *Commentaries on the Laws of England*.\(^{104}\)

While there were no clear English cases dealing with this question, courts in the U.S. and Canada addressed it more directly. Probably the first such reported case – and certainly the most influential – was that of Daniel Washburn in 1819, who was arrested in New York State for a theft of $4,000 in Kingston, Upper Canada.\(^{105}\) The judge here was the famous Chancellor James Kent, former chief justice of New York and long renowned for his *Commentaries on American Law*. Washburn’s lawyers applied to Kent for *habeas corpus*, arguing that the court had no power to detain Washburn for foreign crimes. But Kent rejected that idea, and found both the power and the necessity of holding Washburn in the dictates of international law. “It is the law and usage of nations,” he wrote, “resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony… and fleeing… into a foreign and friendly jurisdiction.”\(^{106}\) While judges could not make surrenders themselves, Kent believed that if there was sufficient evidence to warrant the arrest they were bound to commit the fugitive so that the governor or president could turn him over to the foreign country.\(^{107}\)

We can see in Kent’s decision a deference to the Grotian idea of international society. He leaned heavily on the concept of a state becoming an accomplice in crime if it refused to give up a fugitive, drawing not simply from Grotius but Vattel and other European writers on international law. He cited the eighteenth century German jurist Johann Gottlieb Heineccius and the French legal and political theorist Jean-Jacques Burlamaqui, and concluded from them that extradition was a “common and indispensable obligation.”\(^{108}\) Here he drew also from Edward Wynne’s *Eunomus* and contended that the obligation existed independently of any specific treaty which the United States might negotiate with a foreign power. Indeed, he argued that the 1794 Jay Treaty with Britain, the extradition clause of which had expired, was only declaratory of international law. That is, that the rights and obligations of demanding and surrendering fugitives were recognized by the treaty and not created by it.\(^{109}\)

---


\(^{105}\) In the Matter of Daniel Washburn, 4 Johnson’s Chancery 107.

\(^{106}\) Ibid., 108.

\(^{107}\) Ibid.

\(^{108}\) Ibid., 110.

\(^{109}\) Ibid., 113.
Kent revisited this issue in his *Commentaries*. The four volumes were published between 1826 and 1830 and covered a broad swath of American law. They ranged from constitutional to property, to individual liberty, to real estate and titles. As John Langbein has argued, the *Commentaries* was the most influential American legal publication of the antebellum period, and by the turn of the century it had gone through fourteen editions and made Kent a small fortune.110 Interestingly, Kent began the first volume with international law – it preceded even his section on the U.S. constitution, and at nearly two hundred pages was almost a monograph in itself.

(Indeed, in the 1860’s an English judge updated the international law section and published it separately.111) In it, he praised Grotius, who “arose like a splendid luminary, dispelling darkness and confusion, and imparting light, and guides, and security, to the intercourse of nations.”112 And he echoed Grotius, and his own decision in *Washburn*, in the section on extradition. Beginning with Grotius, he wrote, the key writers on international law agreed that states were bound to deny asylum to criminals and that judges were bound to commit them for surrender if they found reasonable grounds for arrest.113 That obligation extended both to citizens of the country of refuge and to foreigners, meaning that there could be no shielding a criminal from justice because of their birthplace.114

Kent believed that international law was a vital force. He began the section by writing that “the faithful observance of this law is essential to national character, and to the happiness of mankind.”115 But Kent wanted to do more than simply reiterate settled legal ideas and package them for an audience. Rather, as a writer and judge Kent was actively trying to shape American law and statecraft, to add nuance and learning to legal debates and to ensure that patriotic fervour and populism did not shut out wise principles of British and European thought.116 He was reacting to a current in American law and politics that rejected foreign influences on their face,

111 James Kent, *Kent’s Commentaries on International Law, revised with notes and cases brought down to the present time*. J.T. Abdy, ed. (Cambridge: Deighton, Bell and Co., 1866).
113 Ibid., I, 36.
114 Ibid., I, 36.
115 Ibid., I, 1.
as evidenced by the 1799 New Jersey law banning lawyers from citing British legal decisions, opinions, or commentary produced since 4 July 1776.\(^\text{117}\)

In fact, Kent cited British and European sources constantly, though as Alan Watson has shown he often used continental ideas as window dressing to vindicate principles of British common law.\(^\text{118}\) His quest was not simply to create what Langbein calls a “learned law” in New York, but also a “decisional” one, in which jurists laid out broad ideas in published decisions and so ensured that questions were not perennially re-litigated and that law was rendered more uniform.\(^\text{119}\) To that end, he took a keen interest in the development of legal literature, especially in law reporting and, eventually, in writing his *Commentaries*. His decision in *Washburn* is an excellent example of this, since his recitation of international law ideas was not strictly necessary: Kent found the evidence insufficient for Washburn’s arrest, and so released him. The disquisition on Grotius, then, was an exercise in generating precedent.\(^\text{120}\)

Kent’s focus on international law illustrates his desire to cement the U.S. within the tradition of European civilization.\(^\text{121}\) In this, he argued, legal writers had a key role in guiding the conduct of states towards one another given the inherent challenges of establishing and maintaining legal order between sovereigns. International law was amorphous and occasionally conflicted. According to Kent, it consisted of principles of natural justice, usages and customs, and positive treaty law. But where treaties did not spell out the obligations of states, or where customs were unclear or natural law needed organizing, legal writers were to be relied upon.\(^\text{122}\) This was why he revered Grotius so much – he thought Grotius had crafted a systematic international code which “has been resorted to as the standard of authority in every succeeding age.”\(^\text{123}\) Still, international society had continued to develop since the seventeenth century, and while Grotius had done much to establish clear rules, the law of nations remained a complex composite of national legislation, judicial decisions, opinions of statesmen, and ideas of classic and modern treatise writers. These last were especially important given the variety of sources from which the law drew. Kent emphasized their role, arguing that “no civilized nation, that does

\(^\text{117}\) Langbein, “Chancellor Kent,” 567-568.
\(^\text{120}\) Re Daniel Washburn, 114.
\(^\text{121}\) Hulsebosch, *Constituting Empire*, 282.
\(^\text{122}\) Kent, *Commentaries*, I, 3.
\(^\text{123}\) Ibid., I, 16.
not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.”¹²⁴

There were no major writers on international law in British North America in this period. The law of nations did have a place in colonial legal writing, though. Beamish Murdoch’s 1832 *Epitome of the Laws of Nova Scotia*, describes international and municipal law as the two branches of the laws of mankind (as distinguished from the natural law of God).¹²⁵ Murdoch wrote that the law of nations was composed of the customs and treaties of “civilized states,” but apart from that brief mention and some discussion of admiralty law, he left the subject largely out of his four volumes.¹²⁶ Likewise, the Montreal notary Nicolas-Benjamin Doucet took some notice of international law in his 1841 *Fundamental Principles of the Laws of Canada*. Doucet called it “as invariable as the laws of nature.”¹²⁷ He also wrote that the same moral rules which bound individuals together in families and families together in nations “also link together these commonwealths as members of the great society of mankind,” and noted the work of Grotius in laying out the system within which this society existed.¹²⁸ Though nations acknowledged no common superior, he argued that they were nonetheless bound to practice towards one another “honesty and humanity.”¹²⁹ Again, there was little by way of substantive interpretation of the rights and responsibilities of the international system. But while colonial authors did not do much writing about international law, it would be wrong to assume that such influences did not affect jurists in British North America. While we know far too little about colonial legal thought, scholars have demonstrated a wide awareness of American and continental European ideas in nineteenth-century Canada.¹³⁰

We can see this kind of intellectual cosmopolitanism, and the role it could have in shaping colonial law, in the 1827 extradition case of Joseph Fisher. The prisoner was arrested in Lower Canada for a theft in Middlebury, Vermont. After Governor General Lord Dalhousie issued a warrant ordering his extradition, Fisher applied to the Court of King’s Bench in

---

¹²⁴ Ibid., I, 18-19.
¹²⁶ Ibid., 16.
¹²⁷ Nicolas-Benjamin Doucet, *Fundamental Principles of the Laws of Canada, as they existed under the natives, as they were changed under the French kings, and as they were modified and altered under the domination of England*. Vol. I. (Montreal: John Lovell, 1841-1843), 10.
¹²⁸ Ibid., 11.
¹²⁹ Ibid., 11.
Montreal for *habeas corpus*. His lawyers made four key arguments, but chief among them was the idea that the sovereign simply had no power to detain and surrender Fisher to the U.S., and that even if this power did exist it had never been used except in cases of the most serious crimes, such as murder. In opposition, the Solicitor General himself argued that such power did exist, and cited Grotius, Vattel, Heineccius, Burlamaqui and other European writers. Chief Justice James Reid heard the case and roundly rejected the defence’s argument about the absence of power, and in doing so drew from Grotius and other natural law theorists. He declared that the opinions of the legal writers clearly established the law: a criminal was to be punished by the laws he had broken. “If we screen him from that punishment,” he wrote, “we become parties to his crime, – we excite retaliation, – we encourage criminals to take refuge among us. We do that as a nation, which as individuals it would be dishonourable, nay, criminal to do.” He thus decided both that the power of extradition was extant and that as a judge he was obliged to detain the prisoner in aid of it. Delivering Fisher, he wrote, would fulfil the government’s part of the “social compact” which prescribed the rights of nations as well as individuals.

The ideas of Grotius and the other publicists were key to Reid’s decision. But so too were the handful of English cases discussed above. Reid acknowledged Sir William Blackstone’s famous remark that international law is part of the English common law, and claimed rather too confidently that these cases illustrated what his responsibility was under both. But Reid also looked to the American courts for their interpretation of the law, citing Kent’s decision in *Washburn* and a Pennsylvanian case discussed below. As will be shown, these two cases conflicted, but Reid sided squarely with Kent, saying he entirely approved of the Chancellor’s decision, which was “founded on a fair interpretation of the law, and well suited to the national intercourse and good understanding between the two countries.”

As a result, we can see the links between the idea that states were bound to extradite fugitives and a much broader conceptual framework of international legal order. For those who believed in such an obligation, the duty flowed from ideas of international society in which one

---

131 In the Case of Joseph Fisher, *Reports of Cases Argued and Determined in the Courts of King’s Bench and in the Provincial Court of Appeals of Lower Canada*. George Okill Stuart, ed. (Quebec: Neilson & Cowan, 1834), 245-248.
132 Ibid., 249-250.
133 Ibid., 250.
134 Ibid., 251. Reid’s emphasis.
135 Ibid., 251.
136 Ibid., 252.
137 Ibid., 255.
state’s sovereign rights were nonetheless subject to a series of rules imposed by natural law. This tradition went back centuries and suggested that states were bound to enforce the rule of law between states just as they were to do so within their own territory. Sovereignty, in other words, had to be performed outwards as well as maintained within national borders.

After Kent: The Obligation to Extradite and American Law

This section examines the arguments of those jurists who disputed the idea of an obligation to extradite. Taken together, Grotius, Kent, Reid and the other jurists discussed above gave considerable credibility to the idea of an obligation to extradite. But their opinions were not universally shared. In fact, many policymakers, judges, and scholars of international law held very different views about the law was on this point and disputed the idea that governments should or even could extradite as a matter of international law. In large part, this reflects the amorphous nature of nineteenth-century international law – conflicting positions could be held by courts, statesmen, and writers even in the same country about what international obligations were. Moreover, opinions even within countries could vary widely, with jurists taking very different approaches. In particular, the debate also reflects divergent views about formative concepts such as the basic of international law, the role of publicists, and the necessity of sovereign consent in the international legal order.

There are only a handful of reported American extradition cases during the period between James Kent’s 1819 decision in Washburn and the 1842 treaty. But each disagreed with Kent, and together they illustrate how the Grotian idea of an obligation was contested in American legal thought. Probably the first was Commonwealth v. Deacon in August 1823. The case centred on Edward Short, arrested in Pennsylvania for an 1821 murder in Ireland. When Short applied for habeas corpus the case came before William Tilghman, Chief Justice of the Pennsylvania Supreme Court. Tilghman was not satisfied with the prosecution’s evidence, and wrote that if this were simply a commitment hearing with no other issues at play he would be inclined to release the prisoner.138 But there was, Tilghman wrote, a much more important question remaining, namely: if there were evidence, should Short have been detained for foreign crimes? The prosecution said so, and based its case on international law, arguing that a foreign

government had an absolute and perfect right to demand fugitives, and citing Kent, Grotius, and the British cases noted above.¹³⁹

Tilghman decided against the obligation. His decision reflects an interesting position on the role of publicists in international law. Tilghman did not resist their authority, and he did not argue with the idea that a unanimous opinion among treatise-writers should be persuasive in American courts. Instead, he unearthed writers who disagreed with the Grotian obligation to extradite outside of a treaty – as he put it, “there are great names on both sides.”¹⁴⁰ He drew from the German writer Georg Friedrich von Martens, whose 1795 summary of international law was grounded in treaties and acknowledged customs, and not in natural law ideas.¹⁴¹ Martens disputed the idea of an obligation, writing that according to modern custom extradition occurred under reciprocal arrangements or formal treaties.¹⁴² Tilghman found others, including the German writer Samuel von Pufendorf and the Englishman Sir Edward Coke, both giants of naturalist legal philosophy, who took a similar approach.¹⁴³ Nor was he convinced by the English case law, observing that two of the cases involved transferring prisoners between the same sovereign realm. He similarly discounted Justice Heath’s comment in Mure, noting the judge’s comment that prisoners were surrendered by the comity of nations, an idea which tended to militate against a perfect obligation.¹⁴⁴

Tilghman had another, more profound objection to the idea of an obligation to extradite. He argued that it could not exist consonant with other principles of international law and of state sovereignty. He called the idea of a state becoming an accessory in crime “a beautiful theory,” which was unworkable in practice.¹⁴⁵ Here the plight of political refugees, examined in greater detail chapter three, was crucial to his thinking. He noted that Grotius had especially singled out crimes against the state as those which the international community should cooperate to punish. But Tilghman argued that modern, liberal states uniformly provided refuge to rebels from tyrannical regimes and that America was populated by fugitives from oppressive governments all across Europe, and would not give them up to the vengeance of their oppressors. Nor, he added,

---

¹³⁹ Ibid., 3.
¹⁴⁰ Ibid., 4.
¹⁴² Ibid., 107-108.
¹⁴³ Commonwealth v. Deacon, 4-7.
¹⁴⁴ Ibid., 9.
¹⁴⁵ Ibid., 10.
would Britain, which now pressed its demand on the basis of a supposedly perfect obligation. As a result, Tilghman concluded that at best extradition was an imperfect obligation: one state had a right to ask it as a favour, and the other had a right to refuse. In no case was refusal a grounds for war as the earlier writers had alleged.

So Tilghman acknowledged the authority of the great treatises, even as he explored the divisions between them. He was also frank in considering American opinions far more important, and it was these which sealed his decision. He cited the published letters of Jefferson and Monroe in deciding against giving up fugitives without a treaty, and what he said was the policy of the U.S. and of the state of Pennsylvania in not asking other countries to do so either. As a result, with the executive branch unwilling to surrender or demand, the judiciary simply had no power to detain in aid of a foreign request which had no chance of succeeding. Of course, he had also read Washburn, and said that he greatly respect Kent’s opinion. But Kent had laid out a principle of international law which the U.S. had not recognized, and which Tilghman felt he could not now enforce. He left open the possibility of either the federal or state executive giving itself the power to surrender through treaty or legislation, but said in the absence of that voluntary assumption there was no prospect of Short’s surrender.

Deacon was more influential than Washburn. On a state level, magistrate’s manuals in Pennsylvania nearly two decades later still referenced Deacon in declaring that it was unlawful for justices to arrest someone in the state for foreign crimes, at least at the request of a private person, as had been done in the case. But on a broader level, it now provided a precedent to rival Washburn, and affirmed the primacy of American interpretations of international law. More importantly, by specifying that the U.S. had never recognized or consented to the obligation to extradite, Tilghman reflected a growing trend in international law, the shift from naturalism to positivism. As many scholars have shown, there was a transition, however messily and

146 Ibid., 11-12.
147 Ibid., 11.
148 Ibid., 12.
149 Ibid., 12.
150 Ibid., 14-17.
151 Ibid., 16.
incompletely, from a law based largely in natural rights and obligations as interpreted by writers like Grotius and referencing examples and customs from the ancient world, to one premised on sovereign consent to modern rules and expressed primarily in treaties and acknowledged customs. The nineteenth century did not see the beginning or end of this transition, but the period was crucial.

This transition is part of the cleavage in American attitudes to extradition. If as Tilghman claimed, the U.S. had never consented to such an obligation to surrender, did an obligation still exist? Was the U.S. flouting the law of nations or becoming an accessory to that person’s crime by refusing to extradite? Increasingly, American jurists said no. William Rawle noted the issue in his 1825 book on the U.S. constitution, and reframed the question in the light of individual as well as national rights. Rawle argued that no nation had a right to demand a fugitive back from another – any country may conscientiously protect any newcomer. Moreover, according to Rawle, individuals could be punished only by the state whose laws they had broken, and delivering a fugitive for punishment was to assist in that punishment. Additionally, just six years after Kent’s decision in Washburn, Rawle noted it in a footnote as merely a “contrary opinion.”

The precedent also spread to the federal courts. In 1835 the Portuguese government sought the arrest and extradition of Jose Ferreira dos Santos for murder. The counsel for the Portuguese government made the same argument as had lawyers in previous cases, using Grotius, Vattel, the British cases, and now Washburn and the Canadian decision in Fisher. There had “immemorially arisen,” he argued, a twinned right and obligation to demand and surrender, and while some nations concluded extradition treaties, these were merely declaratory of the general law of nations. But as in Deacon, the court did not agree. Federal district judge (and soon-to-be Supreme Court justice) Philip Pendleton Barbour rejected the Portuguese government’s interpretation of the law. Barbour used very similar reasoning to Tilghman, and

156 Ibid., 952.
nearly identical sources. He noted divisions between the treatise-writers and observed that Grotius would demand the surrender of political refugees, something no modern nation would grant. Like Tilghman, he also focused especially on the issue of national consent, and having reviewed the same sources found no such acknowledgment. “The principle has been announced to the world,” he wrote, “that the United States acknowledge no obligation to surrender fugitives, except by virtue of some treaty stipulation.” With a federal executive unwilling or unable to surrender criminals, the federal courts had no role in enforcing foreign law. As a result, Dos Santos was freed.

This was also the approach taken by Joseph Story, both in his role as a Supreme Court justice and as one of the most important legal writers of nineteenth-century America. Story included the extradition issue in his massively influential 1834 *Commentaries on the Conflict of Law*. In the few pages he spent on the issue, Story noted the divisions among publicists and judges on the question of obligation, notably Kent and Tilghman. And he observed almost in passing that the surrender of fugitives had prevailed as a matter of comity and occasionally of treaties, a comment which seemed to dismiss the view of it as an international duty. Story’s vision of the conflict of laws more generally served to underscore this comment. On criminal law, he argued directly that crimes were strictly local and punishable only in the country in which they were committed. “No other nation,” he wrote, “has any right to punish them; or is under any obligation to take notice of, or to enforce any judgment” from the home country. More generally, Story emphasized an international system premised on sovereign consent. In the opening chapter he contended that a country’s laws could plainly have no force within the territory of another, and thus that “no other nation, or its subjects, are bound to yield the slightest obedience to those laws.”

---

157 Ibid., 955.
158 Ibid., 956-957.
161 Ibid., 520.
162 Ibid., 516.
163 Ibid., 7. Story put these views into practice three years later in a case on which he sat as a circuit judge, as Supreme Court justice then did between terms. See U.S. v. Davis, *Federal Cases*, vol. XXV, 786-788.
With decisions in the state and federal courts against the obligation to extradite, Americans were rapidly cementing their stance on this facet of international law. This was signalled graphically by Henry Wheaton’s 1836 *Elements of International Law*. The book is widely regarded as the most important American international law book of the nineteenth century, running through at least eight editions in the U.S. and seven in England, while being translated into French, Spanish, Italian, Chinese, Japanese, and Korean.\(^{164}\) Wheaton himself has been described as the “Blackstone of international law.”\(^{165}\) As scholars have shown, Wheaton was largely a positivist, in that he acknowledged natural law ideas but gave real primacy to treaties and accepted customs.\(^{166}\) He also came down squarely against the obligation to extradite outside a treaty.\(^{167}\) But more interesting than his position is the straightforward manner in which Wheaton made the declaration: in less than one hundred words, with no reference to Kent or Grotius or any of the cases. He cited Martens’ book on treaties and customs to show that extraditions sometimes occurred “as a matter of general convenience and comity,” but otherwise brushed the issue aside as settled and uncomplicated.\(^{168}\)

This marked a change. For Grotius and many of the authors who followed him, extradition was also a simple issue, but in a way inverse to that of Wheaton. For them, there was no reason not to extradite, and surrendering criminals was a straightforward part of law enforcement within international society. But increasingly in the nineteenth century that theoretical obligation was being contested in law books and court rulings. At issue was not simply the question of extradition, but the ways in which the rules of international law were generated. What role were the classical treatises of long-dead European authors to have? And what if those authors disagreed? Did treaties create obligations or merely recognize them? Or both? Could nations be bound by rules to which they had never consented? Certainly the balance tipped towards a positivistic answer to these kinds of questions in the early and mid-nineteenth century, and the extradition issue in part reflected and furthered this transition. But authors and high court judges were not the sole interpreters and administrators of the law of nations. While

\(^{168}\) Wheaton, *Elements*, 111.
they clearly shaped the law and enunciated its underlying philosophies, it cannot be fully understood without looking at statecraft. The following section takes up this task.

**Statecraft and the Extradition Question**

Judges and scholars of international law made sweeping declarations about extradition with little basis in the realities of statecraft. From Grotius to Kent, those arguing that states had a duty to extradite criminals cited few examples to support the claim. Grotius, for example, relied mostly on a handful of Greco-Roman and Biblical anecdotes, while others regarded the issue as one of natural law with no need of reinforcement by actual practice. On the other side, judges such as William Tilghman too-grandly argued that the U.S. never demanded or surrendered fugitives from foreign countries, and Henry Wheaton’s simple declaration that no obligation existed was bolstered by no evidence at all. But the realities of the Anglo-American relationship illustrate that the legal connections between the two countries defied such easy characterisations on both sides. In the U.S., divisions existed both within and between Washington and the states on the issue. In the British North American colonies, meanwhile, officials carved out a customary and statutory regime, and indeed an entire interpretation of international law, very different from that of Britain. With so many divisions it was certainly a frail system. And as the law as enunciated by elite judges and publicists shifted, and as constitutional questions in the U.S. came to the fore and Canadian-American tensions flared in the Rebellion period, the system faltered decisively. After that, the creation of an entirely new extradition link between Britain and the U.S. through the Ashburton Treaty was the only option left.

In the U.S., the federal government resisted extradition in the absence of a treaty. While various eighteenth century statesmen including Thomas Jefferson had spoken out against the duty of surrendering criminals, the most influential legal analysis of the question probably came from William Wirt, Attorney General from 1817 to 1829. Wirt dealt with the question at least twice when the British government requested criminals, and both times he came down strongly against the Grotian idea that states had to surrender them. “We know that the law of nations, as it has been presented by Grotius, and the writers who have succeeded him,” he told President James Monroe in 1821, “beautiful as it is theory, has… been found too perfect to be introduced
into practice.”\textsuperscript{169} Instead, Wirt was keen to highlight what he called the “common practice of nations.”\textsuperscript{170} This practice, he argued, established that among modern states extradition was a conventional and not a natural duty – that is, one grounded in treaty obligations and not natural law.\textsuperscript{171} Here he singled out the European countries, contending that when they did not wish to surrender a fugitive they simply disavowed the crime, and so avoided becoming complicit in the way that Grotius and his successors had described.\textsuperscript{172} Certainly Wirt knew that extradition frequently happened in Europe, but he drew a distinction between a practice grounded in national courtesy and one grounded in law. As he put it, “if the obligation were a perfect one, and enjoined by the immutable and universal law of nations, there would be no option in the case; the thing would happened not more frequently but always.”\textsuperscript{173}

Wirt had two more foundational points. The first was grounded in American sovereignty. As Tilghman would several years later, he argued that America’s sovereign rights and the principles of international law gave the U.S. a perfect right to afford asylum to anyone it chose. This basic prerogative of sovereignty was incompatible with the kind of obligations to enforce foreign laws envisioned by Grotius, he argued.\textsuperscript{174} The second objection was even more fundamental: whatever international law might decree, the U.S. had no constitutional power to arrest a person in U.S. territory except to try them before U.S. courts. “We cannot arrest where we cannot ourselves punish,” he advised Secretary of State John Quincy Adams.\textsuperscript{175} If they did, he argued, the prisoner would certainly be granted \textit{habeas corpus}.\textsuperscript{176} But while Wirt set out these limits on executive power in the absence of positive law, he did not think they were ideal, and he seems to have believed that even if the obligation to extradite was not a perfect one, there were imperfect and moral duties embedded in international law in favour of surrendering fugitives. Given these duties, he said, the present state of federal power was “crippled and imperfect.”\textsuperscript{177}

Wirt’s view of the deficiencies of U.S. power shaped federal policy for decades. Long after his term as Attorney General ended, successive administrations told foreign governments

\begin{flushright}
\textsuperscript{170} Wirt to Adams, 22 November 1817, Ibid., 55.
\textsuperscript{171} Ibid.
\textsuperscript{172} Wirt to Monroe, 20 November 1821, Ibid., 64.
\textsuperscript{173} Ibid., 63. Italics in original.
\textsuperscript{174} Wirt to Adams, 22 November 1817, Ibid., 53.
\textsuperscript{175} Ibid., 57.
\textsuperscript{176} Ibid., 57.
\textsuperscript{177} Wirt to Monroe, 20 November 1821, Ibid., 66.
\end{flushright}
that they had no authority to return criminals. This was also the same position taken by Britain. Until the Ashburton Treaty, British Attorneys and Solicitors General and King’s and Queen’s advocates consistently informed the government that it had no right to demand fugitives as a matter of right under international law, and no power to comply when foreign governments made such requests on them. Without a treaty and an enabling act of Parliament, they advised, the executive had no power to arrest and detain people for crimes in foreign countries.

These opinions were not rendered in theory, as general statements of policy. Rather, they were composed in instances where considerable international or colonial pressure was frequently exerted on the British authorities. For example, when Spain requested the surrender of Cuban convicts who had been shipwrecked in the Bahamas en route to jail in Cadiz, the Attorney General and Solicitor General told the government that the local colonial authorities could not act. So long as the former prisoners complied with local law, they were “entitled to be dealt with as free agents.” Likewise, when Upper Canada wanted to demand the extradition of the Rebel leader Benjamin Lett for murder in 1839 and pleaded with Westminster to intercede with the Americans, the Queen’s Advocate declared that “this Country has not by the Law of Nations, or otherwise, a right to insist upon the Delivery up of Mr. Lett.” In practice, then, the much-vaunted duty of extradition would seem to have failed on both international and domestic grounds in the Anglo-American world. For key officials, the obligation was absent and the power was lacking.

While these opinions were important, they were not universal. Even in the U.S. federal government opinion and practice varied from Wirt’s decrees. In 1818, for example, the American consul general in Copenhagen asked the Prussian government for the surrender of a Prussian sailor named John Stromsky, alleged to have been involved in a mutiny on board an American schooner in which several people were killed. The consul relied on what he said were principles “settled by the best writers” on international law, namely that states were bound to refuse asylum

---

to those guilty of serious crimes like murder and that jurisdiction belonged to the country whose laws had been broken and not the one where the fugitive was found. Moreover, he appears to have made similar requests to Sweden and Denmark in the case, both of which were granted.

Washington and Westminster were also not the only governments who explored this question. Both American states and British North American colonies tested the limits of their legal authority here. In New York, for example, Governor DeWitt Clinton called for a state extradition law in his January 1822 address to the assembly. The announcement came just three years after Kent’s decision in Washburn which enabled, and indeed almost mandated the authorities to deliver fugitives, illustrating how contentious that decision was and how many doubts it probably left in the minds of jurists. Clinton declared that a statutory enactment, meanwhile, would have “a salutary tendency in preventing and punishing crimes and in expelling from our territories malefactors who resort to it from other countries, in expectation of impunity.” A few months later, such an act was passed, giving the governor power to surrender fugitives if their crime would have been punishable by death or imprisonment if committed in the state. Likewise, as David Murray has shown, Michigan authorities were willing to extradite even without statutory power, and at least once in the late 1830’s the Governor of Vermont agreed to do the same.

In the British North American colonies, officials also deviated from metropolitan policy. Lower Canada was the only one where the power and rationale of surrendering was clearly supported by a reported decision from the courts. As noted above, Montreal Chief Justice James Reid applied international law to find that the Governor had inherent power to surrender fugitives in 1827, though his decision seems to reflect what the practice was already. In 1821, for example, the Governor General surrendered a notorious forger named Jacob Smith to New York after Clinton requested him. According to the Montreal Courant, “the principle, we are happy to perceive, seems to be recognised by this government of delivering up renegade criminals from the United States; and we hope it will be readily and gladly reciprocated by the authorities of the

---

183 D’Engestrom to Hughes, 15 August 1817, Piracy and Murder, 17.
184 “Speech of the Governor at the Opening of the Present Session of the Legislature,” The National Advocate, 8 January 1822.
185 1822 New York Laws, chapter 148, 139, April 5 1822.
186 David Murray, Colonial Justice: Justice, Morality and Crime in the Niagara District, 1791-1849. (Toronto: University of Toronto Press and the Osgoode Society, 2002), 184; Jenison to Colborne, 23 March 1839, Correspondence Relative to the Affairs of Canada, Parliamentary Papers, 1840, 90.
Montreal Herald, meanwhile, noted that “for the future, all refugee vagabonds from the United States are to be delivered up in the same manner – they therefore will do well to keep clear of us.” In 1829, the Executive Council observed that its guiding principle in such cases was simple: criminals were to be punished by the country whose laws they had broken, and the country to which they fled had every right to hand them over.

In Lower Canada, Chief Justice Reid’s vision of executive power and international law remained influential. In 1842, when the imperial government reviewed an American request for two fugitives said to be in the province, officials in Westminster questioned whether the Governor could legally give them up. Specifically, they wanted to know whether there was positive law or established custom empowering him to do so. Lower Canada Attorney General C.R. Ogden, then in London, advised that Governors had surrendered fugitives as acts of “high executive authority” and in the end Sir Charles Bagot decided that he did have the power under Canadian law “as interpreted by the chief court of the province,” almost certainly a reference to the Fisher case.

This view of the law also influenced Lower Canadian requests to the U.S. In fact, the continuing influence of Fisher speaks to an interpretation and practice of international law starkly at odds with that of the imperial government, which disputed any inherent obligation or power to extradite. In Lower Canada, that twinned obligation and power appears to have continued as law. In 1839, for example, Sir John Colborne twice claimed fugitives from Vermont, writing that he did so “in accordance with the rules of international Law.” Interestingly, it was not simply the Governor that deployed this view of the law, but also the British Ambassador who attempted to convince Washington to make the surrenders. In the 1839 cases, H.S. Fox told the Secretary of State that the U.S. should “perform the required act of international justice… in compliance with the acknowledged obligations of publick law and usage between conterminous countries.” Thus, in calling the obligation to extradite an

---

188 Montreal Herald, 24 November 1821, reprinted in Providence Patriot, 26 December 1821, 2.
193 Fox to Forsyth, 15 February 1839, Ibid., 482; Fox to Forsyth, 18 March 1839, Ibid., 488.
‘acknowledged’ obligation, Britain’s chief diplomat in America took up the Canadian interpretation of international law in representing a Canadian case and deviated from that of his own government. Additionally, his comment about “conterminous countries” speaks to an idea, echoed by Colborne, that a variation of international law could exist when two countries shared a border. As Colborne put it, Canada and the northern states were bound by “more enlarged and extensive principles.” This represented a further isolation of Canadian visions of law from those of Britain.

This Canadian view of a regional dialect of international law also existed alongside ideas of quasi-universality and civilization. Simply put, some offences made the criminal a universal outlaw, and this language was used to bolster demands for extradition. These ideas of crimes which rendered the criminal the enemy of mankind, crimes for which there should be no asylum, echoed the Grotian idea of an international society and were common in Europe and North America. This was apparent in 1841 when Lord Sydenham agreed to surrender an accused forger to New York. Sydenham wrote that the crime in this case was “an offence against those general laws which prevail in every civilized community.” Likewise, in 1829 the Executive Council wrote that to qualify as extraditable, the offence must be such as were “universally admitted to be Crimes in every Nation.” Lower Canada also deployed the idea of a universal offence in making requests. In 1839, Colborne asked the Governor of Vermont for the extradition of an accused murderer, writing that the offence was “regarded with abhorrence in all communities.” The Portuguese government made a similar argument in Dos Santos, in which counsel argued for what he called “the common principle, recognised and acted upon by the enlightened of all nations,” that crime should be punished. The French government made a similar declaration in considering the surrender of mutineers to the U.S. in 1818, as did a British diplomat in requesting the extradition of pirates from the U.S. in 1817. Whether or not a government embraced the obligation or power of extradition, the idea of a quasi-universal administration of justice among civilized countries remained powerful.

194 Colborne to Jenison, 1 January 1839, Ibid., 476.
195 Sydenham to Seward, 14 May 1841, N.A.R.A., U.S. State Department, M-179, Roll 93.
196 Report of the Executive Council, 15 August 1829, Diplomatic Correspondence, II, 815.
197 Colborne to Jenison, 23 March 1839, Correspondence Relative to the Affairs of Canada, 1840, 90.
198 Ex Parte Dos Santos, 949.
199 Duke de Richelieu to Albert Gallatin, 25 July 1817, Piracy and Murder, 7; G.C. Antrobus to John Quincy Adams, 10 May 1818, Piracy and Murder, 45.
This rhetoric of civilization was not accidental or empty. As Gerrit Gong has shown, the ‘standard of civilization’ was a powerful self-imposed code of behaviour among European countries.\textsuperscript{200} The standard pledged states to observe basic domestic rights, such as life and property and freedom of commerce and religion. Civilized states also wielded state power and had organized bureaucracies and the capacity for efficient administration and self-defence. Civilization also imposed international responsibilities. Such states were members of a community with obligations to partake in diplomatic exchange, to ensure domestic justice not simply for citizens but also for foreigners, and to adhere to norms of international law.\textsuperscript{201} Indeed, legal order and civilization were inextricably intertwined concepts. Kent, for example, wrote that after the Revolution the U.S. “became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law.”\textsuperscript{202} Likewise, Wheaton’s book defined international law “as understood among civilized, Christian nations,” though as Gong has shown the concept became more secular and more inclusive of non-European countries throughout the nineteenth century.\textsuperscript{203} In this context, appeals to surrender fugitives on the grounds of a common civilization drew on established discourses and ideas of international legal order.

In Upper Canada the situation was different. There was no precedent in the courts until 1832 when, as David Murray has shown, doubt about executive power to extradite prompted a test case before Justice James Buchanan Macaulay of the Court of King’s Bench in which the Attorney General acted as counsel for two men facing extradition to Michigan while the Solicitor General acted for the Crown.\textsuperscript{204} The intention of the hearing was to clarify the limits of the governor’s power, but Macaulay’s ruling lacked the kind of force of Reid’s in Fisher, Kent’s in Washburn, or Tilghman’s in Deacon. That is, it did little to empower or restrict either the judiciary or the executive from detaining or surrendering fugitives. As in the latter two cases, the judge’s thoughts on the international question were superfluous since there was a preliminary barrier to extradition in the case: the men were British subjects and so exempt from being turned over to a foreign government for trial under the 1679 Habeas Corpus Act.\textsuperscript{205}

\textsuperscript{201} Gong, \textit{Standard of ‘Civilization,’} 14-21.
\textsuperscript{202} Kent, \textit{Commentaries}, I, 1.
\textsuperscript{203} Wheaton, \textit{Elements of International Law}, 36; Gong, \textit{Standard of ‘Civilization,’} 54-64.
\textsuperscript{204} Murray, \textit{Colonial Justice}, 182-183
\textsuperscript{205} 31 Car. II, cap. 2, sec. 12 [England].
Unlike Kent and Tilghman, though, Macaulay resisted setting out clear parameters in obiter. He did not “deem it susceptible of receiving a fixed rule” and wrote that each case must be considered on its own merits.\(^\text{206}\) Certainly he did think that there were cases in which foreigners might be surrendered by common law, international law, or comity, as happened in Lower Canada. But he also noted many contingent factors to be weighed in doing so: the amount of evidence submitted, the promptness of the request, the seriousness of the crime, and any political motivations behind the offence.\(^\text{207}\) Macaulay was not sure all crimes were extraditable—he thought murder likely was, but was not so certain about less serious offences like theft. Nor was he certain about how much time the foreign government would have to formally request the surrender before the prisoner could apply for *habeas corpus*, or even what degree of evidence the government should present to the court.\(^\text{208}\) In general, the decision left more questions than answers, so it is not surprising that despite his comment that the Governor might sometimes surrender, the legislature soon followed New York in passing an act to clarify that power, to define its procedure, and to set a standard for the evidence required to detain and surrender.\(^\text{209}\) While this statute clarified executive power, there were some like Attorney General Christopher Hagerman, who considered the statute merely declaratory of the “well established principle” of international law in favour of extradition.\(^\text{210}\)

It appears that neither New Brunswick nor Nova Scotia had a court ruling or a statute to clarify executive and judicial power, but both surrendered fugitives. In 1826, Chief Justice John G. Marshall of the Inferior Court of Common Pleas and of the General Sessions in Sydney, Cape Breton, ordered the arrest and detention of several crew members of the American schooner *Fairy* for murder committed on the high seas.\(^\text{211}\) Marshall examined witnesses, compiled evidence, and sent the prisoners to Halifax where Lieutenant Governor Sir James Kempt soon despatched them for trial in Massachusetts.\(^\text{212}\) Similarly, in 1839 New Brunswick Lieutenant

\(^{206}\) “Mr Justice Macaulay’s minutes on the examination of the persons arrested at Sandwich for an offence committed in Michigan,” 29 December 1832, LAC, RG 5, A-1, Vol. 124, Reel C-6877, 68621.

\(^{207}\) Ibid., 68624-68626.

\(^{208}\) Ibid.

\(^{209}\) 3 Will. IV, cap. 7 [U.C.]


\(^{212}\) Kempt to Vaughan, 11 November 1826, Ibid. For a report of the trial and conviction in federal court, see “Trial for Murder and Piracy,” *Salem Gazette*, 19 December 1826, 1-2.
Governor Sir John Harvey ordered that Richard Batchelder, who was indicted for a larceny worth a little over $100, be sent back to Maine for trial.\textsuperscript{213}

In some ways, what is especially interesting about the Nova Scotia and New Brunswick cases is how simple the issues seemed and how little ‘law talk’ there is in the surviving documents. In his report to the Provincial Secretary, for example, Chief Justice Marshall simply noted that the murders were committed out of the jurisdiction of the colonial courts and by U.S. citizens. Under such circumstances, he committed the perpetrators to jail for their transportation to the jurisdiction where they could be tried.\textsuperscript{214} After that, Sir James Kempt told the British minister in Washington that since the men were Americans he was ordering their conveyance to Boston.\textsuperscript{215} Neither official was preoccupied with the authority by which they detained the sailors. Thomas Chandler Haliburton, himself a lawyer and soon a judge, noted the case in his \textit{Historical and Statistical Account of Nova Scotia}, writing simply that Kempt’s decision was “nothing more than an act of courtesy to a friendly Foreign power.”\textsuperscript{216} Similarly, Sir John Harvey’s surviving 1839 warrant of extradition observed that Batchelder was an American, and it was thus “fit and expedient” that he be “made amenable” to the state whose laws he had broken.\textsuperscript{217} Likewise, in September 1838 when a Maine justice of the peace wrote to Harvey asking for the surrender of Thomas Russell on theft charges, he cited no authority at all, and simply asked that the defendant be delivered to be dealt with by Maine law.\textsuperscript{218}

The legal regime of extradition in North America before 1842 was thus divided, uncertain, and contentious. By the late 1830’s imperial and American federal policymakers had said for decades that absent a treaty or positive law, neither government had the power to detain and surrender foreign fugitives, and that there was no international law obligation to do so. Yet British North American colonial governments and some American states authorities disagreed. Acting under a belief either international law or a reciprocal international comity (which occasionally seemed to verge on law in their understanding) mandated extradition, they participated in a fragile transborder law enforcement regime. This regime, though, was based on

\begin{itemize}
\item \textsuperscript{213} Extradition Warrant, 4 June 1839, PANB, RS344/J/2, Harvey papers. I am grateful to Professor Paul Craven for showing me this document.
\item \textsuperscript{214} Marshall to George, 7 September 1826, N.A.R.A., S.D., M 50, Roll 15.
\item \textsuperscript{215} Kempt to Vaughan, 10 October 1826, Ibid.
\item \textsuperscript{216} Thomas Chandler Haliburton, \textit{An Historical and Statistical Account of Nova Scotia}. (Halifax: Joseph Howe, 1829), 311.
\item \textsuperscript{217} Extradition Warrant, 4 June 1839, PANB, RS344/J/2, Harvey papers. I am grateful to Professor Paul Craven for showing me this document.
\item \textsuperscript{218} Leonard Pierce to Harvey, 14 September 1838, PANB, RS344/C/2, Harvey correspondence. I am grateful to Professor Paul Craven for showing me this document.
\end{itemize}
foundational ideas of domestic power and international law which were shifting deeply in this period, and it was soon to fall apart entirely.

The End of Comity

In the late 1830’s, as Anglo-American tensions in north-eastern North America spiked. As I have written elsewhere, a decade of boundary disputes, Anglo-Canadian rage at the support which Canadian rebels found in the U.S., and American fury at the Caroline raid and other incursions nearly brought about a war. That conflict was ultimately averted and the international relationship stabilized by the 1842 Ashburton Treaty, which settled the boundary disputes and other festering issues. The treaty also implemented a new kind of Canadian-American extradition system to replace the one grounded in colonial-state relations examined above, which had ground to a halt in the late 1830’s. This section explores the reasons why this system – or systems, given the diversity of actors and practices at play – ended. Differing visions of international law, arguments over American federalism, continuing uncertainty about executive power, and deteriorating cross-border relations all played a role. In the end, the U.S. Supreme Court all but sealed the fate of the former practice of rendering fugitives in 1840. After that, a new and formalized agreement in the shape of article 10 of the Ashburton Treaty was not simply desirable but necessary. The extradition issue was thus linked to the other kinds of international disputes in this period, but also subject to different forces grounded in international and constitutional law.

As noted above, the final downfall of this system in the late 1830’s and early 1840’s was forecast by legal authors like Story and Wheaton, and judges in a handful of American state and federal courts. During the 1820’s and 1830’s a body of opinion grew up in opposition to the Grotian obligation to extradite. This shift undermined the reciprocal system of extradition between the colonies and the states, and exacerbated existing tensions. One of the lingering problems with the rendering of fugitives was the question of reciprocity. Reciprocity was a key facet of extradition on a state and international level. In his speech to the New York legislature in 1822, for example, Governor DeWitt Clinton called for an extradition statute specifically to empower the state to reciprocate the recent surrender of Jacob Smith by Lower Canada. “As

219 Bradley Miller, “Beyond Borders: Sovereignty, Self-Defence, and International Law in the Rebellion Period Borderlands,” (Accepted for publication); Stevens, Border Diplomacy; Corey, Crisis of 1830-1842.
policy enjoin, so comity requires a reciprocation of the same friendly and liberal offices whenever it shall become necessary,” he said.  

Similarly, the Lower Canadian government invoked reciprocity often when requesting criminals back themselves, supplementing demands based on general principles of international law with the specific obligations of reciprocity.  

These obligations flowed from a common understanding of international law at the time – that states could not be hypocrites, asking for the enforcement of principles that they themselves did not observe. As Attorney General William Wirt observed, the law of nations “must be equally obligatory on all nations; but this equality is destroyed if other nations, which respect this law only in theory, may rightfully call upon us to respect it in practice.”  

There were key problems with this mutual relationship between states and colonies. In the colonies, British subjects were immune from surrender under the 1679 Habeas Corpus Act, and in 1832 Justice Macaulay released the two defendants in the Upper Canada test case for that reason, while in 1833 the Governor of Lower Canada refused to surrender British subjects to face murder charges in New York.  

Likewise, in Fisher, as well as in the Nova Scotia and New Brunswick cases, officials went out of their way to specify that the prisoners were not British subjects, and so were liable to surrender. This exception of British subjects undermined the idea of a binding and perfect obligation, and upset the notion of a reciprocal relationship. One Upper Canada magistrate in Sandwich, for example, noted the 1832 decision and complained that it would hamper extradition relations with the hitherto-cooperative Governor of Michigan. “What shall I say on this liberation to His Excellency Governor Porter?” he asked. “And how can we now apply to him…?”  

Certainly many Americans agreed. In the 1840 U.S. Supreme Court case discussed below defence counsel argued that no international obligation could exist for the U.S. to surrender its citizens, because Canada could not surrender its own.  

On the other side, as constitutional questions in the U.S. increasingly barred the surrender of anyone, citizen or foreigner, reciprocity

220 “Speech of the Governor at the Opening of the Present Session of the Legislature,” The National Advocate, 8 January 1822.
221 Colborne to Jenison, 1 January 1839, Diplomatic Correspondence, III, 476; Colborne to Jenison, 12 February 1839, Diplomatic Correspondence, III, 488; Fox to Forsyth, 15 February 1839, Diplomatic Correspondence, III, 482; Colborne to Jenison, 23 March 1839, Correspondence Relative to the Affairs of Canada, Parliamentary Papers, 1840, 90; Sydenham to Seward, 19 August 1841, N.A.R.A., S.D. M-179, Roll 95.
was further eroded. In 1840, for example, Secretary of State John Forsyth told a New York District Attorney that since Washington had no power to surrender prisoners it could not consequently demand fugitives from Canada.\textsuperscript{226} This too was noted across the border, and in 1841 when New York made a request on Lower Canada, the British minister in Washington observed that colonial authorities might not “find themselves at liberty” to comply, given recent American refusals to do the same.\textsuperscript{227}

Officials in both countries prized reciprocity. However, that did not mean that there was a similar underlying conception of what the act of extradition meant. As we have seen, jurists within each country disagreed on the questions of international obligation and executive power. But by the 1830’s, there was an increasing difference between the colonies, at least Lower Canada, and the northern states: colonial officials used the rhetoric of international law while Americans avoided any such language which might bind their governments. What emerged was a contest of discourses between law and courtesy in which both sides struggled to create precedent. Certainly, the federal government long disbelieved in an obligation to extradite, but Washington also consciously avoided surrendering fugitives as a matter of courtesy, in part because it might, as Wirt worried, “incautiously create a precedent which may embarrass us on future occasions.”\textsuperscript{228} As a result, American requests for extradition came couched in language that avoided or outright denied the obligation. Secretary of State Martin Van Buren did this in 1829 when requesting an escaped slave and the man who had shepherded her into Canada. Van Buren wrote that he was aware there was no legal principle upon which a formal application could be based, and he appealed to a shared “liberality” and a common interest in maintaining order in both countries.\textsuperscript{229} Meanwhile, as noted above, in the late 1830’s Lower Canada used the language of legal obligation when asking for criminals back.

The contrast was especially apparent in a series of 1839 cases between Lower Canada and Vermont. In January, Sir John Colborne asked for the surrender of James Grogan, accused of politically-motivated arsons in the Eastern Townships after the Rebellions there. According to Colborne, he was “justified by the general rules of public law, which bind all civilized nations in a state of peace,” and he noted also the comity exercised by his government towards Vermont in

\begin{itemize}
  \item \textsuperscript{226} Forsyth to H.L. Stevens, 14 February 1840, N.A.R.A., S.D., M-179, M-40, Vol. 30, Reel 28, 481.
  \item \textsuperscript{227} Fox to Fletcher Webster, 12 May 1841, A.O., RG 7, G-6, Vol. 7, Reel C-15627, 374.
  \item \textsuperscript{228} Wirt to Monroe, 20 November 1821, Piracy and Murder, 59.
  \item \textsuperscript{229} Van Buren to Vaughan, 21 July 1829, \textit{Diplomatic Correspondence}, II, 214.
\end{itemize}
this regard. Governor Silas Jenison replied that he was uncertain of his constitutional power in this regard, but said that if it were found that he did not have the authority to reciprocate what he called Lower Canada’s comity he would try to get such authority, presumably from the state legislature or through federal permission. A month later, Colborne wrote again, requesting the return of George Holmes, charged with murder in Kamouraska, and again leaning on “the rules of international law” though he again added also “in pursuance of the comity” that existed between Lower Canada and the northern states. In the latter case, while Jenison decided to surrender, he specifically rejected the notion that he did so under an obligation. He told Colborne that he came to this conclusion “more by the consideration of the amity which has heretofore subsisted… than from any obligation imposed by express enactments.” Just a day later, Jenison asked Colborne for the extradition of an accused forger, specifying that he did so only “in accordance with the amity which has heretofore been so liberally extended to the authorities of this State.” In Canada, then, the issue was one of law; in Vermont, at least, it was something less binding.

But how much less than law was the comity so often noted in these letters? Generally, comity in the international context is the recognition that courts in one country give to the court rulings of another, and how nations defer to one another’s laws out of voluntary willingness to cooperate rather than out of a legal obligation. But in this period, on the subject of extradition, it is sometimes difficult to distinguish between comity and law. The Lower Canadian government often used them together, citing the “rules of international law” and bolstering their plea with a reliance on reciprocity and comity. Likewise, Justice Macaulay in the 1832 Upper Canada test case mingled common law, international law, and the comity of nations when saying that in certain cases a foreign fugitive might be given up by the government. Chief Justice Reid used the term in the same way in Fisher. But how far countries were obliged to enforce each other’s law was contested. The Portuguese government actually equated comity and law in Dos Santos, arguing that the doctrine of comity recognized the right of one country to demand a fugitive’s surrender and the obligation of the other to comply. More generally, the author of the first

230 Colborne to Jenison, 1 January 1839, Diplomatic Correspondence, III, 476.
231 Jenison to Colborne, 10 January 1839, Ibid., 477.
232 Colborne to Jenison, 12 February 1839, Ibid., 488.
233 Jenison to Colborne, 16 April 1839, Correspondence Relative to the Affairs of Canada, 1840, 90.
234 Jenison to Colborne, 17 April 1839, Ibid., 90-91.
235 The King v. Bird and Walker, 10.
236 Re Fisher, 251.
237 Ex Parte Dos Santos, 949.
significant American legal publication on the conflict of laws argued that judges should apply foreign law out of “something like an obligation upon sovereigns,” based on international law.\textsuperscript{238} As Joel Paul has shown, while opinions diverged on this point in the early part of the century, the legal mainstream shifted decisively on this question with the work of Joseph Story in the 1830’s. As noted above, Story was steadfastly against the idea of one country being obliged to honour the laws of another. What remained was courtesy, which a government or court could voluntarily exercise so long as it did not conflict with their own domestic law or public policy.\textsuperscript{239}

On extradition, this courtesy became increasingly difficult for the northern states to exercise because of constitutional questions. The core issue was whether states had the power to surrender criminals, or whether that authority rested with the federal government. Certainly, Washington had the treaty-making power and control over foreign relations, but in the absence of a treaty, could states detain and surrender foreign fugitives pursuant to their police powers? From the time of Kent’s decision in \textit{Washburn} there was doubt on this point. After all, while strongly endorsing the international law obligation, even Kent noted that the question was open whether it was Washington or the states that had the power to execute this responsibility.\textsuperscript{240} Likewise, in 1825 Governor Cornelius Van Ness of Vermont refused to surrender a fugitive to Canada, saying he had no power to act without federal permission, and that the Secretary of State refused to assist or endorse any action of his.\textsuperscript{241} There were doubts even in New York, where there was positive law in place after 1822 giving the Governor power to extradite. The constitutionality of this statute was tested on \textit{habeas corpus} in an 1831 case in the Recorder’s Court of New York City.\textsuperscript{242} Recorder Richard Riker ultimately decided not to overrule the Governor’s extradition order, though his analysis of the federalism question was meagre.\textsuperscript{243}

Not surprisingly, the debate over the constitution did not go away.\textsuperscript{244} In the late 1830’s, with a change in administration in the state, the legal view there shifted decisively. In 1839, when Upper Canada requested Benjamin Lett on murder charges, Governor William H. Seward

\begin{footnotes}
\item Re \textit{Washburn}, 106.
\item “Fugitives from Justice,” \textit{Law Intelligencer and Review}, III(XI), November 1831, 391-411.
\item Ibid., 410.
\end{footnotes}
decided that he could not do so without federal permission. \(^{245}\) Washington, meanwhile, still maintained both that the federal government had no power without positive law and that the subject involved foreign relations and so was a federal responsibility. But the acting Secretary of State suggested that Seward act anyway by detaining Lett and so beginning a test case that would ultimately go to the Supreme Court for a decision on the division of powers question. \(^{246}\) Seward declined the offer. As his own Secretary of State replied, the Governor “cannot perform what he deems an unconstitutional act for the sake of trying experiments or resolving doubts which he does not entertain.” \(^{247}\)

However, almost at the same moment the Governor of Vermont agreed to give up George Holmes, accused of murder in Kamouraska. It is possible that Jenison agreed to let this be a test case for state power, though there is no sign of that in his letter to Colborne agreeing to extradite. Either way, in April 1839 Jenison committed Holmes to jail and in July Holmes’ motion for habeas corpus was argued before the state Supreme Court. It appears that the court’s decision was never reported, and a search of available newspapers turned up no record of its being published in the press. However, the arguments of Holmes’ lawyer were published, and these help to reveal the kinds of issues at play in the state court. The lawyer here was Cornelius Van Ness, the former Governor who refused extradition in 1825 on constitutional grounds. He made four arguments, beginning with this contention that there simply was no international law obligation to surrender fugitives. Indeed, Van Ness was actually hostile to the naturalist notion of international law in a way that previous commentators on the subject had not been. He argued that there was nothing in Vermont law to authorise surrender, and that since the prosecution’s arguments rested in large part on treatises of the law of nations, “the honest farmers and mechanics of Vermont are directed to Grotius, to Puffendorf and Vattel, to learn what measures of personal liberty they are entitled to, and how far they can sit in security in the midst of their families.” \(^{248}\) Having attacked the idea of an obligation, he went on to argue that even if there were one it was a federal responsibility, and that even if there were a concurrent responsibility between Washington and the states the Governor could do nothing without an act of the legislature. Finally, he contended that whether grounded in obligation or comity, extradition

\(^{245}\) John Spencer to Forsyth, 10 June 1839, N.A.R.A., S.D. M-179, Roll 89.
\(^{247}\) Spencer to Forsyth, 11 July 1839, N.A.R.A., S.D., M-179, Roll 89.
should be reciprocal, and since Canada could not give up British subjects, the U.S. could not deliver the American Holmes.249

Holmes lost in the state court. His lawyers immediately launched an appeal to the U.S. Supreme Court which was heard in January 1840. Van Ness’s arguments were largely the same as he made in Vermont – he again devoted much of his time to attacking the idea of an international law obligation.250 But the eight judges who heard the case, and the five who wrote opinions, paid little attention to that issue. Instead, the court focused on the federalism questions: had the Governor of Vermont invaded the federal treaty-making power in deciding to surrender Holmes? And did the court have the power to overrule the Vermont courts on this issue? Four judges decided in the affirmative on both fronts, notably including Joseph Story who concurred in the opinion of Chief Justice Roger Taney, but did not write himself. Taney argued that the rights and duties of nations in extradition were part of international law and thus that the treaty-making power had authority to decide how they were discharged. By agreeing to surrender Holmes, Jenison had invaded that power, whether a formal treaty was used or not.251 Moreover, since Vermont was acting not to protect itself but to assist another nation, the state’s police power was irrelevant, he decided.252

Four other judges disagreed with Taney, which left the court deadlocked. These four contended that they had no jurisdiction to hear the case under the Judiciary Act and the constitution. Smith Thompson, for one, argued that since the U.S. had no treaty with Britain, Jenison’s action was at most repugnant to a dormant power, which he did not think brought it within the purview of the federal courts.253 Interestingly, Philip Pendleton Barbour, who as a federal district judge in Virginia in Dos Santos had released the prisoner, agreed. Vermont had not entered into a treaty, he wrote, and the federal courts had no role in deciding if Jenison had violated his state’s constitution.254 Likewise, Henry Baldwin agreed with the idea that the federal power was dormant, but argued strongly that the state had authority to surrender under their police powers. The federal government could compel surrenders through a treaty, he argued, but it could not prevent the expulsion of a fugitive by a state.255 In the end, though, the most

249 Ibid., 330-352.
252 Ibid., 569.
253 Ibid., 583.
254 Ibid., 593-594.
255 Ibid., Appendix, 614.
contingently important of these opinions was that of John Catron, who declared that no unconstitutional agreement had existed between Canada and Vermont because no demand for Holmes’ surrender had been made, or so he believed.256 This supposition would help change federal law.

In immediate terms the ruling left the law uncertain. The first question was the fate of George Holmes, whose lawyers immediately returned to the Vermont court with another *habeas corpus* motion. However, this time Jenison submitted a letter noting that Sir John Colborne had in fact asked for Holmes’ extradition, contrary to what Justice Catron had assumed in Washington.257 This made the difference. While Chief Justice Charles Williams devoted most of his decision to examining the international law issues – disputing the idea of an obligation and taking a similar approach to that of Tilghman in Pennsylvania – the more decisive question was that of the constitution. He argued that whether it was founded on law or comity the surrender of fugitives was a federal responsibility, and that if Jenison’s letter had been before the court in Washington Catron would have sided with Taney in finding the surrender to be an unconstitutional encroachment on federal power.258 While one judge dissented, arguing that the power of extradition was crucial to the border states, the court ultimately decided 3-1 against the governor. After a year in jail, Holmes was released.259

*Holmes* marked a partial turning point, though not a clear-cut one. Given the divided bench in Washington the decision was less than definitive. New York Governor William Seward wrote of the decision that it had “rendered doubtful the right of the state so that the power could no longer be safely exercised.”260 Moreover, in 1841 when Sydenham asked Seward for the surrender of John DeWitt on arson charges, the Governor turned to the State Department where Secretary of State Daniel Webster actually approved the extradition. In defiance of precedent, he declared that the federal government “would see with entire approbation the exercise of the power understood to be vested in your Exclly by the laws of N.Y.”261 Nonetheless, federal

---

256 Ibid., 596-598.
257 Ex Parte George Holmes, *Reports of Cases Argued and Determined in the Supreme Court of the State of Vermont*, XII, 632-633.
258 Ibid., 640-642.
259 For the dissent, see Ibid., 642-647.
260 Seward to John Tyler, 4 June 1842, NARA, SD, M-179, Roll 98.
261 Daniel Webster to Seward, 16 September 1841, NARA, SD, M-40, Vol. 32, Roll 30, 41.
Attorney General Hugh Legare subsequently rejected that advice, and wrote that from *Holmes*, “we may consider it as law” that the power of extradition was exclusively federal.\(^{262}\)

Nor did the case and the faltering prospects of reciprocity immediately end colonial willingness to surrender. It appears that after the decision Upper and Lower Canada extradited several people to the U.S.\(^{263}\) Most importantly, the colony decided to give up the escaped Arkansas slave Nelson Hackett, a decision which emerged from a years-long debate over granting asylum to fugitive slaves, discussed in chapter three.\(^{264}\) The Hackett surrender, coupled with other cases around the empire regarding slaves, persuaded the imperial government to reign in colonial authority over extradition. Indeed, the Colonial Office despatched instructions to Governors not to surrender fugitives to foreign governments without first referring the case to London for review.\(^{265}\)

The combined result of *Holmes* and the renewed imperial scrutiny of colonial extradition helped bring the former legal regime, in which some of the northern states and the British colonies exchanged fugitives, guided by ideas of international law, international society, and executive power, to an end. The DeWitt case was probably the final one in which state or federal authorities allowed extradition. Meanwhile, imperial authorities took it upon themselves to investigate not simply each case at it arose, but the nature of colonial power over extradition. As noted above, they were persuaded by Bagot and the Lower Canada law officers that Canadian governors were exercising lawful executive authority (there was no comment on Nova Scotian or New Brunswick actions). Still, the situation was deeply imperfect and rested on differing visions of international law. The British diplomat Lord Ashburton, for one, bemoaned “the anomalous state of international law on this subject,” arguing that it had led to criminals of the worst description escaping punishment, no doubt an allusion to George Holmes.\(^{266}\) Ashburton noted that between Canada and the northern states in recent years, criminals had been sometimes surrendered and sometimes refused. The reciprocity necessary to keep the system going was tenuous, and the lawfulness of the authority to make these surrenders was doubted. As he


\(^{264}\) Sir Charles Bagot to Archibald Yell, 19 January 1842, Copies of a despatch from the Governor-General of Canada to the Secretary of State for the Colonies, of the 20th January last, relative to the surrender of Nelson Hackett, *Parliamentary Papers*, 1842, C. 495, 9.

\(^{265}\) Bagot to Seward, 27 May 1842, N.A.R.A., S.D., M-179, Roll 98.

\(^{266}\) Ashburton to Lord Aberdeen, 25 April 1842, *Diplomatic Correspondence*, III, get page number.
observed, in the U.S. fugitives were surrendered “under no authority but the arbitrary will of the respective Governors.”

This situation soon came to an end. Diplomats in Britain and the U.S. had already begun to explore the possibility of a new Anglo-American treaty to address festering issues like the north-eastern boundary dispute, and in 1842 those efforts started in earnest, as long noted by diplomatic historians. Britain sent Lord Ashburton to Washington to hammer out this agreement and what emerged helped stabilize the shaky Anglo-American relationship. It did not resolve every contentious issue between the two countries, but it did bring the end of the immediate ‘crisis’ period so often noted by historians. The treaty also ended the extradition debate discussed in this chapter by including an extradition clause which bound the two countries to surrender fugitives charged with piracy, murder, assault with intent to murder, robbery, arson, forgery, and utterance of a forged paper. While the article was long seen as a deeply flawed instrument of international extradition, as examined in chapter four, it did set Anglo-American extradition on an entirely new and concrete position. Gone were the citations of Grotius and Vattel, and the discussions of international society and the natural law of nations. As a result, the treaty marked not simply a new stage in the Anglo-American relationship, but part of the wider shift in the underlying notions of what made international law and international order: from naturalism to positivism, from a set of laws binding civilized states to which consent was not necessary to a system of rules agreed upon through treaty and custom.

Conclusion

Before 1842 extradition between the British North American colonies and the northern American states was premised on certain specific and contested ideas of international law and order. Jurists in Britain, the colonies, and the U.S. took up these ideas in deciding whether or not the surrender of foreign fugitives was allowed under domestic or international law. On one side, there were those such as James Kent and James Reid who believed in a concept of international law which mandated states to turn over one another’s fugitives as part of the duties of membership in a civilized international society. On the other, jurists such as William Tilghman

267 Ibid., get page number.
and William Wirt read the law of nations differently, finding no such duty and, more importantly, that the U.S. had consented to no such rule. These positions reflect in part different views of sovereignty itself. In the first, national sovereignty entailed intrinsic responsibilities to international society. In the second, sovereignty precluded the imposition of international rules to which the nation had not consented.

This debate dragged on for decades, until Holmes v. Jenison and the Ashburton Treaty. But understanding the period before 1842, in which colonies and states struggled not simply to enforce the law but to ascertain what the law was, means understanding the constellation of legal ideas by which they were confronted. The extradition debate was shaped not simply by the demands of cross-border cooperation but also by contested philosophies of international law, interpretations of the U.S. constitution, and widely differing views of executive power. While governments in Washington and Westminster took a stern line against applying these ideas to allow or require extradition, the colonies and some states decided differently. In so doing, they drew from a pool of legal ideas which had circulated widely in the Atlantic world, and they formed a kind of distinct international society of their own, one which was messily administered and always widely contested. Thus extradition before 1842 was not simply an act of state but also a provocative notion of the legal order in which states existed.
Chapter Three:
“The joy of the fugitive for ages past”: Refugees, Asylum, and Extradition in British North America, 1833-1865

Introduction

This chapter examines asylum in the context of extradition, from the development of statutory extradition power in Upper Canada in 1833 to the end of the U.S. Civil War in 1865. It takes up the three main waves of controversy on the issue: debates over surrendering fugitive American slaves during the 1830’s and early 1840’s, the famous John Anderson case of 1860-1861, and three cases involving Confederate combatants caught in British North America during the Civil War. In each of these cases the prisoners contested their surrender in large part by arguing that they were not criminals but rather refugees whose extradition was asked for by the U.S. for unjust and inhumane reasons. In so doing they attempted to invoke pervasive notions of legal asylum which were widely held throughout the Atlantic world, but which had not taken concrete form in British North American or imperial law. That is, there was wide awareness of the idea of the distinct status of refugee which warranted protection within a foreign state even if there was no one established test for determining what that meant in the context of extradition.

This uncertainty is apparent in the variety of tactics used in the British North American cases. In the 1830’s and early 1840’s, Upper Canadian blacks and their supporters appealed to “British justice” and their service to the imperial cause to make a case for an outright exemption of fugitive slaves from extradition. Later, John Anderson’s defence rested on a far broader basis of natural rights, specifically that as a fugitive slave fleeing bondage he had a natural right even to kill to obtain his freedom, and that British courts could not cooperate with the inherently unjust American demands. In contrast, the Civil War cases centred on international law and involved far-reaching debates over the law of war and whether military operations could be criminal acts. In each instance arguments for asylum encountered a deep and enduring reticence among judges and other officials about granting such immunity to extradition. In each of these cases courts expressed a keen awareness that to do so would proclaim an asylum not simply for the prisoners involved but for all the slaves or Confederate combatants who could follow. This proved to be an enormously influential concern. Given that concern, and given the far-reaching ideologies to which the prisoners appealed, this chapter shows that claims for asylum intersected with and relied upon much broader currents in political and legal thought. These ideas transcended the boundaries of the British North American colonies and even the wider empire,
illustrating an impressive cosmopolitanism in colonial legal thought and the array of transnational forces brought to bear on colonial law.

Asylum has a long lineage in European law. As Matthew Price has recently shown, Greek and Roman law recognized that individuals could escape slavery, persecution, or punishment for crime by reaching certain special places within the jurisdiction or by fleeing into a neighbouring state. Indeed, Price argues that before the onset of immigration restrictions in the modern world, asylum was primarily about immunity from extradition and not about immigration policy, as it is now most often perceived to be. As a result, for centuries asylum was bound up with on-going debates over extradition, particularly over the obligation to extradite which was examined in chapter two. Jurists who believed in that obligation were forced to reconcile it with the tradition of sanctuary – how could international law mandate extradition if sovereigns had a right to grant asylum to anyone they wanted? In addressing this question, jurists espousing the obligation often singled out what we would call humanitarian concerns such as religious persecution or other state violations of natural law in the refugee’s country of origin to distinguish between common criminals vulnerable to return and refugees who should be protected. Conversely, jurists who did not believe in a duty of extradition could use the tradition of asylum as a plank in their argument by asking the same question about the right to grant asylum superseding any purported international law duty. In other words, the refugee could have a status in law which was related to but also distinct from the ordinary foreigner.

Protecting foreign asylum-seekers from extradition was long a prominent and popular concept in England. In the seventeenth-century the writer and judge Sir Edward Coke epitomised this view and observed in his *Institutes of the Laws of England* that nations were “sanctuaries for servants or subjects flying for safety from one kingdom to another.” This view of asylum was often linked with the rights and liberties said to be guaranteed by the English constitution: from early-modern judges declaring that English air was too pure for slaves to breathe to the profound nineteenth-century resistance to extradition treaties which might compromise the country’s status as a beacon and safe-haven for those who fled European tyranny. Indeed, as Bernard Porter has shown, Britain created rights for foreigners more by the absence of state control over them than by positive law. For example, while the power to expel aliens was given to the government

---

270 Ibid., 24-26.
271 Ibid., 35-47.
during the French revolutionary wars it was revoked thereafter, save for a brief period during the
turmoil of 1848. Porter calls this a deliberate denial of control over migration in the name of
human liberty. But as extradition relationships developed, particularly in North America, this
absence of law would prove insufficient to fulfill the ideals of sanctuary.

Ideas of asylum were widespread throughout Western Europe as well. Recent scholars
have demonstrated both that many governments there were deeply concerned about protecting
refugees and that the debates about doing so reflect broader questions of statecraft and individual
rights. Frank Caestecker in particular has shown that even during periods of general hostility to
foreign workers in the early and mid-nineteenth-century, Belgium offered those it had decided to
expel a ‘choice of border,’ so as to avoid the possibility of sending legitimate refugees back into
the hands of their persecutors, a policy rooted in the pervasive political liberalism there. (Caestecker also juxtaposes such policies with those of authoritarian Prussia, which deliberately
did not grant that choice.) Likewise, Greg Burgess’ work on refugees in France has highlighted
how the state spent large sums sheltering and sustaining populations of refugees before, during,
and after the revolutionary wars, even while monitoring them closely as potential sources of
political instability. Burgess also highlights how asylum-seekers’ petitions for sanctuary and
support were designed to show affinity with the government and so reflected pervasive ideas of
what asylum meant in law. While before the revolution refugees asked for “monarchical
asylum,” based on deference to the king and a personal relationship with him, during and after
the revolution this gave way to political asylum in which refugees tried to use their patriotic
service to revolutionary struggles to demonstrate their ideological affinity with the republic.
But in both cases the aim of the refugees was to establish themselves as “reliable foreigners”
who agreed with the aims of the regime and were certain to cause it no harm.

273 Bernard Porter, *The Refugee Question in Mid-Victorian Politics*. (Cambridge: Cambridge University Press,
1979), 3-4. Also, Francesca M. Wilson, *They Came As Strangers: The Story of Refugees to Great Britain*. (London:
274 See Andreas Fahrmeir, *Citizens and Aliens: Foreigners and the Law in Britain and the German States, 1789-
275 Frank Caestecker, *Alien Policy in Belgium, 1840-1940: The Creation of Guest Workers, Refugees and Illegal
276 Caestecker, “The Transformation of Nineteenth-Century West European Expulsion Policy, 1880-1914,” in
Andreas Fahrmeir, Olivier Faron, Patrick Weil, eds., *Migration Control in the North Atlantic World: The Evolution
of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*. (New York:
277 Greg Burgess, *Refuge in the Land of Liberty: France and its Refugees, from the Revolution to the End of Asylum,
278 Ibid., 18-35.
279 Ibid., 23.
This chapter takes up these themes. It focuses on how asylum was debated during a period in which, despite a broad awareness of the concept generally there was no firm legal construction of it in British law. In doing so, it builds on the work of many scholars who have investigated both the slave controversies and the Civil War cases. In particular, the John Anderson case is undoubtedly one of the most studied in all of Canadian legal history. This scholarship has documented in great detail the fascinating histories of each case and the ways in which they often involved Canada, Britain, and the United States in heated diplomatic conflicts. Yet it is arguable that the historiography has been too anecdotal, that the individual treatment of the narratives has clouded the connected currents of legal and political thought which shaped both the arguments of those who sought safe haven in British North America and the decisions of the colonial and imperial governments that decided on their cases. As this chapter shows, these cases reflect transnational and transcolonial issues of British liberty, individual rights, and international law on both sides.

**Fugitive Slaves and British Justice, 1833-1843**

The first major wave of controversies over asylum in the context of extradition occurred in the 1830’s and early 1840’s. During this period fugitive American slaves feared that their sanctuary in Upper Canada would be eroded. While blacks encountered plenty of racism in Canada – even segregated schools for black children – slavery was absent after 1834, and largely

---


dead long before that. The only major threat to this freedom came from criminal extradition back to the U.S., and although British authorities long refused to surrender slaves *qua* slaves, the situation was murkier when the U.S. requested a slave back to face criminal charges. Nor was this a remote threat in the 1830’s and early 1840’s, during which time Upper Canada’s Fugitive Offenders Act empowered the Governor to detain and surrender fugitive felons. Indeed, of the four cases discussed here – Thornton and Lucie Blackburn in 1833, Jesse Happy and Solomon Moseby in 1837, and Nelson Hackett in 1842 – colonial authorities twice decided in favour of extradition.

These cases mostly involved crimes that slaves committed in escaping from the American south. The exception was the 1833 Blackburn case, where it was the Michigan government that requested extradition on the grounds that the Blackburns had committed crimes during a riot sparked by their attempted removal from Detroit by an official from Kentucky. In the other three cases, though, slave state authorities asked the colonial government to extradite for thefts committed by slaves in the course of escaping from slavery. The government decided the 1837 Happy and Moseby cases differently, though both involved the theft of a slave-owner’s horse. The government shielded Happy from extradition partly because he had left the horse in the U.S. before crossing the border and told the owner where to find it – thus he had demonstrated no felonious intent to deprive the owner of his property. In the Moseby case, on the other hand, the government felt that the prisoner had taken more than he needed and agreed to his surrender. Only a race riot near the Niagara Jail, during which Moseby escaped, saved him from return to Kentucky. In 1841 Nelson Hackett was not so lucky. After the government concluded that he, too, had taken more than necessary, including a valuable watch, he was returned to Arkansas, where he was flogged instead of tried for the theft, and apparently sold to a new owner in Texas. In other words, the position of slaves in the context of extradition was tenuous.

This section explores the debate which ran through these cases, focusing on the legal ideas and arguments which underlay both the pleas of fugitive slaves and their supporters and the decisions made by the colonial and imperial officials who decided their cases. It argues that on

---

282 See Kristin McLaren, “‘We had no desire to be set apart’: Forced Segregation of Black Students in Canada West Public Schools and Myths of British Egalitarianism,” *Histoire Sociale/Social History*, 37, 2004, 27-50.
283 In the Moseby case, the former slave was rescued by a vigilance committee before he could be hustled back into American territory, while Hackett was in the end returned to Kentucky as a prisoner.
284 Frost, *Glory Land*.
285 Leask, “Jesse Happy.”
both sides of this debate ideas of British justice and British rights were key. Fugitive slaves and their allies appealed to these concepts in both very general and quite specific ways. They sought special protections against the threat of extradition, but did so by trying to gain the benefits of British citizenship and by touting their own service to the empire during the period during and after the rebellions of 1837-1838. As a result, the rights they pleaded for were those of British subjects, to be sure, but also those which they claimed to actively deserve as loyal and reliable subjects during a period of political turmoil. Likewise, colonial and imperial officials drew from related understandings of the British constitution in weighing the cases. However, these policymakers focused largely on the notion that all people were equal under the British constitution regardless of race. As a result, they decided that fugitive slaves could not receive the special protections they asked for against the threat of extradition. This steadfast focus on equality points towards what Constance Backhouse has called the “ideology of racelessness” – the idea that race and racial categories were irrelevant to Canadian law because racism did not exist here.\footnote{Backhouse, \textit{Colour-Coded}, 13-14.} It also helps illustrate how strained and insufficient that ideology of equal treatment could be.

Clearly both sides drew from core concepts of Britishness shared widely around the empire. As Philip Girard has argued, the notion of a distinctive British liberty was pervasive in the nineteenth-century North American colonies.\footnote{Philip Girard, “British Justice, English Law, and Canadian Legal Culture,” in \textit{Canada and the British Empire}, Phillip Buckner, ed. (Oxford: Oxford University Press, 2008), 259-77; Greg Marquis, “Doing Justice to ‘British Justice’: Law, Ideology and Canadian Historiography,” in \textit{Canadian Perspectives on Law & Society: Issues in Legal History}, W. Wesley Pue and Barry Wright, eds. (Ottawa: Carleton University Press, 1988), 43-69.} Such rhetoric is everywhere in the public discourses of the period: praise for the British traditions of equality and rights generally, and for the specific inheritances of \textit{habeas corpus}, private property, and trial by jury. British North Americans saw these things as historical rights secured for them under the British constitution and by their own status as subjects of the Crown. As Elsbeth Heaman has recently argued, this line of thinking embodied a vibrant and powerful strain of “Rights talk” in the colonies in this period, which largely stood opposed to the more sweeping notions of abstract and universal human rights circulating throughout the Atlantic world.\footnote{E.A. Heaman, “Rights Talk and the Liberal Order Framework,” in \textit{Liberalism and Hegemony}, 147-75. On the more sweeping ideas of rights see Lynn Hunt, \textit{Inventing Human Rights: A History}. (New York: W.W. Norton, 2007).} It was to this idea of British rights that blacks and their allies looked. As the threat of extradition loomed in the 1830’s and the early
1840’s they appealed not primarily to abstract ideas of human freedom, but to the rights of British citizenship as just rewards for service to the British cause.

In Canadian petitions against the extradition of fugitive slaves, pleas were couched in terms of the larger British constitution. In the Jesse Happy case, for example, petitioners praised “the laws and constitution of the British Empire under which they had the happiness to live.”²⁹¹ In another, nearly one hundred blacks declared that they had “received the protection of the British Government and been admitted to the Privileges of British Subjects.”²⁹² As Amani Whitfield has argued, such language typified the development of an African British North American identity in this period.²⁹³ In Nova Scotia black refugees participated in public displays of loyalty, praising the freedom blacks enjoyed in British territory, and carrying banners that read, for example, “Victoria and Freedom.”²⁹⁴ But it is also important to remember that this was largely the conventional language of nineteenth-century British North American political petitions. Carol Wilton has shown that even those campaigning for sweeping democratic reforms in the post-rebellion period used very similar tactics: British flags and other symbols, the rhetoric of British constitutionalism, and pledges of personal loyalty to the Queen.²⁹⁵ The concept of Britishness, then, was both potent and malleable in Canada.²⁹⁶

This was certainly evident in the May 1839 memorial to Queen Victoria sent by a group of black Upper Canadians. They claimed British citizenship for fugitive slaves, and did so for very specific purposes. The petition declared that slaves in the pre-revolutionary U.S. had “never forfeited any rights which might belong to them or their parents, as natural born subjects of the British Monarch.”²⁹⁷ With American independence they had no power to dissent and so could not have chosen to remain loyal to Britain. Under such circumstances, the petition asked that upon reaching British territory, escaped slaves should be considered naturalized subjects of the Queen.²⁹⁸ In some ways, this plea is typical of the nineteenth-century discourse on Britishness: the petitioners professed their loyalty and praised the liberty ensured by the British constitution.

²⁹² Petition for Happy to Head, signed by Peter Banyoner and ninety-eight others, C.O. 42, vol. 439, Reel B-342, 185.
²⁹⁴ Ibid., 20.
²⁹⁶ On this topic, see Radforth, Royal Spectacle.
²⁹⁸ Ibid.
In fact, the proposal echoed a long-standing debate after the American revolution about the effect of independence on the citizenship of those who chose to remain in the U.S. and their children.299 But there was also likely a more specific intent underlying this claim of citizenship, namely that as British subjects they would likely be immune from extradition. The 1679 Habeas Corpus Act, an enduring bulwark of the rule of law in Britain and the empire, exempted British subjects from being sent to foreign countries for trial.300

This exemption was well known in British North America, as shown in chapter two. In 1832, for example, the Upper Canada Court of King’s Bench released two black defendants facing extradition to the U.S. after it was shown that they were British subjects, and in 1833 the Governor General refused to surrender four accused murderers to New York for the same reason.301 Likewise, in the only reported Lower Canadian extradition case in the pre-treaty period, Montreal Chief Justice James Reid took pains to specify that the prisoner was liable to extradition because he was not a British subject; and in issuing the warrant of extradition the Governor made a similar declaration.302 As well, in Nova Scotia and New Brunswick in this period, colonial governments decided to surrender fugitives to the Americans, having declared that they were not subjects of the Crown.303

So “British justice,” in this context, had a very specific meaning and legal significance, alongside its general rhetorical importance. Interestingly, those arguing against the extradition of fugitive slaves also juxtaposed their claims for the protections of British citizenship with the perceived threat of international law invoked by foreigners. As discussed in chapter two, throughout the 1830s policymakers and jurists in Britain, the colonies, and the United States debated whether international law obliged governments to extradite fugitive criminals, and whether, if such a duty existed, governments had the prerogative power to carry out the surrenders without special legislation. Upper Canada’s Fugitive Offenders Act was in large part a response to these questions: it firmly established executive power to detain and surrender while giving the Governor discretion to refuse to do so if for any reason he decided it was “inexpedient.”304 Petitioners in the Jesse Happy case also referred to this question, and likely to

302 Re Joseph Fisher, 246-47.
303 See above, chapter two.
304 Provincial Statutes of Upper Canada, 3 Wm. IV, c. 7, s. 3 (1833).
the colonial statute specifically, in decrying the “operation of the act of international law” by which escaped slaves were “subject to be rescued from the protection of a Government they are proud to support and deprived of the enjoyment of rights it is their privilege … and happiness to enjoy.” The petition to Queen Victoria spoke in similar terms about the more general question of the obligation to extradite, which arguably bound both Upper Canada and the U.S. The language here is telling: “Her Majesty’s just and powerful Government,” they trusted, “will not permit that any of Her subjects should be pursued and harassed like wild beasts … by foreigners, and entrapped into the misery of slavery by a forced and unjust interpretation of international law.” The implication was clear: British rights were menaced and potentially eroded by international law deployed by foreigners.

The opponents of surrendering slaves also played up the differences between British and American justice. In the Happy and Moseby cases, for example, petitioners alleged that the American affidavits contained falsehoods and that the charges were drummed up merely to get the men back into slavery. British law, in other words, was being used as a pretence for injustice. “The moment he lands on the other side of the Niagara River,” the Moseby petitioners declared, “the charge of horse stealing would be withdrawn and him dragg[sic] off once more into irremediable Slavery.” Likewise, in the memorial to the Queen the petitioners argued that American law afforded slaves little substantive justice – that they were allowed jury trials on only a handful of offences while for most others they were subject to the arbitrary will of their masters. These declarations certainly appealed to the pride taken in British criminal procedure, and in jury trials in particular, as a key facet of British freedom. As Blake Brown has shown, the idea of a jury trial as a safeguard of liberty was certainly alive and well in the North American colonies, even if the realities of jury service were frequently found bothersome and intrusive by the colonists.

While the petitioners cast British justice as the epitome of fairness, they also argued that blacks actively deserved its protection. In this they used the context of the Canadian rebellions

305 Petition for Jesse Happy to Sir Francis Bond Head, C.O. 42, vol. 439, Reel B-342, 186; Petition for Happy to Head, signed by Peter Banyoner and ninety-eight others, C.O. 42, vol. 439, Reel B-342, 185.
307 Petition for Happy to Head, signed by Peter Banyoner and ninety-eight others, C.O. 42, vol. 439, Reel B-342, 186; Petition for Jesse Happy to Sir Francis Bond Head, C.O. 42, vol. 439, Reel B-342, 188.
308 Petition for Solomon Moseby to Head from the Inhabitants of the Town of Niagara, C.O. 42, vol. 439, Reel B-342, 196.
310 Brown, A Trying Question, 17-56.
and their aftermath of insecurity to bolster their arguments and to give their professions of loyalty more weight. Thus the memorial to the Queen in May 1839, with its pronouncement of “devoted loyalty and attachment both to Her Majesty’s person and Government” had special resonance.\textsuperscript{311} A similar message emerged from a January 1838 meeting in which a group of blacks met in Toronto and issued a series of resolutions. The group condemned American slavery, lamented the recent attempted extradition of Solomon Moseby, praised British freedom, and professed their own loyalty. One resolution was especially poignant given the climate of political turmoil: “That we express the universal feeling of our coloured brethren throughout this Province when we state our perfect contentment with our political condition.”\textsuperscript{312} Moreover, black Upper Canadians did more than simply praise the political status quo – many enlisted in the militia and fought during the rebellions. While we know far too little about the military service of blacks in the rebellions, one source suggests that nearly one thousand volunteered in the month after the insurrection began in Upper Canada and that five “Negro Companies” were authorized.\textsuperscript{313}

This tendency toward loyalism caught the attention of many prominent white Upper Canadians. Even before the rebellion William Lyon Mackenzie considered the province’s black population “extravagantly loyal” and prepared “to uphold all the abuses of government.”\textsuperscript{314} Conversely, Lieutenant-Governor Sir Francis Bond Head described in his autobiography how during the rising “our coloured brethren … supplicated that they might be allowed to be foremost to defend the glorious institutions of Great Britain.”\textsuperscript{315} According to Head, the enlistees made a deliberate choice to reject republican institutions and philosophies.\textsuperscript{316} His successor concurred, writing that blacks were “firm Defenders of our Soil.”\textsuperscript{317} In a similar vein, the Governor General disapproved of a proposed emigration scheme for Canadian blacks, declaring that he was “quite opposed to losing any of these men from the Canadas.”\textsuperscript{318}

---

\textsuperscript{311} Memoir to the Queen, first presented to Lord Durham 11 May 1839, C.O. 42, vol. 459, Reel B-355, 444.


\textsuperscript{314} Quoted in Winks, Blacks in Canada, 149.

\textsuperscript{315} Sir Francis Bond Head, A Narrative. 2nd ed. (London: J. Murray, 1839), 392.

\textsuperscript{316} Ibid.


\textsuperscript{318} Sydenham to Arthur, 16 January 1841, Arthur, Papers, III, 248.
In the late 1830’s and early 1840’s, blacks and their allies used this service and loyalty in attempting to win more protection. This was clear from the actions of John Rolph, a white man sent by Upper Canadian blacks to London in 1839-1840 to lobby for explicit protections against the extradition of fugitive slaves. In his correspondence with the Colonial Office, Rolph continually touted black allegiance to Britain. When the memorial to the Queen went unacknowledged by the Colonial Office, he reminded them that blacks were a “loyal class of her Majesty’s subjects in Upper Canada.” And when, as discussed below, the imperial authorities provided an unsatisfactorily vague answer to his plea for explicit protections against extradition, Rolph returned to this theme and invoked the rebellions in particular. He praised what he called “the willing and eminent services rendered by this unfortunate body to her Majesty’s Government in Upper Canada, when the integrity of the Empire was menaced by internal commotion, and … repeated acts of foreign invasion.” This service in dire circumstances, he argued, “should cause any application to be viewed in their regard with more than common interest.”

These arguments had great rhetorical appeal both in Canada and Britain. As noted above, these types of professions of loyalty and British patriotism were common to reformers and conservatives alike, part of the general tenor of public discourse. But the idea of an advanced and distinct British freedom on the issue of slavery had special resonance in the decades after the British abolition of the slave trade and especially in the years after the imperial emancipation act, when Britain’s anti-slavery policy quickly became a cornerstone of national pride at home and throughout the North American colonies. Indeed, although the abolition of slavery in the empire was still very recent at the time of the fugitive slave debates studied here, many officials treated freedom from slavery as a kind of ancient British right. During the 1843 debates in the British parliament over implementing the Webster-Ashburton treaty, for example, M.P.’s routinely paraphrased Lord Chief Justice Holt’s famous 1701 observation about British territory liberating slaves. As M.P. Benjamin Hawes put it, this was “the principle to which England owed so much of her glory – the principle, that a slave, the moment he touched her soil, became a free

---

man.” Indeed, Nelson Hackett echoed this idea in his petition to Lord Sydenham written from the Sandwich jail in September 1841. He told the Governor General that “the humanity of the British law made him a free man as soon as he touched the shores of the country.”

Likewise, during the Canadian assembly debates over Hackett’s surrender, Denis-Benjamin Viger accused the government of having trespassed on Britain’s constitutional authority over foreign affairs and, worse, of having compromised the imperial commitment to liberty. “Had the case happened under a despotic government… it could have caused no surprise,” he told the assembly, “but that it occurred under a liberal government like England, is astonishing.”

But despite this rhetorical commitment to liberty, the extradition issue exposed pervasive underlying anxieties about offering blanket asylum to escaped slaves. Sir Francis Bond Head, for example, noted in the Happy case that he was “by no means desirous that this Province should become an asylum for the guilty of any color.” In the Hackett case, Sir Charles Bagot similarly argued that refusing to extradite any slave under any circumstances would transform the province into “an asylum for the very worst characters, provided only they had been slaves before arriving here.” In their thinking, offering clear immunity from extradition was unreasonable, since there were crimes which slaves could commit in escaping that should render them amenable to American law, and to offer to exempt from punishment even those who had committed those offences was to all but reward criminality. This fear was also common in the British parliament, as evidenced by the treaty implementation debates in 1843. There, former Foreign Secretary Lord Palmerston said he did not wish Britain to “afford impunity” to slaves who had “really committed offences” – presumably crimes unrelated to or unnecessary for their escape – while Attorney General Sir Frederick Pollock said that a “plain declaration” that slaves would not be surrendered even on legitimate criminal charges would be “unbecoming the character of the British nation.”

---

322 For Holt’s comment, see Smith versus Browne and Cooper, 2 Salk 666; for Hawes, see August 11 1843, Debates of the Parliament of the United Kingdom [U.K. Debates], third series, vol. LXXI, 580. Holt’s declaration was also echoed by Attorney General Sir Frederick Pollock, Ibid., 566; and by Sir Robert Peel, 21 March 1843, Ibid., vol. LXVII, 1224.
323 Hackett to Sydenham, 18 September 1841, “Copies of a Despatch from the Governor-General of Canada to the Secretary of State for the Colonies, of the 20th January last, relative to the surrender of Nelson Hackett,” Parliamentary Papers, vol. XXVIII, 1842, 7.
the American Secretary of State that while Britain would not return slaves who made their way to British territory simply on the grounds of their having escaped, “you may be well assured that there is no wish on our part that they should reach our shores, or that British possessions should be used as decoys for the violators of the laws of a friendly neighbour.”

With this view of asylum in the background, both the Canadian and imperial governments responded to pleas for explicit protections for slaves with guarantees of equal treatment. The premise of the British position was that British justice signified equality and individual fairness. Blanket exemptions and special rights were thus outside the logic of the system. For example, Sir Francis Bond Head told petitioners in the Moseby case that he could not refuse to surrender Moseby simply “on account of his Colour.” This adherence to racial equality permeated each reply to the specific proposals made on behalf of black Upper Canadians. As the Colonial Secretary told the Lieutenant Governor, British law guaranteed individual equality, and beyond that, the Queen could not “grant to one class of Her Subjects privileges or immunities not enjoyed by others.” Indeed, as laid out by the Colonial Office, such equal treatment was supposed to be a virtue. In reply to the memorial to the Queen, for example, the Colonial Office declared that Upper Canadian law made no distinction between whites and blacks and between fugitive slaves and others arriving in the colony, and so it would not be lawful to extradite a fugitive slave in circumstances where a white would not also be surrendered. This principle was thought “amply sufficient for the protection of the Petitioners.” Likewise, as Rolph continued his campaign in London, the Colonial Office merely told him that all such measures would be taken which were “proper and requisite for the protection of the persons to whom you refer.”

This position should not have been surprising. From the start of the fugitive slave debate, judges and policymakers were insistent that blacks would receive the same treatment before the law as whites – no less, but no more. This was apparent in the Blackburn case, likely the first slave extradition case after the passage of the 1833 Fugitive Offenders Act. There, the Court of King’s Bench, which did not recommend extradition, acknowledged that Blackburn might not receive a trial on his return to the U.S. and might simply be re-enslaved. But the judges were
clear that “no consideration of this kind has had any weight with us” because they could not advise any course in this case different from what might be done if the prisoner were a free white. In the Happy case four years later, Chief Justice Robinson echoed this approach, saying that Canada could not decide that slaves who “murder their masters, or burn their houses, or steal their goods, shall find a secure refuge in this Province, while the white inhabitants of the same Countries shall, under similar circumstances be surrendered.” According to Robinson, there was no legal basis to draw a distinction between white and black defendants in the operation of the statute. If it had been intended to expressly exempt slaves, he wrote, it would have been written into the act.

This was the same stance taken by the colony’s Executive Council. “It cannot be permitted,” they observed, “that because a man may happen to be a fugitive Slave he should escape those consequences of crime committed in a foreign country to which a free man would be amenable.” Although they ultimately decided to release Happy, they pointedly declared that if the evidence had been stronger they would not have been dissuaded from ordering his extradition on account of his being a slave. Indeed, the government had recently decided to surrender Solomon Moseby. Petitioners in that case claimed that the prisoner was not culpable for his offences because he was not a “free agent” at the time. Sir Francis Bond Head disagreed, telling them that in obtaining freedom, a slave “becomes also responsible for his conduct like other free Men. British law gives him as much freedom as belongs to British subjects but no more.” Likewise, in the Nelson Hackett case, in which the government also decided to extradite, the Executive Council’s report described the prisoner first and foremost as a “fugitive felon.” Having found the evidence sufficient, the Council decided to extradite, as it would have in any other case. In explaining this decision to the Colonial Office, Governor General Sir Charles Bagot contended that there was no doubt of Hackett’s guilt, that the goods he had taken had not been solely to facilitate his escape, and that to refuse surrender under such circumstances

336 Ibid.
340 Executive Council, January 1842, “Copies of a Despatch from the Governor-General of Canada to the Secretary of State for the Colonies, of the 20th January last, relative to the surrender of Nelson Hackett,” Parliamentary Papers, vol. XXVIII, 1842, 8
would have been to establish a precedent “repugnant to the common sense of justice of the civilized world.”

This attentiveness to an international “common sense of justice” was particularly acute in the context of the debate over whether an obligation existed in international law to surrender criminals. As chapter two showed, the idea of such an obligation, as well as the political and judicial willingness to carry it out between Canada and the northern states faltered badly in the late 1830’s. As a result, it is important to see the question of slave extradition in the context of this precarious and more general cross-border system of law enforcement. At the time of the Jesse Happy case in 1837 the Upper Canadian authorities were afraid that refusing to extradite any slave would further endanger the idea of a reciprocal obligation. The Executive Council, for example, declared that not surrendering an enslaved black where a free white would be turned over “would be equally contrary to the Law and to the spirit of mutual Justice which gave the origin to it in this Province as well as in the United States.” Chief Justice Robinson agreed and believed that Happy should be given up, in part to ensure the survival of the broader extradition system and the idea of an international law duty. If Canada refused the surrender, he wrote, “the Government and the people of [the U.S.] could feel themselves absolved from all obligation to surrender fugitives from Upper Canada.” For Robinson, law enforcement was an international concern, and, as he put it, “if Laws of this nature are not carried into effect on both sides according to their spirit they will soon cease to be acted upon on either side.” In other words, surrendering slaves when they were charged with criminal offences was part of the duty of reciprocity imposed by a much broader and much more important system of transnational law enforcement.

Robinson’s aim was in part to bring down domestic barriers to the international rule of law. He was certainly informed by this imperative in assessing the petitions in the Happy case. While Robinson acknowledged that the Fugitive Offenders Act gave the governor discretion to refuse surrender, he argued that the foreign government still had a claim “to expect that such a discretion shall be reasonably exercised and the Law shall be carried into effect agreeably to its intention.” In his opinion, the arguments for protecting Happy were not reasonable or consonant with this spirit of borderless justice. He also had little time for the argument that

---

344 Ibid.
345 Ibid., 201.
Happy would be re-enslaved. While slavery “politically considered is a great evil,” he wrote, it was legal in many civilized countries, and Canada should not attempt to change that by protecting even criminal slaves. He also brushed aside the argument that the charges against Happy and the evidence supplied to back them up might be fallacious. To conclude without proof that such a fraud was being undertaken and to refuse to regard the American documents as honest would be “unwarrantable and unjust.” In this, he echoed the court’s decision in the 1833 Blackburn case, when the judges (Robinson included) did not recommend extradition. There, the court dismissed the fear of re-enslavement or fallacious charges, writing that courtesy toward foreign governments required them “always to assume that it has no motive or design on these occasions which is not just and fair and in short none but such as is openly avowed.”

This opinion was echoed by the British Attorney General during the debates over implementing the Webster-Ashburton treaty in 1843. Faced with questions over whether false evidence and false charges would be used to secure the extradition of slaves, Sir Frederick Pollock took precisely the same approach as Robinson, saying that it was not fitting for Britain to assume that the citizens of a friendly nation would commit perjury or for Britain to make some special legal provision against that possibility.

Ultimately, this approach to the problem prevailed, and no express or implied exemption was built into the treaty or the imperial implementing law. As historians have long noted, the list of extradition crimes was narrowed during negotiations in large part to exclude offences such as theft and mutiny, which slaves might readily commit in fleeing the U.S. But for many M.P.’s and Lords in Britain, as for Rolph and the black Upper Canadians who sent him to London, that was not enough, and the government came under considerable scrutiny on this issue. M.P. Thomas Babington Macaulay declared that Britain must not “make ourselves the slave-catchers of the Americans,” while former Attorney General Lord Campbell noted that his only worry about the sweeping and controversial treaty was whether slave-owners might “pervert” it to claim slaves, a worry which even the envoy who negotiated the treaty admitted to feeling. Yet an attempt to insert an explicit exemption for slaves failed, and the government offered only

---

346 Ibid., 202.
347 Ibid., 203.
encouraging words about protecting slaves. For example, Foreign Secretary Lord Aberdeen led off the debate on the extradition bill by addressing the slave question and saying that the widespread concern was “unfounded.” He told the House of Lords that slaves committed no crime in escaping and were entitled to the support and encouragement of all Christian people.\footnote{352 30 June 1843, \textit{U.K. Debates}, third series, vol. LXX, 474.} Moreover, he said that anything taken by a slave in order to effect their escape could not be counted as stolen as the act lacked criminal intent.\footnote{353 Ibid.} (He might also have said that theft was simply not in the treaty anyway.)

These vague assertions were about as far as the government could go. Months before the ratification debate the Foreign Office had asked the law officers whether slaves could be considered liable for a crime committed in a country in which they were enslaved, and whether the treaty could be used to claim them on that ground. The Attorney General, Solicitor General, and Queen’s Advocate replied that British law would consider a slave culpable in such a case. Moreover, they found that if evidence were provided of an extraditable offence, British authorities would be bound to surrender such a person.\footnote{354 Dodson, Pollock, and Follett to Aberdeen, 27 March 1843, \textit{L.O.F.O.}, vol. 4, 183-187.} This was tacitly admitted by the Attorney General in Parliament during the implementation debates. Similar to Aberdeen, Pollock told Parliament that slaves could not be guilty of theft in taking items essential for escape, and that, anyway, theft was not an extraditable offence in the treaty.\footnote{355 11 August 1843, \textit{U.K. Debates}, third series, vol. LXXI, 565.} But Pollock also admitted that if a plausible and extraditable charge were made against a fugitive slave, the law would deal with that person as an accused criminal and not as an ex-slave. That is, once evidence was provided to a British court to support an extradition charge, that court had no business inquiring as to whether the accused had been a slave or had been escaping slavery at the time of the alleged offence. “We did not care whether the man had been a slave or not,” Pollock said, “…that was a point to be settled on the man’s return to America.”\footnote{356 Ibid, 566-567.} With this admission the assurances given publicly in Parliament and privately to Rolph seemed increasingly inconsequential.

This decade-long debate over slave extradition highlights both the prominence and also the limitations of British rights. As the fugitive slaves and their allies petitioned the colonial and imperial governments their proposals invoked British justice, sought out British citizenship, and wielded their service to the British cause as justification. As a result, their campaign embodied key ideas about where rights came from and what law meant in the colony. Far from being
grounded in expansive ideas of human liberty, their petitions pleaded for a freedom much more specifically bounded, available not as an inherent human right but as an historical and social right under the British constitution. But it did not work. The focus of the colonial and imperial officials who handled these cases was on individualized justice and international order. Neither government was willing to grant special protections to fugitive blacks or exempt them, as a group, from extradition to the U.S. Instead, they offered the guarantees of individual fairness in the justice system, promising all the rights enjoyed by any white in the colony, but no more – as if the case of fugitive slaves was no different from any other extradition matter. This steadfast refusal to engage seriously with the real nature of the threat to fugitive blacks re-affirms the pervasiveness of the “ideology of racelessness” in British North America, a concept which drew heavily on ideas of British constitutional freedom. However, policymakers were also unwilling to compromise the ideals of international society upon which a precarious extradition system hung in the late 1830’s. This concern over the international law ramifications of offering slaves an inviolable asylum in Canada was a key force in the colonial government’s deliberations. As a result, black freedom in Canada was debated not simply as a question of whether or not to shelter those fleeing slavery. It involved ideas far more fundamental to Canada’s place in the empire and the wider world.

**John Anderson, Natural Law, and Upper Canadian Courts, 1860-1861**

Extraditing slaves again became a top issue in 1860-1861 with the case of John Anderson. Anderson had fled slavery in Missouri years before and in the process of doing so killed a white farmer who was attempting to stop him. He was eventually arrested in Brantford, Upper Canada and committed for extradition by a local magistrate. He then appealed for *habeas corpus*, first to the Court of Queen’s Bench, which held that he could be extradited, and then to the Court of Common Pleas, which decided to release him on a technicality relating to the magistrate’s warrant of committal. Not surprisingly, the case was a lightning rod for abolitionist energy both in Canada and in Britain, where an abolitionist group began separate legal proceedings in the English Court of Queen’s Bench to free him.\(^{357}\) When he was eventually released, Anderson was paraded through the streets of Toronto by his supporters and eventually

made his way to England, where he embarked on a series of lectures and wrote an auto-
biography, before ultimately moving to Liberia. The case was marked by an intense and
extensive debate in the courts about whether a slave who committed a crime in escaping bondage
could be given up as a criminal or shielded as a free man. As scholars of Anderson’s case have
long shown, the defence argued that since defending oneself against slavery would not have been
a crime in the British Empire, Anderson had not committed an extraditable offence. The treaty
required evidence for extradition which would justify committal for trial if the offence had
occurred in the country where the fugitive was found, and Anderson’s lawyers used this
provision to argue that since Anderson’s actions would have been lawful in Canada he was
exempt from the operation of the treaty.

Alongside and underlying this approach, though, Anderson’s lawyers made far broader
arguments about the rights of man and the limits of state law. This section explores how concepts
of natural law and natural rights shaped the Anderson case. Unlike in the slave cases of the
1830’s, in which Canadian blacks relied primarily on British rights, Anderson’s defence rested
fundamentally on arguments about his inalienable rights as a person – rights which British law
was bound to recognize but which it did not create. This section examines this line of thinking,
focusing on how it played out in the Toronto courts, but also how it drew from and intersected
with intellectual currents that had long been key to abolitionist and emancipationist legal thought
in Britain. However, while there was some degree of receptiveness among the judges for this line
of thinking, most found it both threatening and unconvincing. As in the 1830’s cases, there was a
deep resistance on the bench to granting slaves an exemption based on their status, and indeed
several judges found the idea of doing so, and of thus opening a potential asylum for millions of
American slaves, an enormously troubling proposition.

British constitutionalism and a deference to British ideas were not absent from the
arguments in this case. Anderson’s lawyers used ideas of British justice and the authority of
British sources routinely throughout the hearings. Defence lawyer S.B. Freeman invoked both
Magna Carta and the Habeas Corpus Act of 1679 to justify seeking the intervention of the Court

358 Brode, Odyssey, 99-105.
359 On the argument of the case see Ibid., 40-100.
360 Recent work on natural law and slavery includes John W. Cairns, “Stoicism, Slavery, and Law: Grotian
Gorcum, 2004), 197-231; Gustaaf van Nifterik, “Hugo Grotius on ‘slavery,’” Ibid., 233-243. See also Edith F.
of Common Pleas, and cited British case law to reinforce most of the technical elements of his argument.\footnote{In Re John Anderson, \textit{Reports of Cases Decided in the Court of Common Pleas of Upper Canada}. Vol. XI. (Toronto: Carswell, 1883) 21, 31, 38, 40.} He also drew from the 1842 Parliamentary debates which occurred after a band of slaves took over the American ship \textit{Creole} and forced it into Nassau harbour, as well as debates over the ratification of the Anglo-American treaty in 1843. His point in doing so was to demonstrate that what he called “the British mind” was in favour of exempting slaves from extradition for offences committed in escaping slavery – a view which he argued was binding on Canadian courts.\footnote{In the Matter of John Anderson, \textit{Report of Cases Decided in the Court of Queen’s Bench}. Vol. XX. (Toronto: Henry Rowell, 1861), 139.} In doing so, he used the Parliamentary speeches of key imperial officials, and quoted heavily from them. Although, as noted above, the government had not offered any serious assurances against the extradition of slaves, Freeman used some of the general and largely rhetorical expressions of support for protecting escaped slaves – many of which, as noted above, were offered as a kind of distraction from the absence of substantive or explicit protections.\footnote{See Anderson, Q.B., 138-139; Anderson, U.C.C.P., 34-38.}

But this task of interpreting the treaty also transcended British justice and the authority of British legal sources. Anderson’s case was focused from the start on the dictates of natural law and the slave’s natural right to freedom.\footnote{On natural rights in British and American rights talk, see Michael P. Zuckert, \textit{Natural Rights and the New Republicanism}. (Princeton: Princeton University Press, 1994), esp. 1-25. See also, Morton J. Horwitz, “Natural Law and Natural Rights,” in Austin Sarat and Thomas R. Kearns, eds., \textit{Legal Rights: Historical and Philosophical Perspectives}. (Ann Arbor: University of Michigan Press, 1996), 39-52; Knud Haakonssen, \textit{Natural Law and Moral Philosophy: From Grotius to the Enlightenment}. (Cambridge: Cambridge University Press, 1996). On the history of natural law and natural rights generally, see Stephen Buckle, \textit{Natural Law and the Theory of Property: Grotius to Hume}. (Oxford: Clarendon Press, 1991); Michael Bertram Crowe, \textit{The Changing Profile of the Natural Law}. (The Hague: Martinus Nijhoff, 1977).} Anderson himself made this point in a petition written shortly after his arrest in Brantford. As he told the Governor General, he had “always felt that he had a right to his freedom,” he “had never done anything to forfeit his liberty,” and as a result he could “lawfully use any means within his power to obtain his liberty.”\footnote{Anderson Papers, \textit{Sessional Papers}, no. 22, 1861.} Freeman built on this theme in court, deploying both the authority of the British government and also its adherence to a higher law, and telling the Queen’s Bench that his construction of the treaty was “consistent with the acts and policy of the British Government in relation to the natural rights of man.”\footnote{Anderson, Q.B. 138.} As a result, Britain’s policy more declared and facilitated an existing natural right to liberty than created a new one. What was at issue, then, was whether the treaty and British and Canadian law would be perverted to support the inherently unjust subjugation of a rights-bearing individual.
On this point, in both courts, he returned to the *Creole* debate, and quoted Lord Chief Justice Denman’s remark that he was sure that no British government would “act as policemen or gaolers to enforce the rights of the master over the slaves.”\(^{367}\) As Denman argued (and Freeman quoted, twice in each court), “no country was entitled to enforce a law which was believed to be founded in injustice.”\(^{368}\)

In many ways that was the core of Freeman’s case. Canadian and British law had to be used because anything else would be against the law of nature, which guaranteed human liberty. “Personal liberty,” he told the Common Pleas, “or the right to be free in our persons, and to use them as we think fit, and personal security, or the right to be protected against injury to our bodies or danger to our liberty, are natural rights.”\(^{369}\) Freeman juxtaposed these rights of man with the depravities of slavery, briefly in the Queen’s Bench and more elaborately in Common Pleas. He told the former court that slaves were deprived of dominion over themselves and held captive; they could own no property and male slaves could not be the proper and recognized head of a family – all rights which attached to humanity.\(^{370}\) He was more graphic in the subsequent Common Pleas hearing, invoking the horrors of the Middle Passage and arguing that southern slavery stripped slaves of all the rights of man and in practice rendered them more vulnerable and more poorly-treated than animals. He told the court that a slave girl could be raped by her master with impunity: “In this instance she is not looked upon as either a human being or a brute, but only so much of a human being as to prevent the connection being unnatural, and an abominable crime… and yet so much of a brute as to prevent it being rape.”\(^{371}\)

Freeman used this denial of the natural rights of man primarily to build his case for Anderson’s act having been legitimate self-defence. His explicit hope was that this would transform the case from one about murder to one about manslaughter, a crime which was not extraditable under the treaty.\(^{372}\) His contention was that given the violence and the denial of natural rights inherent in slavery a slave had the same scope of self-defence rights in fending off an attempt to re-enslave him as anyone else would have in defending themselves against an attempt at murder. As he told the Common Pleas, “the thirst for liberty” was a human instinct.

---

\(^{367}\) Anderson, U.C.C.P., 35.
\(^{370}\) Anderson, Q.B., 135.
\(^{371}\) Anderson, U.C.C.P., 23.
\(^{372}\) Anderson, Q.B., 135; U.C.C.P., 26.
and man’s “nature tells him that it is right for him to fight to obtain and maintain it.” In fact, Freeman called such actions by slaves “not only justifiable, but praiseworthy.” Natural law, then, was being used to interpret statute law in both very general and quite specific ways.

Nonetheless, it was not a completely solid case. As previous cases in Britain, Canada, and the United States had shown, and both the Crown counsel and, indeed, most of the Anderson judges contended, the role of extradition courts was not to try the case as a jury might. Rather, their role was to determine if the prosecution had presented *prima facie* evidence for criminality, a view examined in chapter five. According to Crown counsel Robert Harrison, Anderson’s victim was lawfully empowered to arrest him in Missouri and it was not the role of Canadian courts to determine if his power to do so would have existed in Canada. Demanding that the elements of an offence be precisely the same in both countries would render even ordinary extradition cases nearly impossible, Harrison said. Freeman was keenly aware of this argument and it seems likely that his focus on the injustice of Missouri law and his attempt to have the courts use Canadian law to judge Anderson’s actions were intended to overcome this hurdle. In Freeman’s view, the white farmer was attempting not simply to arrest but to unlawfully subjugate and enslave Anderson in violation of natural rights and in a way forbidden by British and Canadian law. And while Freeman agreed that in extradition cases the foreign and domestic law did not need to define ordinary offences in precisely the same way, he argued that the two systems needed to be “alike in spirit.” That could not be the case between Canada and the U.S. because of slavery, when the distinction between slavery and freedom was not an issue of legal technicality but one which centred on a far more central concept of law and justice. In other words, the fundamental gulf between the British and American systems on the subject of slavery should shape the court’s application of the treaty.

It was clearly not a rock solid case, as Patrick Brode has observed. Indeed, Brode has critiqued Freeman’s reasoning as both legally naïve and empirically mistaken: naïve for relying on natural law before a bench of mid-Victorian colonial judges charged with deciding on weighty matters of statutory and treaty interpretation, and mistaken because Brode considers the argument about slaves’ crimes not being extraditable because no slavery existed in Canada to be

---

373 Anderson U.C.C.P., 24.
374 Anderson, Q.B., 140.
377 Ibid., 38.
This is not the place to debate either assertion, though appreciating more fully the context in which these arguments were made may help us understand them better. Freeman’s strategic aim in relying so heavily on rights and natural law may have been two-fold. First, to take on a rhetorical strategy which would mobilize and solidify public support for Anderson, and so apply considerable political pressure to the executive branch to refuse extradition if the courts decided to remand him. As Brode has shown, the case certainly sparked an uproar in Canada, Britain, and the U.S., and the case was followed attentively by newspapers in all three countries.

Second, Freeman’s underlying legal aim may have been to raise enough doubt about the workings of the extradition treaty that the judges would apply the maxim of _in favourem libertatis_ – that where the law was uncertain, it should be read to favour liberty. As discussed below, this had long been a key tactic and principle in abolitionist/emancipationist litigation in Britain, and it was certainly echoed in Freeman’s arguments. (Indeed, Justice William Buell Richards noted in his opinion that it was “the general rule…that that interpretation must be given which is most in favour of the liberty of the accused.”) As Freeman told the court, natural rights could be overridden, but the intention to do so had to be laid out clearly and specifically by positive law. That had not happened in the extradition treaty or the implementing statute, he argued, and given the opinions expressed in the British Parliament on safeguarding slaves, and the anti-slavery efforts of British policy generally, the uncertainty about slaves must accrue to the benefit of the slave. If not explicitly removed, then, Anderson’s natural rights must be respected by Canadian law. Thus his point was not that the British had built an exemption into the treaty or statute for slaves, but rather that absent their express inclusion as criminals, British and colonial courts had no power to cooperate with slave law. This was clearly an argument with expansive implications. It would lead not simply to the liberation of Anderson, but to immunity for former slaves from extradition and to their inviolable asylum in Canada.

While Brode has suggested that this argument was a feeble one to present in court, it was clearly not out of the imperial and Canadian mainstream on questions of slavery. As noted above, there were many elected officials in Canada and Britain who favoured such a blanket asylum. In
fact, many of them linked such sanctuary to the same notions of the natural rights of man invoked by Freeman. In 1842, for example, former Attorney General W.H. Draper (who presided over Anderson’s second hearing as Chief Justice of the Common Pleas and voted to release him) argued in the legislative debate over the surrender of Nelson Hackett that it was an open question whether a human being from a country where he was considered to be chattel could even be held liable for a crime committed there. He was joined in this argument by Executive Councillor H.J. Boulton, who demanded an outright exemption for fugitive slaves on that basis. Seven years later, when the extradition issue was revisited in the legislature Boulton spoke up again and argued that the slaves who seized the Creole had simply “struggled for that liberty which was dear to every man” and that slaves who fled to Canada came from a country “where they are treated as cattle or brute beasts.” Likewise, former premier Henry Sherwood “pleaded the laws of humanity” for the protection of slaves “who had committed some crime in attempt to gain [their] liberty.”

Similar links between slavery and inherent injustice were made during the 1843 British debates over the implementation of the extradition treaty. In fact, Lord Chief Justice Denman, who worried about the use of the treaty against slaves, declared that he “stood up for the liberty of mankind, for the natural rights which belonged to us all.” Likewise, Thomas Babington Macaulay argued as Freeman later would that extradition required the partner countries to have a “general assimilation of laws, manners, morals, and feelings” but that a “fundamental difference” existed between Britain and America over slavery. Meanwhile, Lord Palmerston argued for a statutory exemption of slaves for crimes committed during escape, saying that even a murder under such circumstances could not be treated as a crime for the purposes of extradition. According to Lord Palmerston, a slave who made it to British territory “had rights which we were bound to give him the full enjoyment of.”

---

384 Ibid.
385 2 February 1849, Ibid., 440.
386 Ibid., 441.
389 Ibid., 572.
390 Ibid., 573.
These ideas of rights were embedded in English legal and political thought.\footnote{For the role of natural law in eighteenth-century English political thought, see H.T. Dickinson, \textit{The Politics of the People in Eighteenth-Century Britain}. (New York: St. Martin’s Press, 1995), 161-170. Also, Dickinson, \textit{Liberty and Property: Political Ideology in Eighteenth-Century Britain}. (New York: Holmes and Meier, 1977).} Most prominently, Blackstone devoted a chapter in the 1765 first edition of his \textit{Commentaries} to “the absolute rights of individuals,” which he said were drawn from “the natural liberty of mankind—a right inherent in us by birth.”\footnote{William Blackstone, \textit{Commentaries on the Laws of England}. Vol. 1. (Oxford: Clarendon, 1765), 117, 121.} According to Blackstone, society’s principal purpose was to “protect individuals in the enjoyment of these absolute rights, which were vested in them by the immutable laws of nature,” and which were restrained by the laws of mankind only as much as was necessary to preserve order.\footnote{Ibid., 120-121.} He contended that these absolute rights of Englishmen, embodying the natural rights of man, were chiefly personal security of life and limb, personal liberty, and property.\footnote{Ibid., 125-136.} On the issue of personal liberty, Blackstone specified that it was a “right strictly natural,” which could only be abridged by the “explicit permission of the law.”\footnote{Ibid., 130.} Although he modified the section in subsequent editions, Blackstone contended (paraphrasing Lord Chief Justice Holt’s famous phrase) that the spirit of liberty in England was so strong that a slave became free the moment he touched English soil, and was imbued with all the natural rights recognized in the realm.\footnote{Ibid., 123.} It is not surprising, then, that Freeman drew explicitly from Blackstone in his Common Pleas argument, where he told the court that the rights of personal liberty and personal security could only be affected by positive law and must otherwise remain in force.\footnote{Anderson, U.C.C.P., 20.}

It is beyond the scope of this thesis to trace systematically the prevalence of ideas about natural law and natural rights in British North America around the time of Anderson’s case. Historians of Canada’s rights culture have largely focused on the pervasive and enduring use of ideas of “British rights,” centred on political rights and grounded in the British constitution.\footnote{Heaman, “Rights Talk”; Risk and Vipond, “Rights Talk in Canada in the Late-Nineteenth Century,” 94-129; Risk, “Blake and Liberty,” in Ibid., 130-151.} Yet there is good reason to suspect that natural law and natural rights were relatively common concepts in political and legal discourse in the three decades prior to Anderson’s case. Natural law appears as an underlying (if sparsely-treated) force in two of the best-known general treatises on British North American law during this period. Nicolas-Benjamin Doucet’s 1841
Fundamental Principles of the Law of Canada called the law of nature “the best and most authentic foundation of human laws,” and observed that it was “an immutable justice, always and everywhere the same; no human laws can alter it.” Meanwhile, Beamish Murdoch’s 1832 Epitome of the Laws of Nova Scotia, similarly declared that “the laws of man must be conformable and subservient” to the rules of natural law, “otherwise they cease to be laws, and can have no just claim to obedience.

The concept of both individual and collective rights deriving from natural law was also a prominent part of some important mid-century debates. In the late 1840’s and early 1850’s, for example, officials, merchants, and fishermen in Nova Scotia, New Brunswick, and Newfoundland complained to the imperial government about the treaty terms under which Americans had access to the inshore fisheries. Petitions from all three colonies declared that those fisheries were the natural rights of the colonists. In a similar vein, the Upper Canada Law Journal noted in a short 1856 article on “the rights of woman” that “the natural rights of man and woman are, it must be admitted, equal,” but that women surrendered most of them upon marriage. The same journal also observed in an 1858 editorial on freedom of the press that “it is the natural right of every man to think and to speak, and this involves the consequential right to print and to publish,” though such natural rights could be limited or moderated when necessary for the good of society. In other debates, officials went further and applied the concepts of natural rights – sometimes using the modern phraseology of human rights – to highly contentious questions of policy. For instance, Upper Canada superintendent of schools Egerton Ryerson called the right of children to an education an “undeniable human right,” and a “natural right” which was “fundamental and sacred.”

---

399 Doucet, Fundamental Principles of the Laws of Canada, 8, 10.
400 Murdoch, Epitome of the Laws of Nova Scotia, 16.
403 Upper Canada Law Journal, 4, September 1858, 195.
404 E. Ryerson, Annual Report of the Normal, Modern, and Common Schools in Upper Canada for the Year 1850, Appendix to the tenth volume of the journals of the Legislative Assembly of the Province of Canada ... 20th day of May to the 30th day of August ... fourteenth & fifteenth years of the reign of ... Queen Victoria : being the 4th session of the 3rd Provincial Parliament of Canada. (Quebec: R. Campbell, 1851), KK 41; Ryerson, Address to the Inhabitants of Upper Canada, on the System of Free Schools, Appendix to the eighth volume of the journals of the Legislative Assembly of the Province of Canada, from the 18th day of January to the 30th day of May, both days
Sabbath day observance. A committee of the Upper Canadian Legislative Council wrote in 1857 that it was the paramount duty of every legislature everywhere to ensure that no inhabitant of their country was “unnecessarily deprived of the enjoyment of his natural rights and privileges.” The committee went on to describe the right to a day’s rest from work each week as a “human right” and urged the government to enforce the laws surrounding the Sabbath. These concepts of natural law and natural rights, then, likely had a relatively prominent place in political and legal thought at the time of Anderson’s case.

Beyond the general and rhetorical weight of natural rights, they were also an enduring feature of slavery-related litigation in Britain. Most famously, this argument was used in the 1772 *Somerset* case, in which a slave who had been brought to England challenged the right of his owner to take him to Jamaica. James Somerset’s lawyers argued that his master’s claim of ownership was “opposite to natural justice” and inconsistent with the laws of England. They contended that slavery contravened “all the rights vested by nature and society” in man, rights which “immediately flow from, and are essential to, his condition as such.” They equated this use of the term ‘nature’ with a fundamental morality “which no laws can supersede.” Ultimately, Lord Chief Justice Mansfield found for the slave on much narrower grounds, but did seem to admit the premise of the natural rights argument by observing that slavery was “so odious” that nothing but positive law could be held to support it as an institution. Freeman clearly used this concept in his argument for interpreting the treaty to favour Anderson’s liberty. As he argued, “when a man’s natural rights are taken away by a law, the intent to do so must be expressed with irresistible clearness.”

---

408 Somerset v. Stewart, 502.
409 Ibid.
410 Ibid., 508.
411 Ibid., 510.
412 Anderson, U.C.C.P., 35.
in a quixotic attempt to convince the court that Missouri’s slave laws contravened the American constitution because slavery was not explicitly allowed by it.\textsuperscript{413}

Moreover, as David Bell has noted, there was a “vogue of natural rights reasoning” in anti-slavery sentiment in Britain and North America generally in the late eighteenth and early nineteenth-centuries.\textsuperscript{414} We also know that natural rights reasoning and \textit{Somerset} in particular were important to slave litigation in British North America as well. In the 1799-1800 New Brunswick case of \textit{R. v. Jones}, for example, lawyer Ward Chipman took up the slave’s cause, calling himself “a volunteer for the rights of human nature.”\textsuperscript{415} Chipman’s brief in the case survives and the ideas of the enlightenment philosopher Montesquieu, the natural law concepts of Blackstone, and the reasoning in \textit{Somerset}, among other authorities, are dealt with at great length.\textsuperscript{416} Chipman even told the court that it was “beyond the power of human laws to establish the condition of slavery,” and, like Freeman, he drew directly from Mansfield in making an argument for favouring liberty over the odiousness of slavery in the absence of positive law otherwise.\textsuperscript{417}

Besides \textit{Somerset}, though, Freeman’s arguments echoed other British cases. In particular, lawyers in the 1778 Scottish case of \textit{Knight v. Wedderburn} used a similar tactic. In that case, the slave Joseph Knight contested his owner’s power to transport him to Virginia. His lawyer told the Court of Session that slavery was unjust and repugnant to fundamental principles of morality.\textsuperscript{418} He contended that slavery “deprived men of the most essential rights that attend their existence,” and urged the court not to allow the Jamaican law under which Knight was enslaved any aid from the law of Scotland.\textsuperscript{419} The court’s decision, as reported decades later by Edinburgh lawyer William Maxwell Morison, was that the dominion assumed over Knight under Jamaican law was simply “unjust and could not be supported” by Scottish law.\textsuperscript{420} A different report of the case, though, reveals more diverse opinions among the judges, with several willing to support the

\begin{footnotes}
\footnotetext{413}{Ibid., 39.}
\footnotetext{414}{Bell, “Slavery,” 11.}
\footnotetext{416}{The brief is reproduced in Ibid., 155-184.}
\footnotetext{417}{Ibid., 166, 183.}
\footnotetext{418}{I have relied on the record of argument provided in \textit{The Decisions of the Court of Session... by William Maxwell Morison}. XXXIII-XXXIV [Morison’s Law Dictionary]. (Edinburgh: Archibald Constable and Co., 1811), 14547.}
\footnotetext{419}{Ibid., 14547-14548.}
\footnotetext{420}{Ibid., 14549.}
\end{footnotes}
claims of the slave-owner. Nonetheless, several others relied firmly on the rights reasoning generally and on Mansfield’s observation about slavery’s odiousness in Somerset in particular. Lord Auchinleck, for example, wrote that slavery was not “agreeable to humanity,” while Lord Kaimes declared that “slavery is a forced state, – for we are all naturally equal.” According to Kaimes, Jamaican laws could govern Jamaica, but we “we cannot enforce them; for we sit here to enforce right, not to enforce wrong.” Lord Westhall concurred, saying “I have only to declare my opinion for liberty in its full extent.” While neither Mansfield nor Knight were extradition cases, they did involve questions of what standing slave law should have in British courts, and whether slaves could be sent out of British territory to a place where slavery was legally entrenched. There was, in other words, a legacy of British judges being receptive to and willing to apply natural law arguments in slavery-related cases.

Indeed, there appears to have been an audience for it even in the Upper Canadian Court of Queen’s Bench, where Anderson lost and was remanded for extradition. Justice Archibald McLean’s dissenting opinion leaves little doubt that he was willing to use the natural rights arguments to interpret the treaty in favour of non-extradition. His dissent was written in two parts, the first of which dissected the prosecution’s evidence and the magistrate’s warrant of committal, finding the former insufficient and the latter fatally flawed. He concluded from this that Anderson should be discharged. McLean was careful to note that his decision on this front was drawn entirely from the evidence given in the habeas corpus return and was not based on the fact of Anderson having been a slave. However, he then took up Freeman’s more sweeping arguments about slavery, liberty, and natural law. This case, he contended, could not have happened in Canada where all people were equal regardless of race, and where the law carefully guarded individual liberty. (This was in stark contrast to the U.S., he said, where the “revolting” “curse of slavery” continued.)

421 Knight v. Wedderburn, Decisions of the Lords of Council and Session, from 1766 to 1791... Selected from the original Mss. by M.P. Brown, vol. II. (Edinburgh: William Tait, 1826), 776-780. This report lacks a record of the arguments of counsel.
422 Ibid., 777, 778.
423 Ibid., 777. Emphasis in original.
424 Ibid., 779.
425 Other cases involving slavery and natural law include Chamberline against Harvey, 5 Mod. 187; Smith vers. Gould, S.C. Salk, 666; Shanley v. Harvey, 2 Eden. 126.
426 Anderson, Q.B., 174-188.
427 Ibid., 183-184.
428 Ibid., 184-185.
429 Ibid., 186.
Such praise for Canada’s culture of equality and such condemnation of American barbarity were typical of colonial abolitionist rhetoric. However, McLean was also willing to bring this general abhorrence of slavery to bear on his interpretation of the treaty. Indeed, the humanity of slaves and the inhumanity of slavery were key to the latter section of his decision. He wrote that slavery stripped slaves of “all human rights,” in stark contrast to the natural love of liberty which was “inherent in the human breast, whatever may be the complexion of the skin.” In light of the universality of that desire for, and right to, freedom, Anderson was justified in using whatever degree of force necessary to safeguard his own. As for the standing of American and Missouri law, McLean was frank about the application of these natural law principles to the case: “in administering the laws of a British province, I can never feel bound to recognise as law any enactment which can convert into chattels a very large number of the human race.” As a result, while the freedom argument was not the sole plank of McLean’s decision, it was nonetheless central to his opinion.

However, McLean was the only one of the six judges who heard the case in Toronto to express such views on the law. There was little serious engagement by the other two judges on the Queen’s Bench with either Freeman’s arguments or McLean’s opinion. As with the courts and officials in the 1830’s, the more powerful view in the Queen’s Bench in 1861 was that of a raceless administration of the law. As Crown counsel Robert A. Harrison put it, there was no explicit exemption for slaves, and if charged with an extraditable offence they must be treated “like any other person, bond or free, similarly charged, regardless of what may or may not be done to him when surrendered.” Chief Justice Sir John Beverley Robinson agreed, in conformity with his views on the question in the 1830’s examined above. He declared that the court could not be influenced by the threat that Anderson might be returned to slavery, painful though that prospect was. The question of manslaughter was for a trial jury, and the courts’ role in extradition cases was merely to carry out the treaty faithfully without regard to any distinctions or policies which were not in the treaty or statute. The third member of the court,

---

430 On this, see Stouffer, *The Light of Nature.*
431 Anderson, Q.B., 188.
432 Ibid.
433 Ibid.
434 Anderson, Q.B., 149.
435 Ibid., 173.
Justice R.E. Burns, agreed, writing that whether Anderson was a slave or not was simply irrelevant to the question before the court.\textsuperscript{436}

In the Common Pleas the judges took a different but related approach. The court ultimately decided that errors in the magistrate’s committal warrant were fatal, and that Anderson should be released on that ground. As a result, they were not required to agree or disagree explicitly with the rights-based argument.\textsuperscript{437} Nonetheless, they engaged with the idea of exempting slaves more fully, if less conclusively, than the Queen’s Bench majority. We can see in the opinions of Chief Justice W.H. Draper and Justice John Hagarty a keen desire to limit the scope of their ruling. That is, they were careful to specify that while they were freeing Anderson, their decision did not settle the law in favour of exempting slaves and certainly did not proclaim an asylum for those who committed crimes in escaping slavery.\textsuperscript{438} In this, they echoed the tenor of decisions by British and colonial judges going back decades on the subject of slavery. As scholars have long noted, for example, Lord Mansfield was profoundly concerned that his decision in \textit{Somerset} would be interpreted as abolishing slavery around the empire.\textsuperscript{439} Likewise, as David Bell and Barry Cahill have pointed out, even abolitionist judges in New Brunswick and Nova Scotia steadfastly avoided the question of slavery’s overall legality.\textsuperscript{440} Fearing political backlash or social upheaval, they instead focused on emancipating slaves one at a time through \textit{habeas corpus} – a strategy which Robin Winks has called a “judicial war of attrition.”\textsuperscript{441}

The Common Pleas had a similar awareness of the potential ramifications of a decision in Anderson’s favour. But they were arguably more sincere in their desire to limit the ruling’s effect than the judges Cahill and Bell examine – this was less a covert attack on slavery then an expression of genuine worry about offering asylum to criminal slaves. Draper said quite frankly that he was not prepared to decide that even slaves who committed murder in escaping were immune to criminal extradition, and his opinion displayed a deep ambivalence about offering such asylum.\textsuperscript{442} “I am reluctant on the one hand… to declare that each individual of the assumed

\begin{itemize}
\item \textsuperscript{436} Ibid., 190.
\item \textsuperscript{437} See the observation of Chief Justice W.H. Draper that whatever his views on the “more general grounds” urged by Freeman, the result would be the same, Anderson, UC.C.P., 59.
\item \textsuperscript{438} \textsuperscript{439} See, for example, George Van Cleve, “\textit{Somerset’s Case} and Its Antecedents in Imperial Perspective,” \textit{Law and History Review}, 24(3), 2006, 601-645.
\item \textsuperscript{441} Winks, \textit{Blacks in Canada}, 102.
\item \textsuperscript{442} Anderson, U.C.C.P., 59.
\end{itemize}
number of 4,000,000 of slaves in the southern states may commit assassination in aid of escape… and find impunity and shelter on his arrival here,” he wrote.\textsuperscript{443} Yet he said he was also reluctant to admit that Britain had agreed by treaty to surrender a slave who “as his sole means of obtaining liberty, has shed the blood of the merciless task-master who held him in bondage.”\textsuperscript{444} Clearly Draper was among the many officials in Britain and Canada who were profoundly wary of opening a floodgate or of offering an incentive to acts of violent social upheaval in the U.S.

Hagarty was similarly uncertain, though more sceptical of the arguments for exempting slaves altogether. To exclude slaves from extradition outright, he declared, would allow impunity for offences not strictly necessary for escape.\textsuperscript{445} Likewise, insisting that offences be defined exactly the same in each country – as he seemed to believe Freeman was urging – would hamper the extradition of even common criminals, defeating the ends of justice and making each country a sanctuary for the criminals of the other.\textsuperscript{446} Yet Hagarty was also unwilling to accept entirely Robinson’s and the Crown’s views respecting the irrelevance of slave status. This reasoning, he said, “can readily be pushed to extravagant results” – such as a slave girl being surrendered for the murder of a white man who was trying to rape her and who could do so lawfully, or a slave who resisted corporal punishment that was dangerous to his life or limb.\textsuperscript{447} The key distinction for Hagarty, then, was that resisting slavery itself did not justify taking a life in self-defence and did not amount to the kind of fundamental difference which made international cooperation impossible, but that other scenarios flowing from slave status might. As a result, despite resisting the arguments for slavery being beyond the pale, Hagarty did seem to agree that the natural law rights of self-defence could shape treaty interpretation in other instances.

So we can see some receptiveness to Freeman’s natural law arguments. Judges in both superior courts clearly believed in the basic fact of a natural right to freedom, even if they did not believe that it should shape judicial interpretation of the Webster-Ashburton treaty. Nor was this strain of rights thought foreign to slavery-related litigation or political debates over slaves in Britain or British North America. By the time of Anderson’s case it had been a feature of such discussions for centuries. Nor was it uncommon in broader political and legal discourses, where on an array of questions jurists and policymakers routinely invoked the authority of natural law. Yet this was also a deeply unsettling notion in the context of Canadian-American extradition.

\textsuperscript{443} Ibid., 60. 
\textsuperscript{444} Ibid. 
\textsuperscript{445} Ibid., 71. 
\textsuperscript{446} Ibid. 
\textsuperscript{447} Ibid.
Any decision siding with Freeman’s arguments would have been an open declaration of inviolable asylum for American slaves, and judges clearly worried that such a decision would have sweeping consequences (as judges long had in slave suits on both sides of the Atlantic). While they endorsed freedom in principle, they were more ambivalent about its application to Canadian law.

**International Law and Confederate Soldiers in British North America, 1863-1865**

Issues of asylum and extradition again rose to the forefront of political and legal debate during the U.S. Civil War. In New Brunswick, Upper Canada, and Lower Canada courts grappled with whether Confederate officers who were arrested in British territory could be surrendered to the Union on criminal charges stemming from incidents which the perpetrators claimed were lawful acts of war. Each set of defendants claimed sanctuary in the colonies, arguing that they had commissions from a recognized belligerent force and thus were not individually liable under domestic criminal law and exempt from extradition under a doctrine now called the ‘political offence exception.’ As the defendants and their lawyers made arguments against extradition, and the judges decided on their fate, they drew on ideas about political asylum, the duty of state neutrality, and the nature of the law of war. They invoked concepts and doctrines from sources ranging from the seventeenth-century Dutchman Hugo Grotius to the just-published work of the American publicist and army General Henry Wager Halleck. In so doing, these colonial jurists demonstrated a willingness to apply international law ideas and an impressively cosmopolitan approach to legal thought. This section examines the currents of legal and political thought which drove these cases as they played out in colonial courts, particularly how these cases centred on international law ideas.

This wave of controversies began in December 1863 when a group of men, including some southerners and some British subjects from New Brunswick and Nova Scotia, hijacked the American steamer *Chesapeake* after it left New York City, intending to convert the ship into a privateering vessel. The U.S. navy cornered the ship off Nova Scotia and while most of the hijackers escaped initially, many of them were arrested in New Brunswick shortly thereafter.

---

where the U.S. applied for their extradition.\textsuperscript{449} Next, in September 1864 another group, which included a young Scot named Bennet Burley, seized control of the Lake Erie steamer \textit{Philo Parsons}, which they intended to use in a raid on the Union prison fortress at Johnson’s Island. After the plan dissolved, they sunk the ship off Windsor and fled into Canada, where Burley was arrested and his extradition was sought.\textsuperscript{450} Finally, in October 1864 a band of southerners raided and robbed the small Vermont town of St. Albán’s, notably plundering its bank of some $200,000. They fled towards Lower Canada and many of them were arrested just across the border and brought to Montreal where they, too, faced extradition to the Union.\textsuperscript{451}

In all three cases the defendants fought vigorously against their extradition and pleaded for sanctuary in British North America. However, the courts found very differently in each case. In New Brunswick it was held that the offence had occurred out of American territory and that since piracy was an international crime the U.S. had no jurisdiction to prosecute. In Burley, meanwhile, the judges admitted the political offence exception but found that the prisoner had violated Canadian neutrality and thus waived the protections of asylum. Conversely, in the St. Albán’s case Justice James Smith applied the exception and released the prisoners, finding that the raiders’ violation of neutrality had no effect on their status as political offenders. As a result, the colonial courts left little by way of uniform law on the question of political refugees.

While the cases turned on international law, they also reveal the continuing influence of both British rights and natural law. In Burley’s case, his lawyers unsuccessfully invoked the seventeenth-century prohibition on sending British subjects out of British territory, which Upper Canadian blacks also used in the 1830’s.\textsuperscript{452} Likewise, English case law, particularly a recent decision from the Queen’s Bench involving a Confederate privateer, was discussed extensively and given great weight by lawyers and judges throughout the proceedings.\textsuperscript{453} But as in the slave cases, there were also frequent rhetorical appeals to British freedom and Britain’s role as an asylum state, particularly in the St. Albán’s case. The raid’s leader, Bennett Young, told the court that “the flag of the empire has been an emblem of protection to the oppressed and out-cast alien for many a long year: and it will not fail to give me that impartiality, which has

\textsuperscript{449} Marquis, \textit{In Armageddon’s Shadow}, 134-210.
\textsuperscript{450} Winks, \textit{Canada and the United States}, 287-294.
\textsuperscript{451} Wilson, \textit{Justice Under Pressure}.
\textsuperscript{453} In re Tivnan and Others, \textit{English Reports}, vol. CXXI, 971-990.
made it the joy of the fugitive for ages past.” Similarly, defence counsel W.H. Kerr argued that extradition would abdicate Britain’s role as an asylum state for those fleeing tyranny, while his co-counsel Toussaint-Antoine-Rodolphe Laflamme declared that the raiders sought “that British liberty which Britain never denied the refugee once he entered British territory.”

Natural law and natural rights were also important in the Civil War cases, as they had been in Anderson. In particular, the concept of the law of nature as a barometer for criminality helped lawyers and judges assess whether the actions of each set of defendants should be treated as criminal offences within the meaning of the treaty or as belligerent acts. In the Chesapeake case, the Saint John police magistrate found that the prisoners could be surrendered as criminals since their actions “ought to be considered as against all law – Human or Divine.” Conversely, in the St. Alban’s case defence lawyers used natural law to determine when states should surrender fugitives, and when they should offer asylum. Both Laflamme and co-counsel J.J.C. Abbott argued that the treaty was intended to punish acts universally acknowledged as crimes – those which violated the law of nature, they specified – and not acts flowing from a recognized civil war. As in Anderson, the defence was also keen to establish that theirs was a cause of liberty and freedom, as Young himself testified. Indeed, Kerr attacked vigorously the Upper Canadian Queen’s Bench decision in Anderson for refusing to consider the context of the slave’s fight for freedom in evaluating his criminality, which Kerr called a “monstrous doctrine.”

So the links with both ‘British justice’ and natural law are clear. But the Civil War cases also involved debates over international law on a scale far beyond any in the fugitive slave cases. Lawyers and judges confronted key questions about the applicability of criminal extradition to commissioned belligerents and about the legal meaning of the U.S. Civil War. These and other issues that emerged were discussed and resolved primarily by reference to the law of nations, and using the work of a sweeping array of international law writers. In fact, the hearing records make plain that international law treatises played a profound role at every stage in each case – from the police court in Saint John, where the magistrate used texts by Henry Wheaton and Emer de

454 The St. Alban’s Raid; or, Investigation Into The Charges Against Lieut. Bennett H. Young And Command...
Compiled by L.N. Benjamin, D.C.L. (Montreal: Lovell, 1865), 171.
455 Ibid., 109, 114. See also the comments of both men at 243, 244.
457 St. Alban’s Raid, 245, 445.
458 Ibid., 170.
459 Ibid., 233.
Vattel, to the hours-long debates in the Lower Canadian Superior Court over the interpretation of these and almost every other major work of the previous two centuries.\footnote{For examples, see \textit{Chesapeake}, 23; \textit{St. Alban’s Raid}, 399-431.}

The use of these sources reveals a continuing willingness among British North American jurists to use international law writers almost as an actual source of law, rather than simply evidence for what the law might be – something certainly evident in the 1827 \textit{Fisher} case discussed in chapter two. Where an author was seen to have made a firm declaration about the law, or where there was a consensus among authors on a given point, lawyers on all sides deployed it as tantamount to settled law. In the St. Alban’s case, lawyers for the defence, Crown, and U.S. government all attempted to invoke the authority of these writers. Kerr declared that one aspect of the case “presents no difficulty,” because “the authors are quite unanimous.”\footnote{\textit{St. Alban’s Raid}, 241.} Likewise, Crown counsel F.G. Johnson told the court that another issue was settled on the “clearest authority of writers on international law.”\footnote{Ibid., 338.} Conversely, where the writers were unclear or where they did not lay down a firm rule, the courts admitted their unease. In \textit{Burley}, for example, Justice John Hagarty noted that no respected writer had clearly shown the division between lawful acts of war and criminal acts of murder and plunder. In the absence of such authority, he wrote, the case must then be judged on its own facts and some kind of common sense decision made.\footnote{Burley, Q.B., 49.}

Despite Hagarty’s unease, the works of international law writers guided debate over the difference between war and criminality, even if they did not lay down a firm division. Indeed, lawyers and judges entered into a far-reaching discussion about whether there was a genuine law of war, and what standing belligerent activities had in international law. In all three cases, defence lawyers argued that international law allowed all subjects of a belligerent country to attack all “persons, property, or commerce” of the enemy state, as J.H. Gray told the court in Saint John.\footnote{\textit{Chesapeake}, 32.} “Belligerents have no rights,” he argued bluntly.\footnote{Ibid., 34.} But this point was contested, and sparked a debate about whether law or custom governed war, and if the former did, whether any of the actions in these cases had exceeded its limitations and so transgressed into criminality. In this, conceptual and empirical questions intermingled: did soldiers have a right to plunder? Was it legal to attack and even murder civilians, including women and children? In general,
prosecutors argued that there was a law of war and that the defendants had exceeded it.\footnote{See, for example, the prosecution and Crown arguments in Burley, Q.B., 40-42.}

Meanwhile, the defence argued that what existed were mere usages and customs which did not amount to real law. This debate was particularly pointed and protracted in the St. Alban’s case, where the defence quoted extensively from such writers as Vattel, Bynkershoek, Wheaton, Phillimore, Kluber, Kent, and Halleck. Thus supported, Laflamme argued that “every writer upon war” supported his view: “war is licensed murder, pillage, plunder, devastation, and destruction… Beyond and outside of this principle of unmitigated and unrestrained hostility, there are no laws of war, except those implanted in the breasts of the belligerent by the Creator.”\footnote{St. Alban’s Raid, 265.}

This provocative doctrine was by no means universally-held and the prosecution’s response was not to contest it on moral grounds or to cite diplomatic practice or British policy, but rather to offer a different interpretation of the authorities, and of Vattel in particular, to the effect that non-combatants could not lawfully be attacked.\footnote{Ibid., 306-309.}

The question of criminality and war was also key to the issue of political asylum. Certainly, if the courts held that the alleged offences were acts of war it could follow that they were not extraditable, since by international law states and not individuals were responsible for the conduct of hostilities. As Justice Hagarty – who voted to send Burley back to the U.S. – wrote, “either belligerent flying from the pursuit of the other is safe within our borders,” when that belligerent was clearly acting as an official agent in a recognized conflict.\footnote{Burley, Q.B., 49.}

In this view, asylum for the alleged perpetrators would be a by-product of a larger decision about the nature of the conflict and about acts committed within it. As Burley’s lawyers told the magistrate’s court in Toronto, “mere political refugees” were simply not within the meaning of the treaty.\footnote{Burley, Recorder’s Court, 21.}

But in the St. Alban’s case lawyers on both sides, and Justice Smith in his decision, applied a broader and less technical view of asylum. As noted above, there were pleas from the defence linking their case to the idea that Britain was a refuge for those from oppressive and tyrannical states. They quoted Sir Edward Coke’s famous declaration about England being a sanctuary, and told the court that this principle was “as old as any of the great liberties of her constitution.”\footnote{St. Alban’s Raid, 247.} Although extradition treaties had compromised the blanket sanctuary envisioned by Coke, the defence argued that in the modern world such asylum was still extended to those...
whose crimes could be considered political, including offences occurring in a “social outbreak” such as a rebellion, civil war, or any act ordered by a lawful belligerent power.472

But asylum was not solely a British liberty, and the defence praised America’s stance on the issue and its role in promoting human freedom. “None have more strongly and ably advocated, or more liberally construed the great principles of individual liberty, the freedom of the soil, and inviolability of the asylum offered by them to every individual,” said Laflamme.473 Such conceptual underpinnings also evidenced how the exemption of political offenders was observed by civilized states the world over. As a result, if Canada surrendered the raiders, Abbott argued, it “would be revolting to the sense of justice of the civilized world.”474 Even the Crown, which had intervened in support of extradition, admitted the legitimacy of the exemption. According to Johnson, “the doctrine of affording an asylum to political refugees is admitted to the fullest extent,” though he argued that the readers were not legitimate refugees worthy of asylum.475

This consensus was reflected in Justice Smith’s decision. Ultimately he held that the principle of protecting political refugees did exist, and found the basis of the rule in international law rather than British policy. Indeed, he declared it to be a principle recognized in the U.S. “and all civilized countries” to distinguish between common crimes and actions linked to political upheaval. “Under this distinction, political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up,” he said.476 As a result, the raiders were freed and efforts to extradite them were at an end. Interestingly, nothing substantive was said by the defence, prosecution, Crown, or judge as to whether the courts had any business applying the exemption by releasing prisoners or whether they ought to leave that decision to the executive branch. Since the exemption was admitted as law, it seems that the courts were assumed to have the power to carry it out.

Smith presupposed that states had always distinguished between common and political crimes, and granted asylum for the latter. That is certainly false, as various scholars have pointed out how formal extradition functioned in medieval Europe primarily as a tool to retrieve enemies

---

472 Ibid., 249.
473 Ibid., 245.
474 Ibid., 196.
475 Ibid., 346.
476 Ibid., 470.
of the state. Yet by the time of Smith’s decision the idea of granting asylum to political offenders and specifically shielding them from extradition or expulsion seems to have been a commonly held doctrine throughout Britain, America, and Western Europe. In large part the shift from extradition as a tool of monarchs against their enemies to one focused on common criminals, and which excluded political offenders began in the wake of the French Revolution. Indeed, France soon became the catalyst for a new body of extradition diplomacy which specifically exempted political offences – France even included a clause in its 1799 constitution protecting refugee dissidents. As western European public sentiment shifted in favour of political asylum-seekers, France also led the European states in renovating its existing body of treaties to exclude political offenders from extradition, beginning with the modification of the treaty with Switzerland in 1833, and in negotiating new ones. In 1856, France even withdrew its request that Belgium return the attempted-assassin of Napoleon III, after courts divided on the issue of the crime’s political nature. Other nations quickly followed suit with similar policies.

Despite such acceptance, individual nations still struggled with how best to implement the principle. It was impossible for jurists to arrive at a precise definition of political crime, and so there was still widespread fear that a refugee could be surrendered on an ordinary charge and then tried on political offences, or denied due process entirely. Again led by France, European policymakers increasingly relied on an emerging legal rule called the doctrine of specialty, which decreed that a prisoner could be tried only on the charge for which they were surrendered. It was first used in 1840 when the French government voluntarily returned a fugitive to Geneva after he was acquitted on the extradition crime and prosecutors attempted to arraign him on another. The rule was included as a key part of the French extradition policy of 1841, intended to prevent requesting governments from seizing a fugitive for common crimes within a treaty and then


479 Lora Deere, “Political Offenses in the Law and Practice of Extradition,” American Journal of International Law, 27(2), 1933, 250.

480 Ibid., 252.

481 Ibid., 251.

prosecuting on political charges. Two years later, a French court ruled that trial on any crime other than the extradition offence would violate a prisoner’s rights under international law. 483 The doctrine was quickly incorporated in European treaties, appearing in early forms in French treaties with Belgium and Luxembour in 1844 and in its modern form in the Saxony convention of 1850. 484

This sympathy for political asylum-seekers and exiles was also pronounced in Britain. As Bernard Porter has pointed out, the enduring and profound pride in Britain about the country’s status as an asylum state for political dissidents was reflected in the fact that for most of the nineteenth-century there was no legal mechanism to expel aliens and few extradition arrangements available to surrender them by request. 485 While this was often attributed to the particular liberties of the British constitution, discussions over asylum and political refugees illustrate the importance of an international or transnational ethos of civilization. For example, the M.P. Sir James Mackintosh (who was also the author of a treatise on international and natural law) echoed many other members when he told Parliament in 1815 that “civilized states afford an inviolable asylum to political emigrants.” 486 Similarly, in 1849, Foreign Secretary Lord Palmerston condemned Turkey for surrendering refugee Poles, writing that “if there is one rule which more than another has been observed in modern times, by all independent States… of the civilized world, it is the rule not to deliver up political refugees.” 487 (In fact, Palmerston’s despatch acquired a certain degree of fame and the lawyers for the St. Alban’s raiders quoted his assertion that “the laws of humanity, the dictates of morality, the general feelings of mankind,” forbid extraditing political offenders, and that any government which did so would be “deservedly and universally stigmatized and dishonoured.” 488) Other examples of this internationalist ethos from the years prior to the U.S. Civil War abound, including British condemnation of Saxony for surrendering the dissident Ladislaus Teleki to Austria, where the British minister in Dresden wrote that the extradition had humiliated the Saxons before the

483 Ibid., 83.
484 Blakesley, “Practice of Extradition,” 5; Semmelman, “Speciality Doctrine,” 84. The early forms specified that an offender could not be prosecuted for an offence outside those listed in the treaty. The modern form allowed no prosecution except on the crime of surrender.
486 1 March 1815, U.K. Debates, vol. XXIX, 1138. His remarks occurred during a series of heated debates over the surrender of political dissidents to the Spanish authorities by the British governor of Gibraltar. For the debates and records presented to Parliament, see Ibid., 22 November 1814, 437-444; 29 November 1814, 597-600; 14 February 1815, 740-747; 20 February 1815, 843-846; 1 March 1815, 1126-1166.
487 Palmerston to Lord Bloomfield, 6 October 1849, Correspondence Respecting the Affairs of Hungary, Parliamentary Papers, 1851, no. 1324, 31.
488 Ibid. For the quotation in court, see St. Alban’s Raid, 248.
world.\textsuperscript{489} Additionally, in both 1852 and 1864 Parliament refused to implement extradition treaties with France and Russia respectively in large part out of concern that they could be used to surrender political offenders. In both cases the government went to great lengths to prevent such surrenders and to head off such concerns – including specific clauses forbidding extradition on political charges – but the debates in both cases reveal a powerful pre-occupation with safeguarding refugees.\textsuperscript{490} 

The political offence exception was also a common feature of British and American international law treatises by the end of the Civil War. In the U.S., Yale president Theodore Dwight Woolsey’s work suggested that political refugees were an exception to the growing tendency of modern states to extradite under treaty obligations. He argued that states had a distinct right to offer such people asylum – indeed, that they would do so “unless weakness or political sympathy” led them astray.\textsuperscript{491} Similarly, the 1863 edition of Henry Wheaton’s textbook (by then under the editorship of Rhode Island lawyer W.B. Lawrence) observed that the non-extradition of political offenders was a guiding principle for “constitutional governments.”\textsuperscript{492} Meanwhile, in England M.P. and future judge Robert Phillimore’s 1854 treatise stated that the exemption was “generally admitted.”\textsuperscript{493} Former Chancellor of the Exchequer and future Home Secretary Sir George Cornewall Lewis took a stronger stand on the issue in his short book on foreign jurisdiction and extradition in 1859. According to Lewis, in cases stemming from civil war, revolution, or other political tumult any powerful state was “impelled by the dictates of humanity” to refuse extradition, which he called protection “afforded to individuals against the tyranny of governments.”\textsuperscript{494} The immunity of political offenders from extradition, then, had significant support in the practice and literature of international law by the time of the Civil War cases.

\textsuperscript{489} Charles Murray to Lord John Russell, 4 January 1861, Papers Relating to the Arrest and Extradition of Count Teleki, Parliamentary Papers, 1861, no. 2782, 2.
\textsuperscript{491} Theodore Dwight Woolsey, Introduction to the Study of International Law. 2nd ed. (New York: Scribener, 1864), 130.
\textsuperscript{492} Henry Wheaton, Elements of International Law. 2nd annotated edition by William Beach Lawrence (“Lawrence’s Wheaton”). (London: Sampson Low, Son and Co, 1863), 236. See also John Norton Pomeroy, Lectures on International Law in Time of Peace. Theodore Salisbury Woolsey, ed. (Boston and New York: Houghton, Mifflin, 1886). Although the book was published in the 1880’s, the lectures it contains were written in the 1860’s.
\textsuperscript{494} Sir George Cornewall Lewis, On Foreign Jurisdiction and the Extradition of Criminals. (London: John W. Parker and Son, 1859), 44.
This concern for political offenders was also prominent in North America as early as the 1820’s. In the 1827 Fisher case Montreal Chief Justice James Reid wholeheartedly endorsed the exemption. Reid held that while there was an international law obligation to extradite a state could still grant asylum to political offenders. According to Reid, no state could ever be induced to deliver up such people, which he called a “wise and humane policy, because the voice of justice cannot always be heard amidst the rage of revolution, or when the Sovereign and the subject are at open variance respecting their political rights.”\footnote{Re Fisher, 250.} Conversely, Pennsylvania Chief Justice William Tilghman used the imperative of shielding political refugees as a reason why the dictates of Grotius and other writers who believed in an obligation to extradite were no longer applicable. These writers focused on facilitating the surrender of those who challenged their government, but in the modern world “liberal and enlightened nations” always granted such people asylum, Tilghman wrote.\footnote{Commonwealth v. Deacon, 10. Political offences were also invoked in the 1835 Virginia case of Dos Santos, where the prosecution observed that while asylum was always given for them, it should not be afforded to common criminals. Also, District Judge Barbour disagreed with the idea of an obligation to extradite in part because it could lead to the surrender of political refugees. See Ex Parte Dos Santos, 952, 955.}

The political offence exception was especially prominent in the wake of the 1837-1838 Canadian rebellions. In 1837 when Upper Canada applied to New York for the surrender of William Lyon Mackenzie for offences committed in the rebellion, the state’s decision centred on an 1827 clause in its extradition law which forbid extradition on treason charges – a very early statutory political offence exception, as Christopher Pyle has pointed out.\footnote{Christopher H. Pyle, Extradition, Politics, and Human Rights. (Philadelphia: Temple University Press, 2001), 68-69.} Although the charges against Mackenzie were not expressly treason, state Attorney General Samuel Beardsley found them to be incidental to the attempt at overthrowing the colonial government. “It was a civil war,” he wrote, and those who participated in it “have not forfeited a right to an asylum within the limits of an independent state.”\footnote{Samuel Beardsley to W.L. Marcy, 23 December 1837, N.A.R.A., SD, M-179, Reel 84.} The prominence of inviolable political asylum was also made clear when John Rolph, who was sent to London by Upper Canadian blacks to lobby for explicit protections against the extradition of fugitive slaves, deployed the rhetoric of political asylum in 1839 and 1840. He likened the slave’s fight for freedom to the efforts of political dissidents, telling the Colonial Secretary that it was “entirely out of the practice of Europe to claim or surrender Political refugees,” and arguing that “coloured men in slavery are all political
men.”499 Furthermore, Rolph even juxtaposed the legitimacy of the slave’s struggles with the much more suspect efforts of William Lyon Mackenzie whose extradition was refused on these grounds: “Is he… that fights for human rights, that he may keep his wife, his Sister, his Daughter from the lust and cruelty of white men, less worthy of refuge [than Mackenzie]?” he asked.500

While political asylum and the political offence exception were likely widely-observed notions in North America by the time of the Civil War, it is less easy to trace the doctrine of specialty. Chapter four examines the debate over implanting these concepts in statute law in Britain and Canada in the 1860’s and 1870’s, but concern over what happened to those who were extradited was often intense decades before that. As discussed above, in debates over slave extradition cases advocates for the prisoners routinely argued that the prisoners might not receive any trial at all, let alone a fair one. Rather they said the request for criminal extradition was really a pretence to return the individual to slavery or else summarily punish them as an example to other slaves. Similar worries were expressed in the Civil War cases, most pointedly in the St. Alban’s raid hearings. Both the prisoners themselves and their lawyers told the courts that the criminal charges were a pretence. Defendant Joseph McGrorty told the Sessions Court that the prosecution simply sought to “get us into their power,” whereupon they would face military charges or treason charges, not the criminal offences for which their extradition was asked.501

Yet the official reaction in the Civil War cases differed from those in the slave cases on the issue of what could be done to safeguard prisoners once they were surrendered. In the slave cases Crown attorneys, prosecutors, and judges simply deflected such concerns by saying that it was not an issue which Canadian courts could consider. However in the Civil War cases a very different approach emerged, one which showed widespread adherence to the doctrine of specialty as a duty of international law. For the U.S. government, Bernard Devlin told the court that according to what he called the “well-recognized rules of International law,” the prisoners could only be tried on the charges for which they were surrendered.502 Likewise, Crown counsel F.G. Johnson declared this rule to be established on the “clearest authority” of international law writers such as Foelix and Martens.503 Moreover, the doctrine was also endorsed in Upper Canada by Common Pleas Chief Justice W.B. Richards in the Burley case. In his opinion recommending

500 Rolph to Russell, 10 December 1839, C.O. 42, vol. 469, Reel B-361, 244-45.
501 St. Alban’s Raid, 89.
502 Ibid., 327.
503 Ibid., 338.
extradition, Richards noted rather matter-of-factly that the U.S. government would be “bound” to try Burley for the extradition offence, a point he made with no reference to treatises or established practice. These invocations, then, suggest that specialty had some place in British North American legal thought, though how firmly it was implanted is difficult to tell.

Still, the very discussion of the specialty doctrine helps demonstrate the centrality of international law to the Civil War cases, another way in which ideas about asylum transcended British North American jurisdiction and even the wider empire. By the time of the war the concept of exempting belligerents and other political offenders was a prominent part of international law. There was a lineage in state practice and legal literature of distinguishing political offences from common crimes, and of protecting political refugees once they escaped their home states. As early as the 1820’s North American judges saw this practice as binding international law and during the Confederate cases in the 1860’s most lawyers and judges admitted its status as such. These cases, then, reveal British North American lawyers and judges engaging in far-reaching debates about the application of international law ideas, drawing from a huge range of treatises to debate the rights of individual belligerents, the limits of lawful war, and the boundaries of criminal extradition. Yet these cases also failed to coalesce into a single view of the law, and each resolved on different grounds. As a result, as of 1865, there was little by way of settled law on the question of who British North America would shield from criminal extradition.

**Conclusion**

Both the terminology and the ideology of refugees and asylum were prominent throughout the Euro-American world in the nineteenth-century. There was a pervasive sense that there were some people who, having fled their home countries and found shelter in some other jurisdiction, should be shielded from any attempts to send them back. This entailed distinguishing refugees from both migrants generally and from fugitive criminals in particular, and over several centuries jurists often mentioned humanitarian concerns such as slavery or persecution or political upheaval or civil war as reasons why an alien could be classified as a refugee. Before the onset of immigration restrictions these distinctions came to the fore of

---

504 Burley, Q.B., 46.
political and legal debate primarily as a result of extradition requests, and they sparked often intense debates.

This chapter has examined several such debates in British North America. While the groups who made claims of refuge against their extradition in this period in colonial courts could not have been more different – slaves and those who fought to sustain the southern slave states – they drew from this widespread idea that refugees should not be given up. Yet we can see in their cases the diversity of meanings that asylum had in the mid-nineteenth-century. In the 1830’s the focus of fugitive slaves and their supporters was on British justice, while in the Anderson case it was natural rights, and in the Civil War cases it was international law. Certainly there were links between the three claims on both technical and rhetorical issues of law, but these case studies show a lack of a cohesive law of asylum in British North America. It is also clear that the idea of proclaiming an asylum based on the status of the prisoner was an enormously unsettling idea for many officials, particularly in the case of slaves. Fears of encouraging social unrest in the U.S. or of allowing immunity even for murderers and pirates pervaded these debates, highlighting again the uncertain state of the law. The idea of protecting refugees was widespread, in other words, but the way to do it was not firmly established.
Chapter Four:
“In the Interest of Civilization on this Continent”: Extradition Law and Imperial Power in Canada, 1865-1883

Introduction

Throughout the nineteenth-century protecting refugees was a pressing issue in Britain, Europe, and North America. As shown in chapter three, different legal doctrines and ideas on how to claim sanctuary circulated throughout the Atlantic world. Even in the British North American colonies the diversity of such approaches was clear, as lawyers, judges, prisoners, and others expressed very different visions of natural justice, British rights, and international law. Although protecting escaped slaves was often a top issue in the colonies, no legal guarantees for their immunity from extradition ever emerged. Instead, the law in Europe and North America developed mainly to ensure that political dissidents who had fled tyranny would not be returned by criminal extradition. In particular, ideas emerged in European international law such as the exemption of political offenders and the doctrine of specialty, which protected against seemingly a-political extradition requests being used to render refugees by declaring that prisoners could only be tried for the crime on which they were surrendered. Yet while these ideas circulated widely in Britain and the empire, until 1870 they remained amorphous as part of the law of nations, but not implanted in British or colonial statutes.

This chapter explores that process of codification. It examines how Britain first changed its own law, and then used its imperial authority to police Canadian efforts at extradition reform, ensuring that federal legislation was a near-copy of the British model, which was driven more than anything by concern for the rights of political asylum-seekers. Throughout the 1870’s and early 1880’s this imperial guidance sparked heated debates and much confusion in Canada. In large part these debates were so heated because of different attitudes towards extradition in Canada and Britain. In Canada, the end of the U.S. Civil War simplified the issue. It put to rest the possibility of sympathetic Southern soldiers being surrendered to the North, or of runaway blacks being returned to slavery. As these threats receded, there seemed no reason why the colonies and the post-1867 dominion should not have a wider and more efficient extradition relationship with the U.S. Indeed, policymakers and judges often argued in this period that Canada and the U.S. shared a common civilization and a common sense of the rule of law, and that as a result increased cross-border cooperation against crime was entirely desirable. However, British attitudes were more complicated, and the underlying approach to extradition there was
very different. As discussed in the previous chapter, British official opinion long prioritised the idea of the country as an asylum state for refugees from European tyranny and to many extradition was a menace to that sanctuary. These different perspectives resulted in more than a decade of intra-imperial negotiations. Canadian officials attempted to widen and simplify extradition relations with the U.S. using new legislation, while the imperial government systematically delayed and reshaped these efforts, in large part to implant and codify the political offence exception and the specialty doctrine.

As a result, this chapter highlights the continuing reality of imperial power in post-Confederation Canada. As recent scholars have shown, the British Empire was profoundly influential in nineteenth century Canada. On issues ranging from gender and race to the drafting of legislation and the formulation of legal thought, British examples and ideologies were pervasive. But it is also important to remember that Canadian self-government remained subject to imperial sovereignty and that British power over Canadian affairs remained potent. Besides the judicial power of the Privy Council, Britain had three main types of political authority over its colonies – legislative, executive, and diplomatic – and all three were brought to bear on Canadian extradition law during this period. Britain exercised its role as the supreme parliament of the empire in passing an imperial extradition statute in 1870 and wielded its executive power to reserve and block Canadian attempts to reform the law. Moreover, Britain had a monopoly over treaty-making between the colonies and foreign countries. This latter control led Canadian officials like the Liberal M.P.’s Edward Blake and David Mills to seek other means of facilitating cross-border cooperation once it became clear that British diplomats were incapable of obtaining a new Anglo-American treaty.

The extradition issue also helps illuminate the increasing importance of international affairs and international law for the imperial relationship. More and more, Britain’s imperial policy was guided by developing treaty regimes and legal customs among states. Meera Nair’s


recent work on copyright has shown that as the international system expanded and Britain was
drawn into new kinds of relationships with foreign states, the imperial government was keen to
ensure that its colonies complied with the new rules, even when those colonies claimed that such
oversight was at odds with the principles of self-government. As well, a growing
historiography linking the broader empire into other kinds of global networks has illustrated the
many connections between imperialism and transnationalism, of which law formed a key part.
This chapter highlights the role of the empire in spreading the norms of international law, and
enforcing these norms on its often-unwilling colonies.

In doing so it proceeds in five sections. First, it explores the shift in British official
attitudes towards extradition in the later 1860’s. This shift led to the widespread reform of
imperial policy in 1870 as European international law ideas helped push Britain towards wider
treaty relationships with more specific protections for political offenders. Next it examines
Canadian attitudes towards extradition in the same period, highlighting the emerging consensus
in favour of surrendering criminals to the U.S. in as straightforward and efficient a manner as
possible, as well as the growing frustration with the limits imposed by the Anglo-American
treaty. Third, it assesses the decade of judicial confusion which followed the passage of the
imperial extradition act in 1870, as Canadian courts struggled to make sense of how the imperial
statute affected Canadian law. Fourth, it focuses on the campaign to reform Canadian law that
developed out of the frustration with the extradition treaty and the confusion stemming from the
imperial act, the result of which was Edward Blake’s provocative 1876 draft extradition bill.
Finally, it explores the process by which that draft was reined in by the imperial government.
Between 1876 and 1882 British power systematically dismantled the most controversial aspects
of the bill, and delayed its passage for years until Canada complied with imperial demands.

Refugees, Liberalism, and the British View of Extradition

Extradition was a divisive issue in Britain during this period. Many British liberals
distrusted extradition because it seemed to promise the end of the country’s role as a haven for

those fleeing European tyranny.\textsuperscript{509} In fact, until the late 1860’s concern for political refugees stunted the growth of Britain’s extradition treaty system and even comparatively minor amendments to existing statute law on the subject sparked protracted and bitter debates. Not everyone found this attitude compelling, however. Edward Clarke, author of the first British monograph on the subject, wrote that Britain was “the least ready of all the nations of the world to perform her duty in this matter as a member of the family of civilised communities.”\textsuperscript{510} Likewise, Sir James Stephen, who also found the British attitude backward, said that it sprang from “the extreme, and, in my opinion, ill-founded jealousy entertained by English sentiment as to the administration of justice in foreign countries.”\textsuperscript{511} This began to change during the 1860’s, both because of international pressure and because the emergence of protections for political refugees in European international law assuaged liberal concerns.

Statistics on British extradition practice illustrate the country’s hesitance to surrender foreign criminals. These statistics on extradition requests by the United States for the period 1843 to 1876 are problematic, since in almost a third of cases the Home Office had no record of the result (which may suggest that the application failed). But they do show that only forty-three of eighty-five American requests for extradition were known to have been successful.\textsuperscript{512} More importantly, and perhaps more tellingly of British attitudes, was the fact that as of 1870 Britain had extradition treaties with only three countries – U.S. (1842), France (1843), and Denmark (1862) – while France had agreements with more than fifty nations.\textsuperscript{513} The chief reason was that many British policymakers were uncomfortable with surrendering fugitives to their European neighbours. To many it seemed to promise the end of political asylum. In fact, as discussed in chapter three, Parliament refused to implement treaties made by the government with France in 1852 and Prussia in 1864, in large part out of concern for political refugees and distrust of European regimes.\textsuperscript{514}

Moreover, the statutes passed to implement the French and American agreements were considered ineffectual. In particular, the requirement that both a Secretary of State and a magistrate examine the requesting country’s evidence before issuing an arrest warrant was found

\textsuperscript{510} Edward Clarke, \textit{A Treatise Upon the Law of Extradition}. (London: Stevens and Haynes, 1867), 111.
\textsuperscript{513} LaForest, \textit{LaForest’s Extradition}, 7.
\textsuperscript{514} Clarke, \textit{Extradition}, 75-76, 88.
impractical, allowing the fugitive more time to elude capture. The British insistence that extradition crimes be defined according to the common law also proved disastrous for French requests, an issue examined in the context of Canadian jurisprudence in chapter five. Additionally, Britain required *prima facie* evidence of criminality to remand a prisoner, while the French required only proof that a charge had been laid. \(^{515}\) The result was that during the first decade of the treaty’s operation, the French government reportedly made eighteen requests but were granted just one surrender. \(^{516}\)

Beginning in 1865, however, official British official attitudes began to change. In December 1865, after two decades of frustration, the French government served notice that they would withdraw from the 1843 treaty effective the following June. \(^{517}\) The decision echoed a similar threat the previous year and followed swiftly on an English court decision which enforced the common law definition of forgery on an American extradition request and discharged the prisoner. \(^{518}\) The Foreign Secretary quickly began negotiations with French authorities and convinced them to delay withdrawing from the treaty until December 1866, to allow Parliament time to enact a more flexible extradition law. \(^{519}\) The French Foreign Minister argued that the British *prima facie* standard was too high, and suggested that a French arrest warrant should be sufficient for a grant of extradition. A similar clause had helped sink the 1852 treaty, and the British government likely felt that Parliament would still reject any such measure. Instead they offered instead a minor amendment to the 1843 act which simplified the process of authenticating evidence. \(^{520}\)

This seemingly-innocuous bill sparked intense controversy in Parliament. While it passed the House of Lords with little debate, in the Commons it encountered profound resistance. \(^{521}\) The Foreign Secretary introduced the amending act by pre-emptively dismissing concerns about the vulnerability of political offenders and stressing its minor effect. \(^{522}\) But opposition Liberals were unwilling to accept the insignificance of the change. In a long, impassioned speech, William McCullagh Torrens said the bill “involved a question of national policy and one of

---

\(^{515}\) Stephen, *History*, 68. The treaty proposed allowing a French warrant of arrest to serve as all the evidence of criminality required to secure extradition.

\(^{516}\) Kopelman, “Extradition and Rendition,” 595. Clarke suggests that no French request was successful: Clarke, *Extradition*, 77.

\(^{517}\) *Law Times*, 16 December 1865.


\(^{519}\) *U.K. Debates*, 19 July 1866, 1054.

\(^{520}\) For criticism of the bill, see *U.K. Debates*, 3 August 1866, 2010.

\(^{521}\) *U.K. Debates*, 19 July 1866, 1054-1059; 20 July 1866, 1160-1161; 24 July 1866, 1366-1368.

[Britain’s] oldest and most cherished traditions” – political asylum.\footnote{Ibid., 2009.} Torrens argued that any new extradition arrangements would lead to treaties with oppressive states such as Prussia, Russia and Austria, and then to the decline of political asylum altogether.\footnote{Ibid., 2015.} Compromising with France to keep that country happy, he argued, might seem innocuous “But national subserviency was a fathomless pit; look over its brink and you lost the cool sense of vision; go three or four steps down, and you know not how far you may fall,” he argued.\footnote{Ibid., 2013.} Likewise, John Stuart Mill, who spoke to the issue several times, attacked French criminal procedure and contended that any evidence it produced could not be trusted by English courts. He said that French law made it easy to lay a false charge and that such abuses were much more likely to occur in the case of political offenders.\footnote{Ibid., 2023-2024. A common fear. See Porter, Britain, Europe and the World, 52.} Ultimately the measure was passed, but with an amendment proposed by Mill which limited its effect to twelve months.\footnote{U.K. Debates, 6 August 1866, 2122-2124; U.K. Debates, 10 August 1866, 2153-2154. See UK 29 & 30 Vic cap. 121.} Mill later grandly claimed in his autobiography that this stumbling block had saved Britain from becoming “an accomplice in the vengeance of foreign despotisms.”\footnote{John Stuart Mill, Autobiography. (New York: Columbia University Press, 1924), 210.}

Dissatisfaction with the law continued. Although the amending statute was successfully renewed in each of the next several years, it was only a patch, and Britain’s treaty partners still found the narrow list of treaty crimes and the details of British procedure impractical.\footnote{U.K. Debates, 19 July 1866, 1056.} Meanwhile, British Liberals worried over the lack of any specific protection for political offenders or recognition of the specialty doctrine. The \textit{London Examiner} said the law “naturally filled the minds of many earnest friends of international freedom with misgivings.”\footnote{\textit{London Examiner}, reprinted in \textit{Montreal Herald}, 20 August, 1867.} In 1868, Benjamin Disraeli’s first government decided to address the problem and convened a select committee of the House of Commons to examine the treaty situation and arrive at a uniform policy for Britain and the empire.\footnote{U.K. Debates, 20 March 1868, 1954.} The committee was clearly intended to incorporate the competing viewpoints on extradition. Alongside Conservative officials the committee included prominent extradition sceptics such as Mill, Torrens, and Goldsmid. As the committee prepared to begin hearings, Mill confided to a friend that he was now “quite in favour of extradition of real
criminals” but that explicit legal safeguards were crucial to prevent the surrender of political offenders.\textsuperscript{532} This quickly became the new consensus among British public officials.

Many witnesses who testified urged fundamental reform. The committee heard testimony as to both the inadequacy of the present list of treaty crimes with France and the sanctity of exempting political offenders from extradition. Under examination by Mill and others, Foreign Office head Edmund Hammond testified that he would rather allow a criminal to live in freedom than to risk their being extradited and then prosecuted for a political crime. Hammond also testified that rules on the subject were already so strict that if a Fenian guilty of murder escaped to France, Britain could not – and would not – ask for their surrender.\textsuperscript{533} Hammond, along with Chief Magistrate Sir Thomas Henry and a lawyer from the Banker’s Association also testified as to the inadequacy of the British treaties in areas such as theft, fraud, and embezzlement. The Bankers Association in particular claimed that for British business interests, the present treaties were “all but inoperative” and urged the necessity of broadening the schedule of treaty crimes to encompass embezzlement, receiving stolen goods, obtaining goods and money under false pretences, and other offences related to bailees, factors, bankers, trustees, and directors.\textsuperscript{534} The lawyer said that seven or eight such cases, often involving thousands of pounds, went unpunished every year because the offenders fled to France or Belgium.\textsuperscript{535}

Such ideas proved influential. In the end, the committee emerged almost unanimously in favour of cautious but much more expansive extradition arrangements. Premised on the assumption that Britain would benefit from wider treaty relationships, the committee recommended expanding the list of extraditable crimes and simplifying the process for ratifying treaties. The committee also supported adopting European safeguards, and recommended explicit incorporation of the political offence exception and specialty doctrines and other protections.\textsuperscript{536} These suggestions soon became law, and the government’s strategy in presenting the legislation was to stress the safeguards for refugees. For example, Attorney General Sir Robert Collier tabled the legislation and began with a speech both extolling the necessity of wider extradition arrangements and elaborately detailing the bill’s many safeguards against the surrender of

\textsuperscript{533} Evidence of the Committee on Extradition, 12-14.
\textsuperscript{534} Ibid., 58.
\textsuperscript{535} Ibid., 58-59.
\textsuperscript{536} Report of the Committee on Extradition, iii-iv.
political offenders.\textsuperscript{537} The bill passed with little controversy or debate. Even Mill, who had left Parliament in 1868, said of the legislation that “the cause of European freedom has thus been saved from a serious misfortune, and our own country from a great iniquity.”\textsuperscript{538}

The act incorporated ideas intended to protect political refugees as well as provisions targeted to make extradition more efficient. It embodied the safeguards for which Mill and other liberals had long argued, allowing the magistrate, the \textit{habeas corpus} judge, and the Home Secretary to discharge the prisoner if a case was made to them that the charge was of a political character.\textsuperscript{539} It also prohibited surrender unless the requesting state abided by the doctrine of specialty, and extended the period allowed to the prisoner to obtain \textit{habeas corpus} to fifteen days.\textsuperscript{540} The act pointedly also retained both the \textit{prima facie} standard, flouting the French desire to allow surrender merely on proof that a charge had been laid.\textsuperscript{541} But the act was also crafted to make the surrender of fugitives easier. To save time, it allowed for an arrest warrant to issue from a local magistrate before a request was filed with the government in London – a provision which had been part of Canadian law for decades.\textsuperscript{542} For the first time, Parliament also drew up a schedule of crimes which might be included by the executive in treaties of extradition. Here the government deferred to the testimony of the Bankers Association and other businessmen and law enforcement officials, and included an extensive list of crimes related to forgery, fraud by an employee, embezzlement, and larceny, as well as violent crimes such as rape and kidnapping.\textsuperscript{543} Arguably the most important innovation of the 1870 act, however, was that it changed the legislative process for extradition policy. The handful of previous British acts were \textit{ad hoc} measures designed only to implement specific treaties negotiated by the Crown. The 1870 act repealed those laws and by-passed the necessity of future fractious Parliamentary debates in which the Parliament could block extradition treaties, as had happened in 1852 and 1864, and which many officials argued inhibited countries from even seeking treaties with Britain.\textsuperscript{544} In future, the executive could bring all agreements into force through an order in council.\textsuperscript{545} This had the desired effect, and spurred a wave of new imperial extradition treaties. In the first decade

\begin{thebibliography}{9}
\bibitem{537} U.K. Debates, 16 June 1870, 301-302.
\bibitem{538} Mill, \textit{Autobiography}, 211.
\bibitem{539} [UK] 33 & 34 Vic. cap. 52, s. 3(1). Porter, \textit{The Refugee Question}, 207.
\bibitem{540} [UK] 33 & 34 Vic, cap. 52, s. 3(3) and 3(4).
\bibitem{541} Ibid., s. 10 and 15.
\bibitem{542} Ibid., s. 8(2).
\bibitem{543} Ibid., first schedule.
\bibitem{544} U.K. Debates, 16 June 1870, 301-302.
\bibitem{545} [UK] 33 & 34 Vic, cap. 52, s. 2.
\end{thebibliography}
of the act’s operation alone the British signed seventeen new conventions, a trend which
continued for decades.\footnote{See Sir Edward Clarke, \textit{A Treatise Upon the Law of Extradition.} (London: Stevens and Haynes, 1888), xxxi.}

While the focus of debate was on British policy, this was also an imperial statute with
implications for Britain’s many colonies. The act addressed the intersection of imperial and
colonial extradition laws and in repealing the previous British laws, it also replaced them in any
colonies in which they were still in force. But the act contained at least two provisions which
seemed to minimize its impact on self-governing colonies like Canada. It first allowed the British
government to suspend the operation of the imperial act outright in favour of a colonial
measure.\footnote{\[UK\] 33 & 34 Vic, cap. 52, s. 18.} That is, where a colony wanted to design its own procedure in keeping with the
parameters of the imperial law, Britain would allow it to do so by suspending the imperial act.
This had long been a feature of imperial extradition law. The 1843 act which implemented the
Anglo-American treaty, for example, contained a provision which allowed colonies to do just
that, and indeed Canada had brought in such legislation beginning in 1849. It also authorized an
existing colonial statute to remain in force “as if it were part of this Act” – an uncertain phrase
that would soon be tested in Canadian courts.\footnote{Ibid.}

Although this proviso subsequently led to considerable confusion in Canada, it might
have seemed innocuous to the Department of Justice in Ottawa at the time, since Canada already
had an for Canadian-American extradition passed in 1868 under the provisions of the 1843
imperial statute, and which could presumably remain in force as the section suggested.\footnote{LaForest, \textit{Extradition}, p. 5.} In July,
1870, after the bill had already passed through the House of Commons, Colonial Secretary Lord
Granville sent a despatch on the subject to each colony, alongside a copy of the bill for their
consideration. Granville wrote that previous colonial laws would continue in effect and that
while he did not expect any colonies would wish to be excepted from its operation, provision was
made for the suspension of the imperial act entirely.\footnote{Despatch of the Colonial Secretary, 5 July 1870, AO, F2, Blake Papers, MU 185, Box 47, Envelop 2.} Perhaps because of this proviso, the
Canadian government made no reply.\footnote{Edward Blake to Lord Carnarvon, 27 June 1876, \textit{Sessional Papers}, 1877, no. 13, 13.} Certainly, in repealing the imperial statute regarding the
Anglo-French treaty, the British were making an improvement to the law. So long as the existing
Canadian statute continued in force, Canadian authorities must have expected little effect on their
developing body of law, which was built almost entirely around extradition with the United States. In this, however, they were mistaken.

“A Free Trade in Criminals”: Canadian Attitudes to Extradition

This section examines fundamental divergences between British and Canadian approaches to extradition. In Canada extradition was a much less controversial issue than in Britain. Once British North Americans/Canadians were no longer faced with sending back Southern soldiers or escaped slaves, there was no reason to be wary of surrendering prisoners to the U.S., and extradition became an uncomplicated law and order issue. As the Liberal M.P. David Mills argued in 1869, “it surely could not be a matter of difficulty or delicacy, in providing for the proper punishment of criminals, whether their crime was committed here or in the United States.” 552 Canadian judges, meanwhile, consistently argued that their role in extradition was largely to facilitate cross-border cooperation between two states who shared common values of justice and the rule of law, a point examined in chapter five. Indeed, the idea of a common North American civilization shaped the extradition debate in Canada. 553 While in Britain liberalism had led to a widespread suspicion of extradition as being a symptom of cooperation with illiberal European regimes, in Canada the situation was different. Its most important neighbour was one which seemed much more trustworthy, and a strain of liberal ideology different from which shaped the debate in Britain focused on breaking down domestic barriers to international cooperation. Yet while policymakers and judges were more than willing to extradite, the legal and diplomatic barriers to doing so were increasingly apparent, and widely resented.

The context of the mid to late 1860’s was key to Canadian attitudes. In Canada, extradition was part of a broader national security consensus especially prominent since the start of the U.S. Civil War, when securing the border became a pressing issue. During the war, ensuring that Confederate operatives did not use British territory to plan attacks on the north became an existential matter for the colonies, and part of the Canadian solution was to set up a border police force and a network of spies. 554 As Gregory Kealey and Andrew Parnaby have

552 Debates of the House of Commons, 3 May 1869, 164.
553 Kohn, This Kindred People.
shown, there was little opposition to this secret police force at a time when such a thing was still considered unacceptably illiberal in England. After the war the border remained a security threat, with the growing spectre of Fenianism. As a result, as David Wilson has argued, there was little resistance to the wholesale suspension of habeas corpus in 1866 and 1867 while the Fenian threat persisted. Similarly, Sir John A. Macdonald raised the spectre of lawless, armed Americans, against which Canadians might need to defend themselves when he refused to support an 1869 bill restricting the carrying of revolvers. The extradition issue, then, fit well within the ideas of security and law enforcement which were widely accepted throughout the 1860’s.

This consensus was apparent in Parliamentary debates over extradition in the late 1860’s and early 1870’s. Throughout this period M.P.’s regularly lamented that the treaty allowed for surrender on only seven crimes – murder, assault with intent to commit murder, forgery, uttering forged paper, arson, robbery, and piracy. For all other crimes extradition was not an option, a state of affairs which seemed increasingly out of touch with the realities of the Canadian-American border in a period of such cross-border insecurity. This was evident in 1868 when the government tabled legislation that would simply extend the terms of the existing pre-Confederation Canadian statute to Nova Scotia and New Brunswick, which had never passed their own extradition laws and so were still operating under the older imperial legislation, which was widely held to be clumsy and inefficient. In debating this minor measure opposition M.P. Edward Blake argued that the present law was clearly “defective” and proposed extending the list of extradition crimes to cover the vast array of offences not included in the treaty – a move which would have transferred power over defining the limits of extradition from the imperial treaty to Canadian law. This frustration with the law was widely shared. Timothy Warren Anglin reflected a common idea when he contended that the frequent presence of American criminals endangered Canada.

558 For the act, see 31 Vic, cap. 94.
559 Commons Debates, 17 March 1868, 357.
560 Commons Debates, 8 March 1871, 352.
Figures detailing the extradition of criminals to the United States appear to support the idea that Canadian officials generally backed cooperation with the U.S. Between 1870 and 1876, for example, Canada surrendered eighteen fugitives to the United States, while during the same period only four of the extradition cases brought by the United States were dismissed by Canadian courts, three of which involved a simple lack of evidence on the part of the prosecution.\(^{561}\) In this same period, the United States brought eighteen further cases which seemed to have failed largely because the fugitives could not be found in Canada. As one of the Justice Department clerks noted, “the rule of the United States appears to be to apply for the Extradition of any Criminal who is supposed to have taken refuge in Canada.”\(^{562}\) There is also no evidence of the executive refusing to surrender a prisoner once a court had remanded. In fact, in one case then-Justice Minister Sir John A. Macdonald privately considered the prosecution’s evidence “rather weak” but pressed for extradition anyway.\(^{563}\)

Likewise, Canadian judges were largely of the view that extradition should be as streamlined a process as possible, a position which many judges characterised as ‘liberal.’ In this, they followed the ideas laid out by the court in the 1865 *Burley* case examined in chapter three. There, then-Justice John Hawkins Hagarty wrote that he was “bound to construe a treaty so made between my Sovereign and her ally in a liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect.”\(^{564}\) In 1868, Chief Justice Hagarty noted again that he “always felt disposed to give the fairest and most liberal interpretation to the provisions of an arrangement like this Extradition Treaty, entered into by two nations professing a common civilization, with a thousand miles of conterminous boundary.”\(^{565}\) Justice John Wilson likewise declared that judges were “bound to carry into effect the Treaty in its most liberal spirit.”\(^{566}\)

This liberal approach framed the way courts viewed extradition to the U.S. generally. For example, courts had little time for claims that defendants would not receive a fair trial once returned to the U.S. Most agreed with Hagarty that the two countries shared a common

---

\(^{561}\) “Return Relating to Cases of Extradition of Prisoners under Treaty between Great Britain and the United States,” *Sessional Papers*, 1877, No. 17, 62-63. Six were given up on charges of forgery or uttering forged paper; four were surrendered for murder; three for assault with intent to commit murder; three for robbery; and two for arson; AO, Blake Papers, MU 185, Box 47, Envelop 2, 242.5.

\(^{562}\) Ibid., 243. Emphasis in original. Not surprisingly, the file records only one extradition case brought by a country other than the U.S., 245.


\(^{566}\) Ibid., 25.
civilization and a common sense of justice and the rule of law. Justice John Wilson, for example, declared that “we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own,” and where, indeed, criminals often had more opportunity to exploit legal technicalities than in Canada.\(^{567}\) Hagarty and Wilson also expressed frustration with the state of extradition in Canada, and particularly with the Ashburton Treaty. “The present law,” wrote Hagarty, “is unfortunately powerless to reach the class of felonies most common in occurrence.”\(^{568}\) Wilson concurred, writing that “I have but to express a hope that the time will soon come when other offences may safely come within the provisions of a more liberal treaty.”\(^{569}\) In the post-Civil War period, that liberal spirit was also brought to bear on a range of specific legal questions, as extradition defendants sought to challenge their detention and surrender, as shown in chapter five.

Despite such judicial sentiments and the broader political willingness to extradite, dissatisfaction with the limited scope of the Canadian-American extradition relationship was increasingly common in the press in the 1860’s and early 1870’s. As with policymakers and judges, a consensus formed that the treaties and statutes governing extradition needed to be broadened and reformed to facilitate the cross-border exchange of criminals. In particular, concern grew over the 1842 Anglo-American treaty. Throughout the mid-1860’s a number of cases were reported in British North American newspapers illustrating its flaws.\(^{570}\) When in February of 1865 an American Express agent in Canada West embezzled $10,000 – an offence not listed in the treaty – and fled to the American border, one newspaper lamented that “he may live within sight of Canada, and laugh at the officers across the border without fear of being arrested.”\(^{571}\) Meanwhile, reports of criminals hiding unpunished in Canada because of the narrow treaty excited concerns that the province was “a den of thieves.”\(^{572}\) Even several high profile cases in which fugitives were kidnapped by police officers and returned illegally to the Americans only fed frustration at the limits of the law by highlighting the short list of offences for which extradition could be achieved lawfully.\(^{573}\) Similarly, there were a number of cases in

\(^{567}\) Ibid.
\(^{568}\) Ibid., 54.
\(^{569}\) Ibid., 73.
\(^{570}\) See Halifax Citizen, 20 September 1864; Montreal Herald, 2 January 1867; Morning Freeman, 24 January 1867; Hamilton Evening Times, 12 April 1867.
\(^{571}\) Hamilton Evening Times, 12 February 1865.
\(^{572}\) See Montreal Herald, 2 January 1867. Also Morning Freeman, 24 January 1867, Hamilton Evening Times, 12 April 1867.
\(^{573}\) See Ottawa Times, 16 October 1867; Morning Freeman, 24 October 1867.
which judges appeared to botch the law. The *Lower Canada Law Journal* noted this trend in 1866, when it lamented of extradition cases that “some fatality hangs over them, some blunder besets them, some suspicion of crooked dealings ever attends them.”574 In another case, the *Globe* declared that “if anyone had previously any doubt about the imperfection of our Extradition Treaty with the States, that doubt must now be removed.”575

Thus by the time Westminster passed the imperial act of 1870, Canadian official attitudes were generally very much in favour of extradition. In Canada, the idea of a ‘liberal’ extradition policy meant something very different than in Britain. With the end of the Civil War, lingering hesitations about sending prisoners back to the U.S. largely evaporated, and barriers to a coordinated international effort against crime seemed increasingly detrimental to Canadian interests. As politicians and jurists touted the common notions of justice and the rule of law shared by both countries, and as the national security ethos sparked by the war and kept alive by the Fenian crisis lingered, extradition became a focal point of political concern. The fact that Canadian decisions to surrender American criminals were limited by British policies was soon to become a heated aspect of the imperial relationship.

“A Very Involved Operation”: Canadian Courts and Imperial Law

By the early 1870’s Canadian policymakers and judges wanted extradition to be accomplished with greater ease and with fewer complications. However, the changes to British law caused considerable confusion in Canada, leading to a decade-long debate among lawyers and judges. At issue was what effect the imperial statute of 1870 had on Canadian law. As noted above, the imperial act contained provisions purporting to allow colonial measures to continue in force as if they were part of the British act. What that meant in practice, however, was hotly contested in Canadian courts throughout the 1870’s and early 1880’s. As this debate played out, moreover, it became another motivating force behind Canadian attempts to reform the law of extradition. As this section shows, legal technicalities embedded in the statutes could take on enormous importance once their meaning was disputed.

Initially, no one seems to have expected the imperial act to have much of an effect on Canadian extradition with the U.S. In December 1872, for example, Deputy Minister of Justice

574 *Lower Canada Law Journal* [LCLJ], October 1866, p. 73. Reprinted in *UCLJ*, November 1866, 283.
575 *Globe*, 2 October 1868 and 26 September 1868; *Morning Freeman*, 3 October 1868; *Toronto Leader*, reprinted in *Canadian News*, 29 October 1868.
Hewitt Bernard argued that Canada’s statute was “not, in any way, interfered with as regards Extradition with the United States.”\footnote{Report of Bernard, 3 December 1872, in Order in Council no. 1872-1104 B, RG 2, PCO, A-1-a, Vol. 304, Reel C-3302.} Toronto lawyer Samuel Clarke, author of the first substantial non-judicial Canadian writing on extradition, seems to have shared this view. His 1872 chapter on the subject made no mention of the imperial statute and only discussed the Canadian act.\footnote{Samuel R. Clarke, \textit{A Treatise on Criminal Law as Applicable to the Dominion of Canada}. (Toronto: Carswell, 1872), 23-70.} At first, judges most often agreed, though there appears to have been considerable confusion among them as to the implications of the imperial act. This was reflected in the November 1872 extradition hearing of Charles H. Foster, charged with forgery in Boston and requested by the United States. Quebec judge Robert Mackay committed the prisoner and relied solely on the Canadian statute.\footnote{AO, Blake Papers, MU 185, Envelop 2, p. 247.5.} Following the Ontario courts in \textit{Burley}, Mackay decided that even if evidence for the defence contradicted prosecution witnesses, the case must be presented to an American jury.\footnote{25 November, 1872. Ibid., p. 258-160. See also R. v. Gould, 154, 159.} Defence counsel Bernard Devlin then brought a \textit{habeas corpus} petition to the appellate division of the Court of Queen’s Bench a few weeks later, arguing that section 27 of the imperial act had repealed Canada’s extradition legislation and that Mackay’s decision was therefore invalid.\footnote{AO, Blake Papers, MU 185, Envelop 2, p. 268.} Devlin’s argument is puzzling. Section 27 repealed all previous imperial extradition acts and applied the new measure to the pre-existing treaties, except for anything in the legislation which was inconsistent with these agreements. It saved colonial extradition laws relating to those treaties, however, and allowed them “to have effect as part of this Act.”\footnote{\[UK\] 33 & 34 Vic, cap. 52, s. 27.}

Prosecution counsel W.H. Kerr argued the opposite – that the 1870 act did not apply to Canada – and cited section 17: “This Act, when applied by Order in Council, shall, unless it is otherwise provided by such Order, extend to every British possession.”\footnote{AO, Blake Papers, MU 185, Envelop 2, p. 270. [UK] 33 & 34 Vic, cap. 52, s. 17.} Chief Justice Jean-Francois Duval, having already checked with the Ottawa authorities to ensure that no such order had been issued, agreed.\footnote{Ibid., p. 270.} This also appears to have been a misconstruction, because the order specified in section 17 was unnecessary in the case of treaties already concluded before the act was passed, such as the Anglo-American arrangement of 1842. But Duval and the other judges disagreed with Devlin. One of them addressed the issue in his own decision, specifying that the
Canadian act was the “governing enactment on the subject of extradition throughout the Dominion.”

A few months later, in June 1873, a British Columbia magistrate’s court encountered a similar objection, and the case illustrates a corresponding confusion regarding the imperial law. In the midst of a high-profile extradition hearing, defence counsel objected that under the amended Canadian law, jurisdiction over extradition cases was limited to judges of the county or superior courts. Opposing counsel pleaded that it was “scarcely possible with the information in the Province to argue the question properly” as to which law was in force, but that the case should proceed with the ends of justice only in mind – the extradition of the accused and his trial before an American court. The magistrate agreed, ruling that the case turned on the evidence involved and not the statute in force.

This approach began to change as Quebec courts re-thought the law. In 1874 Quebec judge Thomas K. Ramsay examined the question anew and clarified the relationship between the Canadian and imperial laws. He held that section 27 saved the Canadian law to be read as part of the imperial act. “I must therefore,” he wrote, “at each step decide what part of our Act is not inconsistent with so much of the Act of 1870 as is consistent with the treaties mentioned.” It was new ground in Canadian law, and Ramsay added presciently: “This may become a very involved operation.” Ramsay returned to the question in February 1876. The extradition hearing of alleged forger Charles Worms turned on the admissibility of prosecution depositions, and the defence relied on the narrower provisions of the Canadian act in arguing for their exclusion. Ramsay agreed that if the Canadian act alone governed extradition, the prosecution’s evidence should be excluded. But, citing his own decision in Rosenbaum and reading the two acts together, he found the Canadian evidence provisions modified and widened by the British, and denied Worms’ claim. The question was then brought before Quebec Chief Justice A.A. Dorion, on a habeas corpus petition. Dorion also read the two acts together using section 27 and held that while the admissibility of the depositions was uncertain under the Canadian statute, all

---

584 Ibid., p. 271.
587 Re Isaac Rosenbaum, 10 February 1874, Lower Canada Jurist, XX, 165-166; Re Isaac Rosenbaum, 11 February 1874, Lower Canada Jurist, XVIII, 201.
588 12 February 1876. AO, Blake Papers, MU 185, Envelop 2, 236.
doubt was removed by the imperial terms, which applied insofar as they were not inconsistent with the treaty.\textsuperscript{589}

This new interpretation did not spread across Canada immediately. The result was that Canada remained a patchwork of disparate jurisdictions on the subject of extradition. The Supreme Court of Canada, which might have unified the law in this regard, could not. A few months after its founding in 1875, the government stripped the court of the power to hear \textit{habeas corpus} petitions in extradition cases, and so prisoners lost the right to appeal beyond the provincial courts.\textsuperscript{590} The Justice Minister justified the change by citing the delays that might result from allowing appeals to the high court.\textsuperscript{591} Lacking a central guiding authority, courts continued to disagree about how the imperial law affected Canada. Many judges outside of Quebec continued to rely solely on the Canadian act in deciding extradition cases. In 1878, for example, one New Brunswick court explicitly rejected the proposition that the imperial law was in force at all.\textsuperscript{592}

It was not until January 1878 – almost four years after Ramsay’s decision in \textit{Rosenbaum} – that an Ontario court first read the federal and imperial acts together, in \textit{Re Williams}. While writing his decision in the case, Ontario Chief Justice Robert A. Harrison even telegraphed the Department of Justice to ask if the imperial statute had been applied to Canadian law.\textsuperscript{593} Harrison ultimately decided that the imperial statute, “modified by the colonial acts [is] the immediate and existing law for the extradition of criminals as between Canada and the United States.”\textsuperscript{594} It was a slight departure from Ramsay’s method, but set a precedent for the Ontario courts by incorporating the imperial statute at all. Yet the case also illustrated the general confusion on the subject among the bench and bar in Ontario: the county judge committed Williams under the Canadian extradition act of 1877, discussed below, which was not yet in force. As a result, while Harrison found sufficient evidence to warrant extradition, he was forced to grant Williams’ release because of the error over the statute. Williams was quickly re-arrested, but was subsequently released by the county judge who used the imperial act this time and found the prosecution depositions improperly certified.\textsuperscript{595}

\textsuperscript{589} Re Worms, 21 February 1876, \textit{Lower Canada Jurist}, XXII, 110.
\textsuperscript{590} 39 Vic., cap. 26, s. 31.
\textsuperscript{591} \textit{Commons Debates}, 23 March 1876, 793.
\textsuperscript{593} Harrison to Z.A. Lash, 8 January 1878, LAC, RG 12, A-2, Vol. 40, 1878-62.
\textsuperscript{595} \textit{Globe}, 12 January 1878. There is no indication in any of the statistics that Williams was ever given up.
This uneasiness continued. In the last few years before the ratification of the Canadian act, Ontario courts grappled with increasingly complex questions concerning the admission of foreign evidence and the definitions to be applied to extradition crimes, issued examined in greater detail in chapter five. Yet, as Crown lawyer J.K. Kerr argued in the 1881 Browne case, a persistent uncertainty about the weight of the imperial law in Canadian practice undermined these discussions.\textsuperscript{596} In Browne, the three judge Common Pleas panel divided over the issue of admitting foreign grand jury indictments as evidence. Chief Justice Adam Wilson argued strongly that the indictments could be used as evidence in Canadian courts, and decided to commit Browne solely on that basis.\textsuperscript{597} Justice Featherston Osler disagreed, and relied on the terms of both the imperial and Canadian statutes for support. The British act, he said, required facts to prove the extradition crime, while the Canadian law decreed a judicial examination “touching the truth of such charge,” a standard which could not be met by simply verifying the indictments.\textsuperscript{598} The Court of Appeal sided with Osler, and used the imperial statute to widen the evidence provisions of the Canadian act, which allowed for the surrender of Browne.\textsuperscript{599}

Nonetheless, in the 1882 Hall case the issue of the imperial law was still controversial. The Divisional Court found that the alleged offence was forgery under British law and that there was sufficient evidence to warrant surrender.\textsuperscript{600} Interestingly, in doing so the judges relied solely on the imperial extradition statute for support.\textsuperscript{601} When the Court of Appeal divided evenly on the forgery issue the lower court decision was allowed to stand.\textsuperscript{602} Justice George W. Burton, who voted to release the prisoner, approached the statutory issue much differently, and used only the Canadian act. Burton argued that section 27 of the imperial act – which allowed colonial measures to continue as part of the act – left the Canadian law in full force regarding extradition with the United States.\textsuperscript{603}

The controversy continued in the Phipps case, which was heard at almost the same time as Hall in 1882. In the Court of Queen’s Bench, the defence lawyers very selectively mingled the Canadian and imperial law. First, they invoked the narrow Canadian limitations on admissible

\textsuperscript{596} R v. Browne, 31 \textit{U.C.C.P.}, 1881, 488.
\textsuperscript{597} Ibid., 502-506.
\textsuperscript{598} Ibid., 513-515. [UK] 33 and 34 Vic, cap. 52, secs. 3(2) and 19. 31 Vic, cap. 91, sec. 1.
\textsuperscript{599} R v. Browne, \textit{Ontario Appeal Reports}, Vol. VI, 1882, pp. 394-401. As discussed in Chapter 3, the imperial law allowed the admission of any properly certified foreign depositions as evidence, while the Canadian law admitted only those on which the foreign arrest warrant was based.
\textsuperscript{600} Re Hall, \textit{Ontario Reports}, Vol. III, 1884, 331.
\textsuperscript{601} Ibid., 338.
\textsuperscript{603} Ibid., 1884, 43.
depositions to exclude prosecution evidence. Then they applied the imperial statute to argue that
the county judge wrongly refused to hear evidence that the alleged offence was not an extradition
crime.\footnote{Re Phipps, Ontario Reports, Vol. I, 1882, 597-599.} After a lengthy discussion on whether the offence was forgery under British law, the
judges admitted the depositions and found sufficient evidence to remand.\footnote{Ibid., 586-587.} Justice J.D. Armour
also agreed that section 9 of the imperial statute was in force and entitled the prisoner to produce
evidence of the offence not being extraditable.\footnote{But he found that none had been offered to the county judge. Re Phipps, Ontario Reports, Vol. I, 1882, 611.} Although the Court of Appeal upheld the
decision to remand, Burton nevertheless managed to reignite doubt about the imperial law.\footnote{Re Phipps, Ontario Appeal Reports, Vol. VIII, p. 77.} Lamenting the “trouble and confusion” over the extradition laws, he admitted that he had “very
serious doubts” about whether section 9 had ever been in force in Ontario.\footnote{Ibid., 188.}

Interestingly, while judicial uncertainty on these issues was marked, the imperial act’s
specialty provision caused little or no change to Canadian practice. In fact, both before and after
1870, Canadian courts refused to apply the doctrine. Defence lawyers and defendants in Canada
had known about the doctrine of specialty as an aspect of international law well before 1870, and
in 1854 and 1866 prisoners surrendered to Canada asked colonial courts to enforce it. Both
would be tried in the U.S. for an offence other than that on which he was given up, and the judge
replied that he was leaving “all questions of municipal law between the foreign authorities and
their prisoner to be dealt with and settled by their own system.”\footnote{Re Richard B. Caldwell, Ontario Practice Reports, Vol. V, 220.} When Caldwell was indeed
indicted on another offence – with the consent of a U.S. judge – he petitioned the governor
general to enforce specialty, calling the American indictment a “violation of the law of nations
and of the spirit and true intent and meaning, if not of the very language” of the treaty.\footnote{See the decision of Judge Benedict, 3 January 1871, Extradition Return 1877, Sessional Papers, 1877, 72-73; Petition of R.B. Caldwell, 12 January 1871, Extradition Return 1877, Sessional Papers, 1877, 70.} The
Canadian government passed the case to the Colonial Secretary in London, who decided against
intervening. “There is nothing in the Convention,” Lord Kimberley wrote, “which would
preclude the indictment of the petitioner in the United States for an additional offence which is

\textit{Ibid., 586-587.}
\textit{But he found that none had been offered to the county judge. Re Phipps, Ontario Reports, Vol. I, 1882, 611.}
\textit{Re Phipps, Ontario Appeal Reports, Vol. VIII, p. 77.}
\textit{Ibid., 188.}
\textit{Re Richard B. Caldwell, Ontario Practice Reports, Vol. V, 220.}
\textit{See the decision of Judge Benedict, 3 January 1871, Extradition Return 1877, Sessional Papers, 1877, 72-73; Petition of R.B. Caldwell, 12 January 1871, Extradition Return 1877, Sessional Papers, 1877, 70.}
not enumerated in the treaty,” provided he was also tried on the charge for which surrender was granted.612

The specialty doctrine was also an issue in the Rosenbaum case where Justice Ramsay first read the imperial and Canadian acts together. While Ramsay invoked the imperial act, he also refused to apply specialty. The defence argued that under the imperial statute the requesting nation must prove an adherence to the doctrine, and so the United States must show proof that Rosenbaum would face only arson charges. Echoing Lord Kimberley, Ramsay decided that the new provisions of 1870 could not be applied to the older treaties, and that were specialty a binding tenet of universal international law, it would have been unnecessary for the imperial Parliament to insert a clause requiring its observance.613 As noted above, Ramsay was careful to specify that in interpreting the two acts together, his job was to figure out “what part of our Act is not inconsistent with so much of the Act of 1870 as is consistent with the treaties mentioned.”614 Implicit in this general approach was the idea that specialty was not in the 1842 treaty and so could not read backwards into it.

Yet while specialty did not complicate Canadian law, judicial uncertainty over how to reconcile the British and Canadian statutes stretched from the early 1870’s into the early 1880’s. This confusion came to an end in 1883 when the imperial government officially suspended the operation of its extradition statute in Canada, an event discussed below. From that point on, a single Canadian law governed extradition across Canada, and Canadian courts were no longer faced with the question of how the imperial and Canadian statutes fit together. But the long debate had created rifts both between and within provincial courts as they struggled to interpret the law. This protracted dispute was keenly watched by Edward Blake and other federal officials who were part of the movement to change Canada’s extradition law. For them, the confusion at the bench and bar strengthened the argument for patriating authority over extradition through a single Canadian statute. The process of achieving that goal, however, would further expose the continuing reality of Britain’s power over Canadian affairs.

612 Kimberley to Lisgar, 16 May 1871, Ibid., 74-75; in 1872 British Attorney General Sir J.D. Coleridge made the same argument in court where a prisoner was fighting his extradition to France under the 1843 treaty, see Ex Parte Bouvier, Cox’s Criminal Cases, XII, 1875, 307.

613 Re Isaac Rosenbaum, 11 February 1874, Lower Canada Jurist, XVIII, 202, 204. Rosenbaum’s habeas corpus petition was also denied, 3 March 1874, AO, Blake Papers, MU 185, Envelop 2, 285-294.

614 Re Isaac Rosenbaum, 10 February 1874, Lower Canada Jurist, XX, 165-166; Re Isaac Rosenbaum, 11 February 1874, Lower Canada Jurist, XVIII, 201; See on the question of the imperial law in Canada, Re Worms, 21 February 1876, Lower Canada Jurist, XXII, 110.
The Genesis of the Extradition Act of 1877

During the 1870’s and early 1880’s, judicial confusion was only one element of the increasingly heated issue of extradition. For Canadian policymakers, two other aspects were also pressing. First was the persistent dissatisfaction with Britain’s extradition diplomacy and its failure to produce a new Anglo-American treaty despite Canadian protests. Second was the imperial government’s refusal to end the operation of its 1870 extradition statute in Canada. Edward Blake’s extradition bill, drafted in 1876 and passed by Parliament in 1877, during his tenure as Minister of Justice, was a response to these pressures. The statute had a long life, and remained in force with only a few amendments until 1999. There is a well-founded consensus among legal scholars that the measure was modelled on the imperial statute of 1870, suggesting that this is another aspect of the late-Victorian Canadian deference to British ideas. However, the resemblance was not because of any slavish colonial sentimentality or desire for imperial uniformity on Blake’s part. Rather, as originally drafted in 1876 it was a bold repudiation of British policy and an expression of the widespread Canadian desire to achieve what one judge endorsed as “the free trade in criminals”: it undermined the imperial treaty system, modified the specialty protection, and appropriated sweeping discretionary powers to the Canadian cabinet and minister of justice. It would have been a milestone of both law reform and Canadian constitutional autonomy. But in the years between his original draft and its final ratification by Britain, Blake’s bill was stripped of its most controversial aspects by the imperial government and brought back into line with imperial policy.

Blake was not the first to attempt a radical reform of the extradition system. In the late 1860’s and early 1870’s, Liberal M.P. David Mills repeatedly introduced private member’s bills into the House of Commons which would have given the federal executive the same kind of domestic power to surrender fugitive criminals as had the 1833 Upper Canadian statute discussed in chapter two. Mills’ speeches on the issue illustrate both the widespread frustration with the status quo of Canadian-American extradition as well as the keen awareness that many in Canada had of the complex domestic, imperial, and international law considerations at play in the debate. When Mills first introduced his bill in 1869, he said it was “in the interest of civilization on this

616 Free trade in criminals: Comment by Mr. Justice Featherston Osler, Re Parker, Ontario Practice Reports, 1882, IX, para. 24.
continent” and argued that extradition should not be a difficult or delicate matter – fugitives should simply be tried where their alleged crimes were committed.\footnote{Commons Debates, 3 May 1869, 164.} His bill did not compel the executive to surrender, he argued, but it highlighted the moral obligation which governments were under to extradite foreign criminals, and allowed the government to do so as a matter of comity.\footnote{Ibid., 165.} As discussed in chapter two, comity was a key part of the debate in the 1820’s, 1830’s, and early 1840’s over whether governments were bound to extradite under international law, and it was often mingled with the notion of an actual legal duty to do so, though the two were distinct. When he re-introduced the measure in 1871 he was careful to distinguish between comity and law and in so doing reviewed the different positions held by treatise writers and statesmen from Grotius onwards about the requirements of international law in this regard. Mills did not believe there was an international law duty, but argued that “it ought never to be forgotten that although a matter of comity, [extradition] is a power that should be exercised as readily and as promptly in the interests of justice and good neighbourhood, as if it were a matter of obligation.”\footnote{Commons Debates, 8 March 1871, 347.} Although Mills saw the debate in terms of comity not law, he was alive to the duties of international society discussed in chapter two.

Mills’ bill would have given the executive power to fulfill this moral obligation independent of the Webster-Ashburton Treaty and imperial law. His emphasis was on correcting what he saw as the defective state of the law, under which, he said, many criminals well knew which offences were and were not extraditable, and so which crimes they could commit with impunity so long as they could across the border.\footnote{Ibid., 346.} This spirit of borderless law also motivated several other departures from imperial policy. For example, he included no specific acknowledgment of the political offence exception. To be sure, Mills believed in protecting political offenders, but his view was that the duty of protection was already so well entrenched in western civilization, and it was so dishonourable to give such people up, that there was no reason to fear that the federal executive would use the power he proposed in any such way.\footnote{Ibid., 342-344.} Likewise, Mills refuted the British version of specialty, arguing that once a prisoner was returned to the foreign government, they could be tried for any extraditable offence. Indeed, he dismissed the
British position on this point, saying that a “more narrow and less rational basis can serve no other purpose than to occasionally defeat the ends of justice.”

It is not clear how provocative these provisions were among Canadian policymakers. At the time, the 1868 Canadian statute contained no mention of either political offences or specialty, though there was some small criticism of Mills’ positions in the debates. The more important concern was over Canada’s constitutional power to pass such a measure. When Mills first presented his bill in 1869, Sir John A. Macdonald simply said that Britain would block any extradition act not based on an imperial treaty. During the more substantial debate in 1871, similar points were raised about Canada’s authority to subvert the imperial treaty system by allowing non-treaty surrender, and there was considerable scepticism about whether the bill was constitutional. As the Conservative Jean Langlois put it, even under the peace, order, and good government power “we could have no jurisdiction in matters of international law.” Likewise, John Hillyard Cameron contended that the power to surrender British subjects was strictly an imperial one. There were some who believed the proposed authority was constitutional, such as Robert A. Harrison who saw it as a “mere police power,” and there was much sympathy for Mills’ general aim of fostering more cross-border law enforcement. But in the end, the prevailing idea was that Canada had no power to pass such a bill, and it was ultimately dropped.

The government also took up extradition reform, but in a much more cautious and much less comprehensive way, by seeking to end the operation of the imperial law in 1872. That was two years before Justice Ramsay’s decision in Rosenbaum, and the imperial act had not yet been applied to Canadian-American extradition in the courts (as a result, it only applied to extradition with other countries where Canada had not passed its own act, such as France and Denmark). Hewitt Bernard urged that Canada pass its own statute to implement future treaties largely for the sake of convenience and clarity, a move the Colonial Office initially backed. After the Canadian Parliament passed such a bill in 1873 to implement future treaties while leaving the 1860 act for Canadian-American extradition in place, it went to London, where the Chief Magistrate among others reviewed the legislation, and found it satisfactory in most respects. He

622 Ibid., 347.
623 See the comments of John Hillyard Cameron, ibid., 349.
624 Commons Debates, 3 May 1869, 165.
625 Commons Debates, 8 March 1871, 354.
626 Ibid., 348.
627 Ibid., 350.
identified one minor clause in need of change but called it “a trifling exception” which could be fixed later.\(^{629}\) The imperial authorities appeared ready to bring the bill into force, but when the Liberal government was replaced by Benjamin Disraeli’s Tories in 1874, the Colonial Office took a harder line. Colonial Secretary Lord Carnarvon demanded a series of changes and refused to ratify the bill until they were made.\(^{630}\)

When the government revisited the issue of extradition, however, it was not to present a new bill making all of the revisions demanded by the imperial government, but to protest formally the limits of the Ashburton Treaty and to request that the imperial government take whatever steps necessary to conclude a new arrangement.\(^{631}\) The impetus for doing so probably came from recently-appointed Justice Minister Edward Blake, who had a keen interest in extradition law and a growing dissatisfaction with imperial interference in Canadian affairs.\(^{632}\)

Blake pressed the issue on cabinet, writing a report detailing the recent rise of the British treaty system, and pointing out how narrow and ineffectual the 1842 Anglo-American arrangement was in comparison.\(^{633}\) As a result, he argued, “cases are of very frequent occurrence in which persons guilty of serious crimes pass from one country into the other; and almost within sight of their victims and of the country whose laws they have offended, find a secure refuge for themselves and there [sic] ill-gotten gain.”\(^{634}\)

Negotiations on the subject had been going on for years, and at various points a new agreement seemed imminent. In March 1874, for example, Canadian Justice Department officials advised on the inclusion of larceny and embezzlement in the apparently approaching treaty.\(^{635}\) Yet, as imperial officials soon admitted in response to the Canadian protest, the negotiations fell apart. Foreign Office official T.V. Lister noted that they had been abandoned in May 1874 over the political offence exception. The reason was that the imperial government was bound by the terms of the 1870 statute to negotiate a treaty allowing judges, as well as a Secretary of State, to weigh a fugitive’s claim for political exception. The American government, however, declared that only the Secretary of State should have such authority, and when they refused to concede the point, Foreign Secretary Lord Derby called off the discussions. Owing to an 1875 controversy

\(^{630}\) Carnarvon to Dufferin, 18 May 1874, LAC, RG 13, A-2, vol. 2139, 1873-1591.
\(^{631}\) Report of the Privy Council, 8 December 1875. Sessional Papers, 1876, No. 49, 1.
\(^{633}\) Report of Blake, 2 December 1875, Sessional Papers, 1876, No. 49, 2.
\(^{634}\) Report of Blake, 2 December 1875, Sessional Papers, 1876, No. 49, 3.
\(^{635}\) Memo for Dorion, 19 March 1874. AO, Blake Papers, MU 186, Box 48, Envelop 6.
over an Anglo-American case involving the specialty doctrine, Derby revived talks with the State Department, only to find American opinion unchanged. As a result, Lister wrote that there was little hope for a new treaty at any point soon.\textsuperscript{636}

This announcement pushed Blake to consider different approaches, and he singled out Mills’ idea for unilateral non-treaty extradition. In a report to council, he argued that if Anglo-Americans negotiations had not produced the reasonable prospect of a new and wider treaty by the next session of Parliament, the Canadian government should provide by legislation “some remedy for so much of the evil resulting from the present state of affairs as accrues from Canada being made a refuge for the criminals of the United States.”\textsuperscript{637} This was the first time Blake formally announced his view that Canada possessed the domestic authority to surrender fugitive criminals outside of an imperial treaty.\textsuperscript{638} This also marks the point at which extradition became one of a collection of divisive issues simmering between the Canadian and imperial governments. During this period the Liberal government found itself increasingly at odds with Carnarvon and Governor General Lord Dufferin over the Supreme Court Act, the prerogative of pardon, and the British Columbia railway question, among other issues.\textsuperscript{639} There was also a concurrent sense of dissatisfaction within the government at the confines of imperial diplomacy and a feeling that Canadian interests had been routinely sacrificed to appease the United States.\textsuperscript{640} Prime Minister Alexander Mackenzie memorably remarked at the time that Canadians “are all but ruined from first to last by English diplomacy and treaty-making and we would have no more of it at any price.”\textsuperscript{641}

Clearly, Anglo-Canadian relations on this subject were already irritated when, in the summer of 1876, Britain made them even worse by causing a complete shutdown of extradition between the empire and the United States. This was caused by a Foreign Office reversal on whether specialty could be applied to the older treaties. The dispute began in 1875 when Foreign Secretary Lord Derby protested the rumoured American indictment of a prisoner surrendered by

\textsuperscript{636} T.V. Lister to the Colonial Office, 29 January 1876. \textit{Sessional Papers}, 1876, No. 49, 4-5. The imperial obligations are laid out in [UK] 33 & 34 Vic, cap. 52, sec. 3.
\textsuperscript{639} On these issues see, Barbara J. Messamore, “‘The line over which he must not pass’: Defining the Office of the Governor General, 1878,” \textit{Canadian Historical Review}, 86(3), 2005, 453-483.
Britain for a crime besides that on which extradition was granted – a clear deviation from the specialty doctrine. The Foreign Office argued, with little apparent backing, that the indictment violated a long-standing tacit understanding between the two governments on specialty.\footnote{Thornton to Derby, 13 December 1875, \textit{British and Foreign State Papers [B.F.S.P.]}, 1875-76, Vol. LXVII, 799.} The Americans resisted this interpretation and the controversy continued until the summer of 1876 when the United States requested the surrender of Ezra Dyer Winslow, remanded in England for extradition on forgery charges. Derby demanded a guarantee that Winslow would face only those charges, saying that it was a principle of international law ("the embodiment of what was the general opinion of all countries"), and that there was "no country in the world which claims the right now put forward by the United States Government," to violate specialty.\footnote{Derby to Colonel Hoffman, 4 May 1876, \textit{B.F.S.P.}, 1875-76, Vol. LXVII, 833, 837.}

The question was two-fold: whether there was a bilateral understanding between Britain and the U.S., and whether specialty had crystallized into a binding principle of international law which was applicable to the 1842 treaty whether or not it was included there explicitly. The U.S. argued that no tacit understanding had ever existed, and Secretary of State Hamilton Fish pointed first to the simple absence of specialty from the 1842 treaty, and to the testimony of Foreign Office officials before the 1868 Parliamentary committee, noted above, that specialty was unenforceable on older treaties.\footnote{For a summary of the American position, see Fish to Hoffman, 31 March 1876, \textit{B.F.S.P.}, 1875-1876, Vol. LXVII, 818-829.} Likewise, he used the opinion of the Attorney General stated in Parliament in 1866 that legislation after the fact could not alter the meaning of a ratified treaty.\footnote{U.K. Debates, 6 August 1866, 2122; Fish to Hoffman, 22 May 1876, \textit{B.F.S.P.}, 1875-1876, Vol. LXVII, 861.} But British and Canadian cases also worked against the Foreign Office position. Fish relied heavily on the arguments of another Attorney General before the English Queen’s Bench in 1872 to the effect that new statutory provisions inconsistent with old treaties could not be imposed on them.\footnote{Ex Parte Bouvier, \textit{Cox’s Criminal Cases}, XII, 1875, 307.} As well, Fish cited the decisions of Canadian courts in the 1854 and 1866 cases noted above, where judges declined to enforce specialty.\footnote{Fish to Hoffman, 31 March 1876, \textit{B.F.S.P.}, 1875-1876, Vol. LXVII, 823.} He relied as well on Justice Ramsay’s decision in \textit{Rosenbaum} where the judge had declared that "I cannot see how a new provision of the Act of 1870 could be consistent” with the older treaties, and observed that if specialty were part of international law, Britain would not have had to include it in the new legislation.\footnote{Re Rosenbaum, 11 February 1874, \textit{Lower Canada Jurist}, Vol. XXVII, 202. See Memo of Hamilton Fish to Sir Edward Thornton, April 1876, \textit{B.F.S.P.}, 1875-1876, Vol. LXVII, 840. Fish also relied on Chief Justice A.A.}

---

\footnote{Fish to Hoffman, 31 March 1876, \textit{B.F.S.P.}, 1875-1876, Vol. LXVII, 823.}
international courtesy have changed the principles on which they were then recognized as resting.” As a result, the U.S. refused to issue the guarantee that American authorities would abide by specialty and, when Winslow was released from jail, President Ulysses S. Grant sent a message to Congress saying that the British action had abrogated the treaty. Extradition between the British Empire and the United States was at an end.

Blake was then in London on his famous ‘Mission to England’ to save the Supreme Court Act, shear back the Governor General’s power, and secure imperial permission for a new extradition statute. After Grant announced the abrogation of the treaty, Blake began pressing on the Colonial Office the threat posed to Canada by the end of extradition. “The state of things even under the Ashburton Treaty was deplorable,” he wrote, “but the condition of affairs would, in the absence of any arrangement, be intolerable.” In a series of letters and meetings over the next two months, Blake forwarded reports of cross-border crime purportedly encouraged by the abrogation. Sending one set of newspaper clippings, he told Carnarvon that “I fear the carnival of crime is beginning on our border.”

Colonial Secretary Lord Carnarvon did not need convincing, on either the practical or the legal grounds. He privately told the Governor General he thought the Foreign Office stance was mistaken, and he was far from alone in that opinion. In fact, Derby’s position was widely regarded as weak and he was attacked for it in the British press. The criticism also continued in Parliament, where an array of prominent peers rose to challenge Derby, including former Foreign and Colonial secretaries, and Lord (Edmund) Hammond, head of the Foreign Office for twenty years. Hammond in particular damningly dismissed Derby’s insistence of an un-stated, pre-existing Anglo-American understanding on specialty. “I never heard of its existence,” he said, “which I could not have failed to do.” Against this backlash, Derby meekly re-asserted his position and promised to seek out a new treaty and to find a modus vivendi in the interim.

Nonetheless, extradition was not re-established with the United States until Derby backed down from his demands for guarantees of specialty and agreed to the surrender of a fugitive in December, by which time the treaty had been inoperative for six months.  

The issue was a key part of Blake’s mandate in England, and a focus of his dissatisfaction with the imperial government. Shortly after arriving, he began pressing on the Colonial Office the necessity of a new Anglo-American treaty and of a Canadian extradition statute. Blake laid out the government’s hopes for the treaty. “The circumstances of Canada and the United States imperatively require that their extradition arrangements should be of a most liberal character,” he wrote. Accordingly, his requests were straightforward: any new treaty should include as many extradition offences as possible, allow for colonial governments to design the hearing process, and provide for a simple and direct channel for making requisitions. Blake also urged the imperial authorities to continue to allow the extradition of nationals, though it was in contrast to Britain’s recent wave of European treaties.

Blake did not agree with the imperial focus on protecting political offenders at all costs. For him, as for Mills, political offences were not a serious concern in the context of the Canadian-American relationship, a position rooted in an understanding of Canada and the U.S. as similarly civilized societies. He told Carnarvon that such cases were very rare, but that property and financial crimes were increasing all the time and that most were not included in the present treaty. He also took a very pragmatic approach to the specialty issue that was at the root of the diplomatic rupture. He suggested that in lieu of a straightforward specialty clause, any new Anglo-American treaty should simply prohibit surrender if the fugitive could show that he was liable to be prosecuted for a political offence after being surrendered for a common crime, unless the requesting government pledged not to make such a charge. If the imperial government wanted to maintain the protection against other, non-political charges after surrender, Blake suggested simply limiting it to offences not included in the treaty. Implicit here was the idea that the two countries shared common legal and political values and a common sense of the rule of law, so that no reason existed to curb cross-border cooperation against crime.

---

658 Ibid.
659 Ibid.
661 Ibid.
662 Ibid., 2.
Blake also lobbied for a single Canadian statute. In fact, he arrived in England with a
draft statute already in mind, telling the Colonial Secretary that the new law “should be very
plain and simple and suited to the circumstances of the locality.” 663 Blake wanted the imperial
statute suspended in Canada, so that the confusion over competing legislation would cease. For
the same reason, he wanted the act to apply to every treaty, avoiding the pitfalls of different
regulations governing different extradition relationships. 664 However, he was also anxious to re-
establish extradition with the United States as soon as possible, and he declared that unless a new
treaty or temporary convention could be negotiated quickly, Canada would legislate for the
surrender of fugitives irrespective of any diplomatic arrangement. 665 Interestingly, although the
question of Canadian constitutional authority in this respect had been a main focus of the debate
over Mills’ bills, the imperial government initially agreed that Canada did in fact have such a
power, at least in the context of the abrogation. Foreign Office advisor George E. March, who
replied to Blake’s memoranda, argued that if the Anglo-American treaty remained inoperative,
Canada would indeed have the domestic authority to assume such a power. 666 Here we can see an
echo of the America debates over federalism and state-level extradition power in the 1830’s and
early 1840’s, examined in chapter two. During the 1840 Supreme Court case of *Holmes v.
Jenison* judges differed over whether, if the federal government were not exercising its treaty
power, the states had infringed upon it by extraditing prisoners themselves. In other words, in
some ways the division of powers between the U.S. states and Washington was not dissimilar
from that between Ottawa and Westminster.

After a month of this lobbying, the Colonial Office asked Blake for a draft bill. 667 The
resulting text laid the groundwork for the measure passed by Parliament the next year and which
remained in force until 1999. As legal scholars of extradition have observed, that act was largely
modelled on the imperial statute of 1870. 668 Indeed, one such scholar notes that the act was close
enough that British decisions could continue to apply in Canada. 669 This appears redolent of the
slavish imitation of British precedent, which is a familiar element of Canadian legal history. For
instance, in his history of the criminal code, Desmond Brown notes that Sir John A. Macdonald

664 Ibid.
665 Ibid., 18.
667 Blake to Carnarvon, 4 August 1876. AO, F2, MU 258, Box 120, Envelop 44.
669 Botting, “Executive and Judicial Discretion,” 70.
desired uniformity between British and Canadian law, in part because of his colonial sentimentality.\textsuperscript{670} But such motives played little role in the construction of the Canadian extradition bill. On extradition, Canada had little choice but to legislate in line with British policy. Simply put, Blake followed the imperial model because anything else would be voided by Britain.

As a result, the imperial framework was the guiding legislation for Blake’s draft. Understanding some of the specific premises of the bill helps illustrate the array of influences brought to bear on the legislation. Aside from its basic premise as a general measure implementing all extradition treaties, his draft bill followed the imperial law in several key ways, especially in mingling the adoption of protections for political refugees with measures designed to make the surrender of prisoners easier generally. First, it included a specific political offence exception.\textsuperscript{671} Second, it allowed any properly certified foreign depositions to be admitted as evidence; the 1868 Canadian act only allowed those on which the foreign warrant was granted.\textsuperscript{672} Third, it lengthened the time granted to fugitives to apply for \textit{habeas corpus} to fifteen days.\textsuperscript{673} Fourth, the bill granted specialty protection to fugitives surrendered to Canada.\textsuperscript{674} The bill also retained both the historic British \textit{prima facie} evidence requirement and the stipulation that a prisoner could be released if no requisition was made within two months.\textsuperscript{675} But there was a Canadian influence as well. The bill embodied the time-saving provision that a judge could issue an arrest warrant before obtaining executive permission, which had been a feature of Canadian law since 1849.\textsuperscript{676} Likewise, the bill upheld the Canadian restriction against magistrates acting in extradition cases.\textsuperscript{677}

Despite these ties to the imperial statute and older Canadian law, Blake’s draft was very provocative. It was an attempt to patriate power to Canadian officials, to circumscribe protections for political refugees which Blake felt were unnecessary, and to circumvent the


\textsuperscript{671} Extradition Bill 1876, sec. 7. AO, F2, MU 258, Box 120, Envelop 44.

\textsuperscript{672} Ibid., sec. 10.

\textsuperscript{673} Ibid., sec. 18.

\textsuperscript{674} Ibid., sec. 23.

\textsuperscript{675} Ibid., secs. 14 and 19.

\textsuperscript{676} Ibid., sec. 12.

\textsuperscript{677} Ibid., sec. 9.
imperial treaty system. The bill appropriated extradition authority entirely to the Minister of Justice and Canadian cabinet, including discretionary power to refuse extradition. Moreover, it broke with imperial precedent on both the political offence and specialty provisions. Although it acknowledged the exemption of political offenders from extradition, it allowed their surrender for common crimes if the requesting government agreed not to prosecute for a political crime. In other words, Blake would allow the surrender of political refugees if they were guilty of a-political offences as well. (It is worth noting that Blake was far from alone in rethinking such protections. At its 1880 conference the Institut de Droit International endorsed limiting the political designation to offences that did not include normal crimes as well.) His bill also limited the specialty protection afforded to fugitives surrendered to Canada. Under it, the Canadian government could not charge such a prisoner with political offences but could indict on charges other than those for which surrender was granted, provided the surrendering government gave permission. Most importantly, it dispensed with the necessity for an imperial treaty by allowing surrender to nations with which there was no treaty, or if that agreement had been suspended or abrogated. It also circumvented narrow arrangements like the Ashburton terms by allowing surrender on all the crimes listed in the bill, even if they were not mentioned in the treaty. This was a clear expression of Blake’s frustration with the imperial standoff over specialty and the limited scope of the Anglo-American treaty. It also expressed both a desire to facilitate cross-border law enforcement and an implicit trust that political refugees would not become an issue between Canada and the U.S.

This provision, for non-treaty surrender, and the way it revived the ideas and arguments of David Mills from a few years before, is telling. Both Blake and Mills were Liberals who thought that Canadian self-government should be absolute on questions of domestic policy, and both were irritated by imperial involvement in domestic affairs. Indeed, during Blake’s short tenure as Justice Minister (1875-1877) he fought the imperial government on several major issues and notably re-wrote the Governor General’s Royal Instructions to shear back vice-regal power on pardons and the reservation of federal bills, a change which has loomed large in

---

678 Ibid., secs. 16, 17, and 19.
679 Ibid., sec. 7(3).
681 Ibid., sec. 23. The imperial act made no provision for a second charge or obtaining permission from the surrendering government. See [UK] 33 and 34 Vic, cap. 52, sec. 19.
682 Ibid., sec. 5.
nationalist historiography as a benchmark of Canadian autonomy. In this, Blake, like Mills, was an exponent of legal liberalism – believing that constitutional practices should be clear, codified, and subject to the rule of law. Both disliked Sir John A. Macdonald’s vision of what Robert Vipond has called “political federalism,” in which provincial autonomy was subject to the political judgments of a supreme federal government, just as colonial autonomy was subject to imperial decree. In most ways Blake’s extradition bill is a clear manifestation of this idea: it formally appropriated the Governor’s discretion to the cabinet, and mapped out the entire procedure in extradition cases, laying out even the forms that judges should use in issuing arrest warrants and remanding prisoners. But the power that Blake’s bill, like Mills’ before it, gave to the executive to surrender prisoners even in the absence of a treaty represented the kind of sweeping and discretionary executive authority that both found problematic in other areas of the law. Here, then, their mutual inclination towards continentalism – towards a liberalism that eroded unnecessary national barriers to international cooperation – helped override any rule of law worries about executive power.

With Blake’s 1876 draft, that liberal ideology combined with years of frustration at imperial diplomatic ineptitude and what Blake saw as the British government’s unnecessary fixation with political asylum and political refugees. In his view, political asylum was indeed a worthy and established tradition – to a point and in some contexts. But he found the manner in which Britain had modified its own law as well as the imperial government’s tactics in trying to export those norms to both Canada and the U.S. unsuitable to North American conditions. The 1876 abrogation was the last straw, and prompted Blake to take up the cause of extradition reform in a fairly radical, though not unprecedented, way. As a result, what appears at first to have been another symbol of Canada’s late-Victorian legislative deference to British ideas and models, actually represented a significant rebellion against those imperial influences. As we will see, though, Britain’s imperial power remained potent enough to win Canadian compliance and stifle the most important aspects of the bill.

Imperial Power and the Extradition Bill

Edward Blake’s draft bill was provocative. On top of modifying the specialty protections embedded in the imperial law, it did away with the necessity for an imperial treaty at all by allowing the federal executive to surrender prisoners as a matter of domestic law. Not surprisingly, then, it proved controversial among imperial authorities. At stake for the officials in London was not simply their control over Canadian law, but their role in ushering the colonies into emerging norms of international law and in ensuring a common and uniform imperial foreign policy. As a result, we can appreciate a continuing rift in attitudes between the Canadian and imperial governments. For Canada, extradition was primarily a practical and domestic concern focused on getting foreign criminals out of Canada and returning them to a trusted neighbour. For the British, it invoked a much broader array of concerns centring on political asylum and involving much less trusted neighbours. In this context, imperial officials decided to exercise Britain’s continuing power over Canadian law by delaying, blocking, and ultimately re-writing Blake’s original bill. This section explores how, in the few years after its drafting in 1876, Blake’s measure was systematically stripped of its most contentious clauses and brought back into line with imperial policy.

As a result, the extradition debate highlights the continuing imperial authority Britain had over Canada after 1867, particularly its executive and legislative powers. While the outright disallowance of colonial legislation – voiding an act that had already received Royal Assent – declined steeply from the late 1840’s, this decline did not mean that the empire abdicated all control over colonial law. Published statistics are incomplete, but it appears that from the grant of Responsible Government in each of the eastern British North American colonies until Confederation, the imperial government continued regularly to reserve and occasionally to block colonial laws.685 The reservation power was potent because a reserved bill would expire if not expressly approved within two years, giving the imperial authorities leverage to demand amendments during that time.686

After Confederation, the disallowance of acts continued to decline and was likely used only once. But reservation continued and the imperial government continued to be able to

685 Swinfen, Imperial Control of Colonial Legislation, 31-45, 85; Colonial Office return of reserved bills. (London: H.M.S.O., 1864), pp. 8-11; Colonial Office return of reserved bills from which assent was withheld. (London: Eyre and Spottiswoode, 1894), 3-7.
686 Swinfen, Imperial Control, 35-41.
demand changes to Canadian laws using the spectre of expiration. This practice became extremely rare after the revision of the Governor General’s Royal Instructions in 1878, when the clause instructing him to reserve certain classes of bills was dropped. But in the decade after 1867, at least twelve Canadian bills were reserved and reviewed in London, and assent was withheld from at least six of these. The reserved bills touched on issues such as copyright, merchant shipping, marine telegraph cables, and extradition – areas where foreign relations, international law, or extraterritorial powers were involved.

These were also the areas in which London exercised the second facet of its power: its role as supreme parliament of the empire. During this period, London usually did not legislate for its colonies without extensive consultations in which the imperial authorities often circulated draft bills, solicited colonial opinions, and exempted any unwilling colonies. But the imperial government did continue to legislate for the empire on issues where a uniform imperial policy was thought important. It remains unclear how often this occurred, though one Victorian writer on the Canadian constitution compiled what he suggested was a partial list of new imperial acts applying to Canada between 1867 and 1887, and it cites twenty-seven pieces of legislation. The issues are similar to those on which Canadian legislation was reserved: submarine telegraphs, merchant shipping, copyright, naturalisation, and extradition, among others. These were significant policy areas as international law and the international system generally expanded in the latter half of the nineteenth century.

While the constitutional power to block Canadian law remained potent, imperial policymakers well knew that such authority must be used carefully. Indeed, the British government’s first response to Blake’s 1876 draft was to stall. Foreign Office legal advisor George E. March agreed that Canada had the domestic power to provide for surrender without a treaty, but urged the federal government to postpone the measure until it was known whether a new Anglo-American agreement could be reached. Later, March called the bill “excellent in most respects,” but also alluded to an apparently pending amendment to the imperial statute’s

---

687 Both imperial reservation and disallowance were included in the British North America Act: see sections 55 and 57, and 56; Barbara J. Messamore, “The line over which he must not pass”; W.E. Hodgins, Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895. (Ottawa: Government Printing Bureau, 1896), 6-58d. This number does not include ten further bills for divorce which were also reserved. See 5-60.


specialty provision, apparently necessary to secure a new treaty with the United States. He noted this would also keep the specialty provision in Blake’s bill consistent with British law. The Canadian government, he implied, should wait for this change, and for the new treaty, before tabling the legislation. A few weeks later, the Foreign Secretary also declared that the Canadian bill would “hamper, if not altogether impede the negotiation,” since it would grant the United States unconditional access to its fugitives without the necessity of a treaty. In the short term, however, there was no word on the progress of the treaty negotiations, and no decision from the imperial government on whether it would ratify the Canadian bill if it were passed by Parliament. For this reason, Blake held off introducing it in the House of Commons.

These demands for delay pushed Blake to begin re-fashioning the bill, and excising its most important reforms. This process of imperial revision began in January 1877, when the Colonial Secretary repeated his request that Ottawa should delay its extradition legislation, since negotiations with the United States were ongoing and Canada’s provision for non-treaty surrender would damage them. A frustrated Blake replied that the government could not delay the legislation any further, particularly since treaty negotiations seemed to be progressing quickly. (His point was that if a new treaty were signed, Canada’s 1868 law, which related only to the specific 1842 treaty, would be entirely inoperative, so he wanted replacement legislation already in place if that occurred.) Instead, he agreed to cut the non-treaty surrender clause out of the bill, fundamentally altering its purpose, and sent it off to London for final approval. A month later, with no further advice from the Colonial Office, Blake was furious. “It is extremely vexatious,” he told the Prime Minister, “that we should have been unable in the course of six or eight months to obtain the consideration of the draft by the Foreign Office.”

The Colonial Office eventually assented to most of the bill but requested three further cuts. Lord Carnarvon now wanted the political offence exception removed entirely, as well as the specialty guarantee to fugitives surrendered to Canada. He also requested removal of the

---

690 Memo of March, 1 September 1876. AO, F2, MS 20, Reel 2.
691 The draft treaty reached by the United States and the United Kingdom in August 1876 was silent on the issue of specialty. AO, F2, MS 20, Reel 2, p. 88. The American government wanted the right to try a surrendered prisoner for any offence listed in the treaty, not simply the crime of surrender – precisely the solution proposed by Blake. See Sir Edward Thornton to Lord Derby, 14 September 1876. AO, F2, MS 20, Reel 2. It appears from March’s comments that there was some movement in the British government to concede this point and make the necessary amendment to the imperial law.
692 Julian Pauncefote to Robert Herbert, 14 September 1876. AO, F2, MS 20, Reel 2.
695 Blake to Mackenzie, 20 February 1877. LAC, Mackenzie Papers, Reel M-198, 1336.
discretion given to the Canadian cabinet about whether to apply imperial treaties. These, he said, “involve questions of principle under the discussion of the Foreign Office and foreign governments, and should therefore be left out.”

Blake was puzzled by the shift in imperial policy towards political offences, which probably reflected the lingering amendment Britain was considering to its statute and which seemed necessary to achieve a new Anglo-American arrangement. Making this change would transfer all authority over political offence and specialty provisions to imperial treaties, and thus to the imperial government, but he very reluctantly agreed to edit the bill again, in order to get it through Parliament before the end of the session and before any new Anglo-American treaty. However, he refused to submit the bill to Parliament without any political offence protection at all, and suggested scrapping only the most contentious aspect, which allowed political offenders to be surrendered but tried only for non-political crimes. Although he thought his provision an improvement on the imperial section, he reported unhappily to cabinet that “I recommend we submit to its elimination.”

While Carnarvon’s demands had excised most the measure’s controversial clauses, the act was still substantially the same as Blake’s 1876 draft. Bereft of its provision for surrender without treaty, the act’s key purpose was now to simplify and standardise procedure and to end the continuing legal controversies. In his Parliamentary speeches on the bill this was one of Blake chief arguments – that the bill would clarify the confused state of Canadian extradition law. He likewise told Lord Carnarvon in 1876, the bill would be used rarely, largely by junior judges, and sometimes under intense international pressure. For these reasons, the bill laid out procedural and technical steps in great detail and provided standardized forms for judges to use in extradition cases. Blake’s aim in all this was to create a statute clear and complete in itself, with little reference to other procedural laws – in effect, an extradition code. Moreover, stripped of the most controversial clauses, the bill encountered no substantive opposition in

697 Report of Blake, 5 March 1877, Ibid.
698 Extradition Bill 1876, sec. 7(3).
700 Debates, 14 March 1877, 710-711.
701 Blake to Carnarvon, 27 June 1876. Sessional Papers 1877, No. 13, 16.
702 For the act, see 40 Vic, cap. 25.
703 Blake to Carnarvon, 27 June 1876, Sessional Papers 1877, No. 13, 16.
Parliament, and resolutions urging the imperial government to allow it into force passed unanimously with support from the opposition Conservatives.\footnote{Debates, 10 April 1877, 1316-1317; Dufferin to Carnarvon, 11 April 1877. Dufferin-Carnarvon Correspondence, 44.}

Nonetheless, the process of imperial revision continued. The Colonial Office reply to Blake’s changes to the draft was not received until after the act was passed by Parliament, though it was reassuring. The Colonial Secretary simply thanked the government for complying with his suggestions and hoped the measure would prove useful in Canada.\footnote{Carnarvon to Dufferin, 29 March 1877. O.C. No. 1882-0120, LAC, RG 2, PCO, A-1-a, Vol. 410, Reel C-3337.} But a few days later another despatch arrived from London. “Upon one minor point doubt has occurred to me,” Carnarvon wrote.\footnote{Carnarvon to Dufferin, 5 April 1877, Ibid.} He now believed the act’s provision for Canadian authorities to deliver a prisoner into the territory of a foreign state was \textit{ultra vires} of the federal Parliament. He did not demand a change, but simply asked the government to examine the clause and consider an amendment.\footnote{Ibid.} Nonetheless, Blake was furious. In a letter forwarded to Carnarvon, he complained that the draft bill had been submitted the previous August and that imperial opinion had been continually sought after that and until the introduction of the bill to Parliament.\footnote{Blake to Mackenzie, 27 April 1877, Ibid.}

Moreover, Blake argued that the Canadian Parliament had the authority to deal with extradition as well as the specific right to do so under the B.N.A. Act. The government, he said, might consider an amendment later, but in the meantime he wanted the imperial law suspended as soon as possible.\footnote{Ibid.} Carnarvon quickly backed down, saying that the point was minor and “certainly not one which ought to stand in the way of the progress of the measure.”\footnote{Carnarvon to Dufferin, 1 June 1877, Ibid.} For the moment, it seemed as if the Canadian law would actually come into force.

After the hints from Lord Carnarvon in 1877 that the British government would suspend the imperial act in Canada, nothing further was heard from London. In January 1878, by way of reminding the Colonial Office that the issue was pressing and consequential, the Canadian cabinet forwarded Chief Justice Harrison’s decision in \textit{Williams}. (As noted above, Harrison’s decision illustrates the ongoing confusion surrounding extradition law: he was forced to release the prisoner after finding that the committing judge relied solely on the Canadian act of 1877, which had no legal force.\footnote{Re Williams, Common Law Chambers, VII, 1879, 283.}) Harrison’s was also the first decision to find the imperial act
applicable in Ontario. However, newly-appointed Colonial Secretary Sir Michael Hicks-Beach served notice that the imperial government would delay any decision on the legislation until after a recently-named Royal Commission on Extradition issued its final report. It was only the first in another series of delays.

The eventual report from the commission proposed no changes to the system of authorizing colonial extradition laws in place of the imperial statute. However, after its publication in May 1878 there was no further word from London about the fate of the Canadian statute. For almost two years the imperial authorities withheld their decision. Ottawa did not press the issue again until March 1880, when Blake (now in opposition) announced that he would table a petition to the imperial government in the House of Commons. As the Governor General told Hicks-Beach, the cabinet was anxious to have some kind of answer for Blake. The Colonial Office’s reply repeated the worries about Canadian power to transport fugitives inside the jurisdiction of foreign states and added an additional demand for revisions. The imperial government now believed that the discretionary powers given to the Minister of Justice to refuse surrender were too large, and if exercised might result in the violation of an imperial treaty. The offending section laid out the specific grounds on which the Minister could refuse to surrender a fugitive committed for extradition. Its chief purpose was to give the Minister statutory discretion in political offence cases, but one sub-section allowed the Minister to release a prisoner if “for any other reason he ought not to be surrendered.” Although the Colonial Office singled it out as dangerous, the clause was actually an adaptation of one contained in the 1868 Canadian statute, which had been ratified by imperial government. This entitled the governor to release a prisoner if, for any reason, he thought surrender improper. While such power was acceptable in the hands of an imperial official, it was apparently deemed too threatening to be used by a Canadian minister.

The reply had barely been received when Blake tabled his motion in Parliament. Beginning a long, detailed speech, Blake read out in full the unanimous joint address of 1877

---

712 Ibid., 281.
713 Hicks-Beach to Dufferin, 5 February 1878, O.C. No. 1882-0120, LAC, RG 2, PCO, A-1-a, Vol. 410, Reel C-3337.
715 Hicks-Beach to Lorne, 13 March 1880, Ibid.
716 Ibid.
717 40 Vic, cap. 25, sec. 16(3).
718 31 Vic, cap. 94, sec. 4.
calling on the British government to suspend the operation of the imperial act. That had not been
done, he said, and now the law in Canada was in a “very unsatisfactory state.”\textsuperscript{719} He quoted
Justice Ramsay’s description of how judges must reconcile the imperial and Canadian statutes,
remarking “that is the very involved operation which is to be performed in each case.”\textsuperscript{720} Blake
also alluded to the “grievous difficulties” of the Williams case and challenged the government to
explain its tardiness in taking action to suspend the imperial act.\textsuperscript{721}

The matter rested there for almost two more years. In January 1882, Justice Minister Sir Alexander Campbell revived the issue and decided to petition the imperial government. Campbell offered no amending statute or revision to the powers of the minister, but simply asked for the suspension of the imperial act in Canada.\textsuperscript{722} Not surprisingly, the imperial reply was terse, and Colonial Secretary Lord Kimberley noted that the imperial government maintained its objections to the minister’s discretionary power and no suspending order would issue until it was abandoned.\textsuperscript{723} Campbell quickly agreed to the change and drew up a short amending bill.\textsuperscript{724} Introducing it in the Senate, Campbell read out Kimberley’s despatch as justification. It was important, he said, to bring the 1877 act into force in order to simplify and clarify Canadian extradition law.\textsuperscript{725} Three weeks after its introduction to the Senate, the bill was signed into law and the Minister’s discretionary power was sheared back. But while the imperial act still operated in Canada, the change had no practical meaning.

Despite Kimberley’s promise, nothing happened quickly, and no word came from London regarding the suspension of the imperial act. Finally, on 28 December 1882, Queen Victoria signed the suspension order.\textsuperscript{726} After a decade of negotiation and legislation, the law in Canada had changed and a Canadian statute regulated all extradition cases. But, as if for a final demonstration of imperial confusion, no one informed Canada. Almost two months after the order, Blake raised the issue in the House of Commons, noting newspaper reports of an imperial order which he said no one in Canada could confirm.\textsuperscript{727} “Considerable interest,” he said, “exists

\textsuperscript{719} Debates, 24 March 1880, p. 875.
\textsuperscript{720} Ibid.
\textsuperscript{721} Ibid., pp. 875-876.
\textsuperscript{723} Kimberley to Lorne, 2 February 1882. O.C. No. 1882-0840 E, RG 2, PCO, A-1-a, Vol. 413, Reel C-3337.
\textsuperscript{724} Report of Campbell, 3 March 1883, Ibid.
\textsuperscript{725} Senate Debates, 26 April 1882, p. 434.
\textsuperscript{727} The Globe published notice of the British order on 6 January 1883.
Macdonald was apparently unaware also, and asked Campbell to look into the issue. In the meantime, the confusion in the courts was ongoing. On 30 December 1882, the Ontario Queen’s Bench refused *habeas corpus* in Phipps’ case, finding *inter alia* that the 1870 act was in force. In early March when the Court of Appeal issued its decision, and Mr. Justice Burton expressed his doubts noted above, the law enforced had still not changed, though the judges noted rumours of an imperial order. However, this uncertainty was soon at an end. Within a few weeks the Canadian government was notified of the order and the extradition act of 1877 took force in practice.

This ended the movement to supplant the imperial extradition statute in Canada. These efforts led to a long series of delays, compromises, and revisions. In the end, the policy originally envisioned by Blake in 1876 as comprehensive reform was sheared back according the dictates of the Colonial Office and other imperial authorities. At issue was not simply Canadian law and imperial relations. Rather, as imperial authority over Canadian domestic affairs had declined throughout the nineteenth-century, Britain’s role as the authority over foreign relations for the entire empire had in many ways increased. As nations were drawn into new kinds of legal and diplomatic networks and norms, Britain saw itself as ensuring that its colonies abided by the developing systems of international law. In doing so, however, the British government was able to use the lingering tools of traditional imperial authority. As a result, this process of law reform highlights both the extent to which imperial power was still manifest in post-Confederation Canada, and the ways in the imperial relationship was shaped by the norms and concepts of international law.

**Conclusion**

By the time Britain suspended the operation of its statute, extradition had been a pressing political issue in Canada for more than a decade. This long debate over surrendering criminals highlighted the different approaches taken by the Canadian and imperial governments. In Canada, extradition was a largely uncontroversial issue. With no fear of having to give up slaves or Southern soldiers after 1865, extradition became a simple issue of maintaining law and order.

---

728 *Debates*, 19 February 1883, p. 42.
729 Macdonald to Campbell, 20 February 1883, AO, F23, MU 475.
732 *Sessional Papers*, 1885, No. 130, pp. 1-3.
Liberals such as David Mills and Edward Blake, and the larger liberal ideology of eroding domestic barriers to greater international cooperation, drove a movement to widen extradition arrangements with the U.S. and to engage in a more concerted cross-border campaign against crime. The officials who led this movement, and the commentators and judges who supported it, saw the U.S. as a trusted neighbour with a common sense of the rule of law, and believed that refusing to surrender criminals to such a country risked transforming Canada into a haven for foreign criminals. As a result, extradition law reform became a top priority, and in 1876 Blake proposed a sweeping bill which would re-shape extradition, undermine imperial power, and make surrendering criminals to the U.S. far easier for Canadian authorities.

These efforts did not succeed. Until 1883 extradition reform remained beyond the power of the Canadian government. Throughout the 1870’s and early 1880’s, imperial authorities suppressed, delayed, and re-wrote federal legislation to bring it into line with British policy. Their decision to do so, however, stemmed from longstanding British concern that extradition would be used to surrender political refugees and so would undermine political asylum as a principle and allow Britain’s European neighbours to stifle liberal dissent. During the 1850’s and 1860’s this concern made even minor amendments to Britain’s underdeveloped body of extradition law difficult. But as Britain moved to adopt legal safeguards for political offenders which had been circulating in European international law for decades, this concern eased, and the imperial government began the process of implanting these concepts into the legal regimes of its colonies. In this context, the imperial government saw Blake’s 1876 draft and 1877 act as a challenge not only to imperial authority but to desirable norms of international law. The resulting tension – between imperial and Canadian law, and between North American continentalism and European liberal internationalism – led to years of intra-imperial disputes. These disputes only ended once Blake’s bill was stripped of its most contentious innovations and imperial power won out.
Chapter Five:
Developing the Transnational Rule of Law: Extradition Jurisprudence, 1865-1910

Introduction

This chapter focuses on the birth of extradition jurisprudence in Canada. It examines the forty-five years after the end of the U.S. Civil War (and thus after the highly controversial Civil War cases discussed in chapter three) to assess how the law governing extradition from Canada to the U.S. developed in Canadian courts. During this period the diplomatic and statutory infrastructure of the extradition system grew dramatically. As shown in chapter four there were a raft of new imperial treaties with countries around the globe, the new Canadian Extradition Act ratified in 1882, and finally a new Anglo-American convention in 1889 which raised the number of extraditable offences between Canada the U.S. But these developments still left Canadian courts to craft a jurisprudence from nearly nothing. Prior to 1865 there had been only a handful of reported cases in Canada and Britain, meaning that courts had little to work from by way of precedent. As a result, there remained fundamental questions of law to answer.

What emerged was messy. This chapter draws on one hundred decisions in the cases of sixty-four defendants that were published in Canadian law reports during this period, a pool that appears to represent the entire roster of reported cases between Canada and the U.S. Certainly there were commonly held and enduring ideas apparent across the country in these cases. This was particularly true when it came to the general interpretive vision brought to bear on the law by judges. For instance the idea of a “liberal” interpretation of the law which favoured cooperation with the U.S., and which was first articulated in the Civil War Burley case remained profoundly influential for decades. In this view, ‘liberalism’ meant the erosion of national barriers to international cooperation and not, as it does now, a concern for individual rights. But extradition was also the focus of an intense debate among lawyers and judges, especially when it came to the technical administration of the law. Prosecutors and defence counsel each attempted to drag the law in very different directions, trying to redefine burdens of proof and the role of the courts, for example. Likewise, major cleavages emerged among judges on core issues such as the scope of habeas corpus and the ability of prisoners to challenge effectively their own detention. Nor was the liberal transnationalism of Burley without opposition among jurists. Indeed, this

733 A very small number of cases appeared involving countries other than the U.S. Since these cases involved different treaties, and thus a different range of offences and a different international relationship, I have chosen to exclude them from the chapter.
chapter argues that the case law after 1865 represents both a fledgling national and transnational system and one which was riven by continuing and sometimes deepening differences on key legal questions.

This chapter also looks at the case law as an aspect of Canadian state formation. As Brian Young and others have shown, law and legal doctrine were at the core of the emergence of the nineteenth-century state. Particularly in the area of criminal justice and punishment the state expanded its reach throughout the century and this surge of state power manifested itself not simply in the form of new court houses, prisons, and police forces but also in sweeping debates over legal doctrine and law reform. As a result, as courts generated case law in extradition and other such areas, they also crafted the rules by which the state enforced its jurisdiction. In extradition, moreover, that process of creation was doubly important and apparent since so little case law existed at the start of this period. Canadian courts built the foundations of the system during this period in a way that is not true for many other areas of law, where the lineage of the English common law was much longer.

Yet the extradition case law also had comparatively little to do with that other crucial state formation process of the period – the nascent working-out of Canadian federalism. As many scholars have shown, the terms of the British North America Act spawned an enduring debate over how the powers of the federal and provincial governments could co-exist. Often written by the same judges who presided in extradition cases, a jurisprudence of the constitution was written and then re-written as the Judicial Committee of the Privy Council began to hand down its federalism decisions. The key debates in extradition law, on the other hand, were rarely between jurisdictions, but rather within them, as judges in the same province and often on the same bench disagreed profoundly with one another. In other words, the focal points of debate were intellectual and not jurisdictional, a reality which made for a messy case law, at least in some areas. Moreover, the Supreme Court of Canada played no real role in the development of this law, while the J.C.P.C. authored only one reported decision. Left without overriding

---


736 See Saywell, The Lawmakers.
authorities, provincial courts borrowed freely from one another with no imperative for a national consensus and no tribunal struggling to impose one.

This body of law also illustrates an oft-neglected facet of state formation – the international context. As Jerry Bannister and others have argued, state formation was never a purely domestic process. During the nineteenth-century the imperatives of international goodwill and the surging influence of treaty law and international law generally enveloped states in complex relationships that tightened the bonds between them and, in many ways, eroded the concept of exclusive sovereignty which had such a large place in the legal imagination of the nineteenth-century. These bonds often prompted domestic authorities to enlarge the powers of their governments, as they did in extradition. As a result, we can see in the extradition jurisprudence not simply the development of a system of domestic law, but one geared towards and built around the international context. On a fundamental level, those who espoused the liberal interpretation prioritised international cooperation against crime and the duties of international law. These beliefs shaped the extradition jurisprudence in crucial ways. Likewise, even in the sources to which Canadian jurists looked for ideas about extradition law this international engagement is apparent. Canadian jurists routinely drew from American sources and were in some cases quite willing to apply those ideas to Canadian law.

While this body of case law represents the emergence of a national and transnational system it is also important to understand its implications for civil liberties. Despite some excellent scholarship, we know relatively little about the history of civil liberties in Canada. There has been some emphasis on the inheritance of ‘British rights’ such as trial by jury, *viva voce* examination of witnesses, and *habeas corpus*. Yet particularly on issues like *habeas* we have little scholarship on the operation of these concepts in practice, and particularly so outside

---


of periods such as the 1837-1838 rebellions. The extradition case law affords an opportunity for such an examination. As shown in chapters three and four there was long a profound resistance to extradition in Britain and Canada because of fears that it would compromise the ideal of British territory as an asylum for fugitive slaves, political dissidents, and other foreign refugees. Although these fears largely evaporated in Canada after 1865, debates over civil liberties in the context of extradition did not. As a result, while many jurists focused on building a more efficient transnational system, others dealt in great detail with questions about how prisoners could challenge their detention, particularly whether they could introduce exculpatory evidence, what they could argue in habeas corpus proceedings, and whether they could be granted bail. We can see in these often very technical debates that although the liberal ideology of extradition was powerful it was not accepted uncritically or universally by lawyers and judges. Rather, even many judges who supported the ideas underlying international extradition acknowledged that on an array of legal issues the system must be balanced with a concern for individual rights. This chapter highlights that tension, between individuals and the imperatives of international order.

“Lots of Money and… Lots of Law”: An Overview of the Extradition Jurisprudence

This section undertakes a largely statistical analysis of the case law, analyzing it by the success and failure rates of prosecutors, the types of proceedings involved, the kinds of offences charged, and the province in which the cases were handled. During this period the Supreme Court of Canada did not play an active role in extradition, so the provincial courts largely determined legal questions in this area for themselves. Yet what emerged from Canadian courts was in general a jurisprudence friendly to prosecutors and in favour of as much cooperation against crime with the U.S. as the law allowed. This is apparent in the relative success rates of the prosecution and defence. Alongside this general homogeneity, though, this analysis shows that we must be mindful of several things. First, the ‘national’ case law was in large part grounded in Ontario and Quebec. These two provinces generated the bulk of the reported cases and, as shown in subsequent sections, their courts exercised a decisive influence across Canada. Second, the case law was also grounded in the superior courts and these were often engines of

---

741 For 1837-1838 see F. Murray Greenwood and Barry Wright, eds., Canadian State Trials, vol. II. (Toronto: Osgoode Society and University of Toronto Press, 2002). For recent international work on habeas see Halliday, Habeas Corpus.
law to which only a privileged professional class could afford to appeal. An analysis of the types of offences involved and of the backgrounds of the defendants illustrates how those who contested their detentions most vigorously, and consequently sparked courts to generate more case law, were those who could most afford to do so. As one extradition defendant who did just that reportedly remarked in 1882, he “had lots of money and intended to obtain lots of law.”

The one hundred reports examined here involve sixty-four defendants (including two cases in which two co-accused are dealt with together). As a result, while the published reports include several decisions by extradition judges that do not appear to have gone any further than that initial court, either because the prisoner did not challenge the detention or the judge ordered their release, this pool of decisions also includes many more protracted cases involving multiple reported decisions. Among these is the case of John Gaynor and Benjamin Greene, first arrested in Canada in 1902 and not ultimately surrendered until 1905, after a fight which involved no fewer than eleven published decisions emanating from every level of court in Quebec, as well as the Supreme Court of Canada and the Judicial Committee of the Privy Council. Not surprisingly, these one hundred reports vary widely in length and insight. Some, such as the J.C.P.C. decision, include samples of the hearing dialogue with near-verbatim recitations of the arguments and elaborate citations from the case law and legal literature. Others are much more brief, such as a 1906 Ontario Divisional Court decision that simply mentions in the headnote the grounds on which the defence appealed and then observes in a single sentence that the court dismissed the appeal. The average case report though is quite thorough and reporters were largely careful to describe lawyers’ arguments in some detail and provide generally reliable references to cases and books relied on by the lawyers and judges.

In order to understand the ways in which these cases drove the law it is necessary to appreciate what kinds of proceedings appear in the reports. These break down into three categories: extradition hearings; bail applications, motions, and other challenges by the defence; and habeas corpus petitions. The first type, extradition hearings, took place after the prisoner’s arrest, where a judge or specially appointed commissioner examined the prosecution’s evidence and decided whether to commit them for surrender. While undoubtedly crucial to the system of international extradition, these decisions make up only a small portion of the total reported

---

743 See the summary of the case in Botting, Extradition Between Canada and the United States, 121-124.
decisions – just 13%. This should not be entirely surprising owing to the often straightforward nature of the judge’s duties at this stage in the process, namely to examine the evidence as an ordinary preliminary hearing magistrate might to see if a prima facie basis for criminality existed, a standard discussed below. As a result, their decisions were largely about the facts marshalled before them and not about contested ideas of law, which were the chief focus of the law reports. However, there were certainly exceptions to this interpretation of the committing judge’s role both among lawyers and judges, as discussed below.

The second type of proceedings was the motions, bail applications, and defence objections. These also account for a minor portion of the reported cases – 10%. They include three attempts at winning bail for a committed prisoner, a protracted effort to obtain a writ of prohibition barring an extradition commissioner from proceeding with a hearing (which involved five separate court rulings), and two defence motions made before extradition judges. It is worth noting that this aspect of the jurisprudence is largely centred on a single case. Of the ten decisions in this category, six occurred during the attempt to extradite Gaynor and Greene. While this type of proceeding regularly involved the kind of very contentious legal issues which might have been worthy of independent publication, motions and objections were often incorporated into the extradition judge’s ultimate committal decision or decided on by the habeas corpus court, and so not published as an independent report.

The final type of reported proceedings is habeas corpus cases. These make up a large majority of the cases – 77%. Almost without exception they occurred when a prisoner committed by an extradition judge challenged the legality of the detention in the superior courts. Habeas was the sole mode of doing so, and as discussed below the writ largely confined the types of objections prisoners could make to the extradition court’s decision, meaning that habeas courts most often saw themselves not as appeal courts in the general sense but only as reviewers of a narrow set of circumstances involving the judge’s jurisdiction. However, despite these limitations we can see in this pool of cases the diversity of ideas brought to bear on many aspects of extradition law. The lawyers’ arguments and judges’ decisions were often massively complex, and ranged from Canadian, to British, to American law, and to international law as well. Moreover, habeas courts ranged from single judges in chambers to full panels of the superior, divisional, and provincial appeal courts, as well as, in the Gaynor case, the Supreme Court of Canada and the J.C.P.C. Judges on the same courts also routinely disagreed about fundamental aspects of the cases, meaning that the litigation was often anything but straightforward, despite
the confines of the writ. These *habeas* cases, then, were the primary engine of the emerging extradition jurisprudence, in which courts gave shape to the treaty and statutes governing extradition.

While statistics clearly cannot conclusively map this body of law, they can help us understand its general tenor. Overall, the statistics from these cases might suggest that what emerged from Canadian courts after 1865 was a prosecution-friendly jurisprudence. For example, in the seventy-five *habeas corpus* cases in which the prisoner’s freedom was at stake – i.e., those in which the prisoner asked for an outright discharge – the court decided against the prisoner and in favour of remand 73% of the time. While the much smaller pool of committal decisions is more evenly divided, with seven committals and six discharges, the prosecution had overwhelming success in non-*habeas* motions and won nine of ten. (The defence won only in asking a Quebec court for permission to appeal to the Supreme Court, which subsequently declined the appeal citing lack of jurisdiction.) Taken as a whole, with the prosecution’s success in the *habeas* proceedings and the motions, the defence had a 29% success rate and a 30% success rate where the result was either discharge or remand. But this success/failure rate can be read both ways and it is important to remember that the prosecution was required to present only *prima facie* evidence, not proof beyond a reasonable doubt. This was a much lower standard, and in some ways that there were any discharges from custody at all might suggest either lax efforts by prosecutors and/or an interest by Canadian courts in individual rights.

It is difficult to see a uniform direction in the law across the period after 1865, at least through the statistics. A decade-by-decade breakdown of the cases shows little by way of uniform rise or fall in the prosecution or defence success rates. In the period 1868-1880, for example, the prisoners’ overall success rate was 36%. In the period 1881-1890 that number dropped to 21%, and during the decade spanning 1891-1900 it fell to just 13%. These numbers would seem to suggest a linear development of the law in favour of extradition: as the statutes and treaties widened and troublesome technicalities were smoothed over defendants increasingly found little with which to challenge their detention and surrender. However, during the period 1900-1910 the defence success rate rose steeply to 37%. These numbers are nearly identical if the discharge/remand decisions are isolated: 28% for 1868-1880; 21% for 1881-1890; 13% for 1891-1900; and 41% for 1901-1910. These uneven and non-linear statistics suggest that even as the treaties were broadened to include more offences and the statutes were amended to improve
their operation judges continued to find problems with the American cases and prisoners continued to be able to use the law to their benefit.

In assessing this body of case law, it is important to appreciate how it developed unevenly across Canada and how certain types of charges drove the jurisprudence more than others. First, the reported cases were not evenly spread across Canada. Although with the exception of Prince Edward Island all the provinces were represented in the body of published cases, it was dominated by Ontario and Quebec. Of the sixty-four individual defendants, 47% were brought before Ontario courts, while 25% were handled in Quebec, meaning that the two provinces together accounted for a large majority of the cases, and as discussed below this numerical dominance was reflected in the overwhelming qualitative importance of the decisions of the two provinces’ judges. The rest of the provinces were minor by comparison: Manitoba had seven cases (11%), British Columbia had four (6%), the North West Territories and New Brunswick each had two cases (3% each), while Nova Scotia, Alberta, and Saskatchewan each had one (1.5% each). These figures change slightly if we try to assess which provinces generated the most case law, since a single defendant often spawned multiple decisions, but they continue to illustrate the centrality of Ontario and Quebec to extradition jurisprudence. Here, Ontario dips slightly with 44% of the reported decisions, while Quebec rises to 31%. The other provinces remained similarly distant: Manitoba had 8%, B.C. had 6%, N.W.T. had 4%, N.S. and N.B. each had 2%, and Saskatchewan had 1%. As a result, it is important to appreciate that the development of Canada’s ‘national’ extradition jurisprudence was driven primarily by judges in just two of the provinces.

While Ontario generated the most case law by bulk, statistics suggest that its decisions were also the most likely to be prosecution-friendly. Here, two sets of statistics coincide – the percentage of remands vs. discharges (in habeas and committal hearings), and the overall numbers including those decisions along with the motions. In Ontario, the prosecution had a success rate in remand/discharge proceedings of 80% and an overall success rate of 81%. In Quebec prosecutors also had high rates of success: 75% in remand proceedings and 73% overall. The results in the other provinces are less statistically significant because of the much smaller pool of cases, but here the numbers are less lop-sided in favour of extradition. In Manitoba, for example, the eight remand/discharge cases were evenly divided between the prosecution and defence. In Alberta and N.B. the results were similarly even, and each province had one case decided for each side, while in N.S. and Saskatchewan the defence actually came out ahead (2-0
and 1-0 respectively). However, in B.C. and N.W.T. the prosecution had overall success rates of 4-2 and 3-1 respectively.

Breaking down the cases to examine which offences sparked the most judicial attention reveals some stark divisions. The cases are heavily weighted towards what we might call ‘white collar’ and certainly non-violent crimes. By far the plurality of cases involved forgery or uttering forged papers: they account for some 43% of the charges and nearly all involved businessmen, government officials, or otherwise prominent people. Another large pool of cases involves offences such as perjury, bribery, obtaining goods or money by false pretences or fraud, and embezzlement, nearly all of which also involved businessmen or officials. The total of these cases together with the forgery cases amount to 71% of the charges. By contrast, violent offences were minor aspects of the extradition jurisprudence. Only four murder cases appear (one of which involved a female lover who died after an abortion), and only three cases of assault with intent to murder occur. Likewise, only one charge of rape and two of robbery appear. All told, offences involving violence account for just 13% of the cases. Clearly, then, the development of extradition law in the courts was driven primarily by cases involving ‘white collar’ or business-related crime.

This concentration of the case law in such offences is forcefully reflected in the backgrounds of defendants. Information on these defendants reflects the reality that the superior courts, whose reports form the core of the extradition jurisprudence, were often accessible only to those with the resources to wage lengthy legal fights. In the cases involving money the sums vary wildly from the Manitoba case of F.H. Martin who fled Minnesota after writing a bad cheque for $44 to the Quebec case of Charles C. Browne, a New York customs officer who conspired to under-value Japanese silk imports and so reportedly deprived the government of $1,000,000 in duties.\(^{746}\) (This was not the only customs fraud case among those studied here. In 1870 Richard B. Caldwell was surrendered on charges that he had been part of a conspiracy which reportedly brought in over $250,000.\(^{747}\) All told, at least five of the cases involved federal, state, or local government officials who stole from the public treasury. This notably


included Major Ellis Phipps, the head of the Philadelphia alms house who reportedly plundered the organization of $650,000 over the course of a decade in power, and Levi D. Jarrard, the tax collector of Middlesex County, New Jersey, who allegedly embezzled over $36,000.748

Individuals involved in business make up an even larger share of the defendants. At least twelve such people appear in the reports, ranging from bookkeepers and railway clerks to senior partners in major firms and successful retail entrepreneurs. They were charged with offences such as forgery, theft, embezzlement or larceny relating to their jobs. Likewise, in the Gaynor and Greene case noted above the defendants were prominent businessmen who were given a federal contract to renovate the harbour at Savannah, Georgia. They allegedly billed for some $575,000 in work that was never done before fleeing to Quebec, where their massive pay-out from Washington fuelled their years-long legal battle.749 Moreover, there are seven additional cases involving the financial services industry, in which bankers or investment managers were charged with taking money unlawfully. Here the cases also involved huge sums of money, such as that of W.H. Latimer the proprietor of an investment firm in Philadelphia who allegedly embezzled nearly the entire capital of the business, some $185,000, and the New York bank president John C. Eno who reportedly took close to $4,000,000, nearly wiping out the bank.750

This kind of elite class background is apparent throughout the case law. Even many of the charges which did not involve stealing from an employer or a client involved defendants of considerable means. In the 1887 case of David H. Weir, for example, the prisoner was a doctor and allegedly raped repeatedly a very sick young woman in his hospital who afterwards died.751 (During his extradition proceedings Weir attempted to wield his medical background as a defence, claiming that the assaults were treatments for what he called “defective


749 For the amount of the fraud see Re Gaynor and Greene # 11, Canadian Criminal Cases, vol. X, 158.


Likewise, in the 1904 case of James N. Abeel, the forgery charge centred on a letter he had apparently falsified in order to impersonate a famous businessman and to insinuate himself with a young woman who he seduced. She later sued him for breach of promise after they had sex and he pledged to marry her; press reports noted that he was the scion of a wealthy family who would dip into his inheritance to pay off the large jury verdict against him in the case. Finally, the sole female defendant in the reported cases, Johanne Lorenz, who fled to Montreal with her daughter before a Manhattan divorce court judge could hand custody of the child to her husband, appears in press reports as an upper-middle-class wife. Her husband is described as a noted New York businessman who hired a spy to board with her during their separation to gather information about her alleged infidelities. In other words, it is apparent that those extradition defendants who made law in the courts were usually those who could afford to do so.

However, there do not appear to have been major differences in the prosecution and defence success rates between business-related and violent crime charges. In forgery cases, which made up a plurality of the charges, the prosecution had an overall success rate of 79.5%, winning in thirty-five of forty-four proceedings. The success rate for the pool of non-violent business-related crimes described above is quite close to this: 78%, meaning the prosecution succeeded in fifty-four of sixty-nine proceedings. In violent crime cases, the prosecution had a slightly lower but still quite high rate of success: 73% in the eleven decisions. In one sense this similarity should not be surprising, given that the majority of the reported cases took place on habeas corpus where the court was focused on examining the legality of the detention and spent little time on the nature of the offence, though as noted below the superior court judges were certainly conscious of the gravity of the charges in the cases brought before them. But this homogeneity probably does go to the general pro-extradition perspective which courts espoused regardless of the offence at issue.

---

752 Ibid., 395.
Thus in looking at the pool of case law we can tentatively identify trends in both how it was formed and what it reveals. Those who took their cases before the superior courts on *habeas corpus*, which proceedings made up a large majority of the reported cases, were largely those who could afford to do so, having come from an elite background and/or obtained enough money from their offences to fund lengthy legal battles. As a result, when we look at how fugitive criminals sparked the emergence of an extradition jurisprudence in Canada we see the legacy not so much of violent or brutal offences perpetrated by the kinds of working-class criminals that were long the focus of social paranoia, but of offenders who were often prominent, powerful, and respectable, whose offences struck at the core of civil society, such as the plundering of public treasuries or the embezzlement of vast sums by bankers or investment managers. We can also see that what emerged as ‘Canadian’ extradition law was in reality driven by provincial courts, concentrated in two provinces, and spearheaded by a subset of those provinces’ high court judges. Drawing conclusions from success/failure rates is more difficult. The statistics also suggest that the law these courts crafted was one largely built around what many judges called a ‘liberal’ interpretation of the law, focused on facilitating international cooperation against crime, and, ultimately, one in which the prisoners often had little chance of success. Yet the best evidence for this position is qualitative – the doctrines that the judges enunciated, and not the sheer number of cases in which they chose to remand or release.

**Domestic Courts and the Formation of an International Extradition System**

This section examines in a qualitative manner how Canadian courts shaped the Canadian-American extradition system in the years after 1865. As noted in the previous chapter, after the end of the U.S. Civil War extradition generally became a much less ideologically complex issue in Canada. Fears of having to return fugitive blacks to slavery or Confederate combatants to a vengeful Union evaporated, and the question transformed into one of maintaining law and order. Yet while Canadian officials, especially judges, were more than willing to do their part in facilitating the return of foreign criminals, extradition was not so simple as a matter of law. As the previous chapter discussed, the treaty between Britain and the U.S. under which extradition took place covered only seven crimes until 1889, when a new Anglo-American convention was signed, and Canadian efforts to more easily accomplish the return of fugitives were stymied and
suppressed by the imperial government.\textsuperscript{755} Then there was the question of the interaction between Britain’s imperial statute and the Canadian acts, which prompted nearly a decade of confusion in Canadian courts.

But beyond the parameters of the treaty and the collisions over imperial and Canadian statutes, courts in this period were tasked with creating an extradition jurisprudence from nearly nothing. The case law was minimal, both in Britain and in Canada, and so foundational questions of evidence, procedure, civil liberties, and international law confronted courts. Although none of the cases in the post-1865 period had the kind of diplomatic and political gravity of those from the Civil War era, collectively they represent courts grappling with a subject of enormous international importance, piece by piece, over the course of more than four decades. In examining these cases together we can see both the genuine desire of most judges to facilitate the “liberal” exchange of fugitives and so further the causes of international and domestic order, and the difficulties of shaping and administering this system during a period in which so many crucial legal questions had yet to be worked out.

Perhaps the most immediately apparent shift during this period was the growth and influence of the Canadian extradition jurisprudence itself. By the time of the Civil War and even into the later 1860’s and 1870’s only a handful of Canadian cases were reported, and the most important source for case law remained the English Queen’s Bench, and even there only a small number of cases had been decided with any major precedential value. As a result, a small body of English decisions had a major influence in Canada on a sweeping array of questions. In particular, the 1865 decision in \textit{Ex Parte Windsor} was crucial to Canadian case law on issues ranging from minor procedural steps to foundational questions about the meaning of the Anglo-American treaty.\textsuperscript{756} Indeed, as Patrick Brode has shown (and as discussed below) it both contradicted and essentially overrode the 1861 Upper Canadian decisions in the John Anderson slave case, relegating that decision to a very minor role in the jurisprudence.\textsuperscript{757} Nor did the English influence vanish. \textit{Windsor} was cited for decades, and other Queen’s Bench decisions


\textsuperscript{757} Brode, \textit{The Odyssey of John Anderson}, 112-115.
were relied upon as authorities until the end of this period, often decades after they were first handed down.\textsuperscript{758}

Yet as the sheer bulk of Canadian case law grew, so too did its influence. By the end of this period Canadian judges had at least touched upon most areas of extradition, and so not surprisingly Canadian decisions came to dominate the reported cases. An early harbinger of this was Samuel R. Clarke’s 1872 treatise on Canadian criminal law, which featured a lengthy chapter on extradition. Clarke’s was the first substantive and non-judicial Canadian writing on the subject, and he worked entirely from Canadian cases, with no reference to any of the English decisions.\textsuperscript{759} He emphasized in particular the Upper Canadian decision from the Civil War case of \textit{Burley}, which as shown below was central for decades, shaping how judges conceived of their own powers and the rights of the defendant.

After 1872, though, the growing scope of the Canadian jurisprudence was even clearer, and it was particularly marked by the adoption of Ontario decisions in other provinces, perhaps to be expected given the amount of this writing which emanated from central Canada. This Ontario influence was clear from the early 1880’s, when appeal courts in the province dealt with the \textit{Browne}, \textit{Hall}, and \textit{Phipps} cases. Between them, these three cases sparked nine separately published decisions in which the defence raised lengthy objections ranging from arcane technicalities, to criminal procedure, to treaty interpretation.\textsuperscript{760} The influence of these decisions across Canada is readily apparent in the number of citations and in the importance placed on these opinions. For example, in the 1889 \textit{Burke} case from Manitoba, which was one of the most substantive to emerge from Western Canada, the defence relied on \textit{Phipps, Hall, Browne}, and other Ontario decisions at every stage of their argument and they used no cases from any other province.\textsuperscript{761} Likewise, the three judges overseeing the case leaned heavily on Ontario

\textsuperscript{758} See the example of the 1844 case \textit{Ex Parte Jacques Besset}, \textit{Queen’s Bench Reports} (N.S.), vol. VI, 481-486. It was used for decades in Canada. For examples see \textit{Ex Parte Charles L. Zink}, \textit{Quebec Law Reports}, vol. VI, 268; \textit{Ex Parte Cadby}, \textit{Supreme Court of New Brunswick}, vol. XXVI, 458; \textit{Re Harsha # 2}, \textit{Canadian Criminal Cases}, vol. XI, 68.

\textsuperscript{759} Clarke, \textit{A Treatise on Criminal Law}, 23-70.


\textsuperscript{761} R. v. Burke, \textit{Manitoba Court of Queen’s Bench}, vol. VI, 122-123.
jurisprudence as the core of their opinions and made only passing reference to the province’s own extradition decisions.\footnote{Ibid., 123-145.}

We can also see in the post-1865 cases the continuing influence of the Upper Canadian argument for a “liberal” interpretation of the law. As noted in chapter four, in both the \textit{Burley} case and the post-Confederation \textit{Morton and Thompson} decision Ontario courts emphasized the twinned themes of a liberal transnationalism and a shared North American ethos, both of which made extradition desirable and possible. Domestic barriers to international cooperation against crime had to be brought down, the argument went, and it was safe to do so since the two countries had such similar beliefs, values, and laws. In particular, Justice John Hawkins Hagarty declared in \textit{Burley} that judges should apply the treaty with a “liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect”\footnote{In Re Bennet G. Burley, \textit{Upper Canada Law Journal (N.S.)}, vol. I, February 1865, 49-50.} In \textit{Morton} he declared similarly that the treaty should receive the “most liberal interpretation” in light of the “common civilization” and long border shared by Canada and the United States.\footnote{Re Morton and Thompson, \textit{U.C.C.P.}, vol, XIX, 20.}

This approach was somewhat at odds with that of the Quebec court in the Civil War St. Alban’s Raid case. There, as discussed in chapter three, the court emphasized asylum over international cooperation, and heard very extensive evidence from the defence so that the prisoners could win their own discharge. But in the post-1865 case law the ideas of \textit{Burley} roundly trumped those of the St. Alban’s Raid decision both in Quebec and in the rest of Canada. On one level that is immediately and obviously apparent by the relative use of the two. \textit{Burley} was published in the \textit{Upper Canada Law Journal} (as well as in the U.S.) and was cited frequently for decades on an array of issues from procedural questions to broader ideas of extradition and international law.\footnote{In Re Bennet Burley, 34-51; In Re Bennet Burley, \textit{Monthly Law Reporter}, vol. XXII(II), 1865-1866, 92-109.} If these citations became sparser in the last years of this period it was largely because the cases for which \textit{Burley} proved so influential in the late 1860’s, 1870’s, and 1880’s themselves became the foundations for a new generation of jurisprudence, such as \textit{Phipps, Hall, and Browne}. Moreover, some of the \textit{Burley} judges remained on the bench for decades and continued to expound a liberal vision of the law. Hagarty, most importantly, served as a judge until 1897 and last wrote a reported extradition decision in 1895, in which he endorsed once again a “fair construction and execution of the treaty” and complained of
technicalities being used to frustrate this purpose.766 The St. Alban’s decision, on the other hand, went virtually unnoticed. First, it was not officially published in any of the law reviews or reports, though it was printed privately by a Montreal lawyer.767 Even then it was rarely used by lawyers or judges and the first citation of the case did not occur until 1902 when it was used on a comparatively minor point; two small mentions of the case also occurred in 1905.768 These three citations appear to represent the sum total of the decision’s presence in the Canadian case law. Likewise, the Chesapeake decision from New Brunswick, which also shielded a Southern combatant from extradition, was also published independently, and seems to have been used very rarely in subsequent cases. It was cited by a Quebec judge in 1880, but appears to vanish from the reports after that.769

As Burley became a default reference point for jurists across the country, Hagarty’s notions of a liberal interpretation and a common North American civilization were echoed quite explicitly for decades, particularly by his Ontario colleagues.770 They were apparent in the 1888 Quebec case of Debaun, for example, where Commissioner G.E. Rioux declared that Canadian law should approach extradition with a “liberal spirit,” and where the habeas corpus judge noted that while it was important to safeguard individual liberties the “utmost good faith” must be presumed (and preserved) between Canada and the U.S.771 Likewise, in 1910 a Manitoba judge noted the enduring argument about the liberal interpretation and echoed Hagarty by saying that judges should be vigilant against giving effect to merely technical objections to extradition.772

Alongside the argument about liberal transnationalism, the belief in a common North American culture was also an enduring one. For many judges this was primarily about the reliability of U.S. justice. Quebec judge Louis Caron, for example, declared in 1902 that he implicitly trusted the U.S. in extradition matters because the country “always gives beautiful examples of justice.”773 Likewise, in the 1889 Burke case, Manitoba Queen’s Bench justice Joseph Dubuc declared that the U.S. was a “civilized country” where defendants would certainly have a fair trial, while

---

766 Re Cornelius Murphy, Ontario Appeal Reports, vol. XXII, 391.
767 The St. Albans Raid. The decision is at 447-471.
768 Re Greene and Gaynor, Les Rapports Judiciaires de Quebec, vol. XXII, 99; Re Gaynor and Greene # 3, 218.
770 See the decision of county court Judge James Shaw Sinclair, and the habeas opinion of Justice Armour in Re Ellis P. Phipps, 597, 608. In the 1904 Cohen case, Justice F.A. Anglin treated the liberal approach as the continuing and accepted default: Re Cohen, Ontario Law Reports, vol. VIII, 254.
771 U.S. v. Debaun, La Revue Legale, vol. XVI, 634-635; Ex Parte Charles Debaun, Montreal Law Reports, vol. IV, 151. For another example of the
772 Re Moore, Manitoba Reports, vol. XX, 49.
Justice A.C. Killam endorsed the “freest exchange with our neighbours to the south” of criminals.\textsuperscript{774} Others saw the issue in more expansive terms. In 1906, for example, Justice R.M. Meredith of the Ontario Court of Appeal emphasized the long border and the shared basis of Canadian and American law in English common law, but he also singled out the apparently common racial heritage and cultural traits of Canadians and Americans as reasons why the U.S. could be trusted and why Canada should afford no asylum to American fugitives.\textsuperscript{775}

Clearly, judges were generally well-disposed to many of the ideas underlying international extradition. This was especially true after the end of the Civil War, and became more widespread as the specialty and political offence exception debate waned in the 1880’s. The result was that the links made between extradition and the violation of humanitarian asylum were almost entirely severed. First and foremost, the end of the war meant the end of slavery. As Hagarty’s colleague John Wilson wrote in \textit{Morton}, a “terribly dense cloud” had been swept away, and it was now safe to set up extradition arrangements involving a much larger range of offences without needing to exclude those which slaves might commit in fleeing the South.\textsuperscript{776} This was doubly true as the debate over specialty eased. As noted in chapter three, the political offence exception had been accepted as law by courts in Upper Canada, Lower Canada, and New Brunswick during the Civil War. This was affirmed in 1882 by Hagarty himself who wrote that it “always will be, the honest pride of our country to offer an inviolate asylum to mere political fugitives.”\textsuperscript{777}

Yet until the mid-1880’s the specialty issue lingered. After all, as noted in chapter three, when the British and Americans re-established extradition relations in 1876 after the treaty abrogation, the issue was not finally resolved. Instead, Britain agreed not to enforce the principle on the older Anglo-American treaty, while not changing its view on the place of specialty in international law. As a result, the issue was occasionally raised by defendants in Canadian courts. It emerged in the 1886 New Brunswick \textit{Cadby} case, for example, where Justice W.H. Tuck noted conflicting American precedents on whether the country was bound by international law to enforce specialty, and where he was forced to evaluate whether the issue should affect judicial consideration of extradition cases.\textsuperscript{778} Yet that conflict in the U.S. was soon resolved with the

\textsuperscript{774} R. v. Burke, 138, 141.
\textsuperscript{775} Re Harsha, \textit{Canadian Criminal Cases}, vol. X, 449.
\textsuperscript{776} Morton and Thompson, 25.
\textsuperscript{777} Re Ellis P. Phipps, 606.
\textsuperscript{778} Ex Parte Cadby, 466-468. The Kentucky Court of Appeals decided in 1878 that specialty was binding. See Commonwealth v. Hawes, \textit{Albany Law Journal}, vol. 17, 1878, 325-329.
Supreme Court’s 1886 decision in *U.S. v. Rauscher*, which held that specialty was binding.\(^{779}\) At a stroke, the issue was gone and the dispute between the U.S. and Britain was over. Thereafter, Canadian courts simply brushed aside defence objections grounded in specialty. As Justice Caron noted in 1902 it was now “generally admitted” that no state had a right to try extradited prisoners on anything other than the crime of surrender. According to Caron, this was “one of the principal rules of extradition.”\(^ {780}\)

Even as these principal rules were being worked out, Canadian courts also faced the task of constituting and administering the extradition system at more minute but nonetheless important levels. While questions about the admissibility of certain types of evidence or the definition of offences might appear to be mundane and wholly procedural, they were in fact among the chief challenges to a more efficient system of international law vis a vis extradition. These, in other words, were very practical questions of enormous international importance. Nor were they simple, as the issue of documentary evidence makes plain. Throughout this period courts routinely confronted the question of what kinds of documents could be used to secure the surrender of a prisoner. Since extradition hearings generally took place far from the scene of the crime prosecutors usually relied on depositions as opposed to *viva voce* witness testimony. As a result, these documents carried an enormous burden: they had to be sufficient in every respect to support an individual’s detention and removal from Canada to a place hundreds of miles away if not more. Even for judges who generally believed in the necessity of efficient extradition, this raised questions of civil liberty. The Ontario judge John Wellington Gwynne said in 1874 that where a prosecutor relied on such documents, “it is the right of the accused, which impartial justice and the letter and spirit of the law award to him, that the minutest forms and technicalities… shall be strictly complied with.”\(^{781}\) Likewise, as late as 1910 the Manitoba judge T.L. Metcalfe declared that he initially found it “abhorrent” that a person could be detained and then removed from Canada on the basis of depositions when they could not cross-examine or confront the witnesses who gave them.\(^ {782}\) Yet in the end Metcalfe, like the other Canadian judges who considered this issue, agreed that extradition cases could ultimately rest on such documents.

\(^ {780}\) The Gaynor and Greene Extradition Proceedings, 546. The Ontario courts took a similar position: Re Garbutt, *Ontario Reports*, vol. XXI, 466, 475.
\(^ {782}\) Re Moore, 53.
Nevertheless, defence challenges to the admissibility of particular depositions were constant. During the 1870’s and early 1880’s defence lawyers used the different provisions of the imperial and Canadian acts to try to exclude prosecution evidence, thus raising the broader question of which piece of legislation prevailed, a debate examined in chapter four. Canada’s 1868 legislation allowed only those on which the original foreign arrest warrant was based, while Britain’s imperial act had looser requirements. As the debate over which act was in force in Canada played out the admissibility of depositions was often the chief issue at stake. But challenges to depositions did not end with the resolution of that debate. Some challenges came down to issues of basic quality – was the information contained in the deposition sufficient to hold the prisoner? Judges sometimes found that it was not and expressed bitter frustration with the prosecution. In one case a B.C. county court judge discharged the prisoner on that basis, and excoriated the American evidence, quoting from the English judge Lord Bramwell in saying that the depositions did not “condescend to particulars” about the defendant’s guilt.

In other cases the defence focused on whether the depositions were properly authenticated. This seemingly arcane technical requirement was in fact crucial to the extradition system. Extradition hearings were usually far more text-based than other areas of criminal law, and questions about the authority and legitimacy of the texts continually emerged. In a system based on documents in which the freedom of the prisoner and their removal from Canada was at stake, courts were quite clear that documents had to be properly and officially issued in order to be legal evidence, though what that meant in practice was somewhat flexible. In the 1909 Manitoba case of Royston, for example, the defence lawyer challenged the prosecution documents – namely, shorthand depositions signed by the person who had transcribed them but not by the Justice of the Peace before whom they were taken or by the witness. The judge agreed with the defence, released the prisoner, and wrote that the Criminal Code prescribed a procedure for authenticating such evidence and it was simply not an option to bend the rules to ignore these requirements. In other cases, such as the 1904 N.W.T. case of Lewis, the defence made arguments about who could properly authenticate such documents – in other words, which foreign officials could grant the imprimatur of the United States government and so be trusted in Canadian courts. The wording of the statute was vague on this and defence lawyers sometimes argued that while a senior judge might be acceptable, a local clerk of a county court was not a

---

783 For example, see R. v. Browne, *U.C.C.P.*, 496.
784 In Re Ockerman, *British Columbia Reports*, vol. VI, 144.
sufficiently responsible official.\textsuperscript{786} In \textit{Lewis}, though, as elsewhere, the courts interpreted the statute broadly to include such local government officials.\textsuperscript{787}

Debates over evidence also shaped the extradition jurisprudence in other ways. In at least eight of the sixty-four cases prosecutors relied at least in part on the foreign indictment as evidence of criminality. Here again a seemingly-mundane aspect of the law had much hidden significance. If such documents were accepted either as \textit{prima facie} in themselves or as contributing to it, the extradition system would be stream-lined remarkably and the justice systems of Canada and the U.S. would be moved towards a kind of automatically reinforcing relationship, removing (or at least severely diminishing) the judicial functions of the extradition courts. As the Ontario judge Featherston Osler wrote in 1881, accepting indictments would transform extradition hearings from judicial investigations of crime into mere confirmations that a charge had been laid at all.\textsuperscript{788} In a case the previous year Osler had also noted that this would make the foreign grand jury, and not Canadian courts, the arbiter of Canadian extradition.\textsuperscript{789}

But there was dissent on this point, even on the same bench. Writing in the same 1881 case as Osler, Chief Justice Adam Wilson agreed with him about the legal transformation that would occur if indictments were used as evidence. Unlike Osler, though, Wilson embraced the shift and articulated a provocative vision of the connections between Canadian and American law that was both based in and much beyond the pervasive idea of a liberal interpretation of the law. He said that there was no reason a U.S. indictment should not have the same standing in Canada as it did in the U.S. Since it was sufficient to hold a prisoner there, it should be in Canada as well.\textsuperscript{790} Wilson admitted that he did not know the evidence on which the indictment was based, but said that since U.S. courts would be bound by it so was he.\textsuperscript{791} There was also some support for this position in Quebec, where Justice Alexander Cross noted that while it was not necessary for him to take a firm position in that particular case, he leaned towards Wilson’s opinion and admitted the indictments.\textsuperscript{792} However, both in Quebec and around the country this vision of extradition and of international cooperation did not prevail. Beginning with a Quebec

\begin{footnotes}
\footnotetext[786]{Re \textit{Lewis}, \textit{Canadian Criminal Cases}, vol. IX, 236.}
\footnotetext[787]{Ibid. Also, Re H.L. Lee, \textit{Ontario Reports}, vol. V, 593.}
\footnotetext[788]{R. v. Browne, \textit{U.C.C.P.}, 515.}
\footnotetext[789]{R. v. Hovey, \textit{Practice Reports}, vol. VIII, 349-350.}
\footnotetext[790]{R. v. Browne, \textit{U.C.C.P.}, 501-502. Wilson’s view on this apparently affirmed the initial \textit{habeas} judgment of Justice J.D. Armour which was not reported.}
\footnotetext[791]{Ibid., 501.}
\footnotetext[792]{Ex Parte William Campbell Phelan, \textit{Legal News}, vol. VI, 262.}
\end{footnotes}
decision in 1874 and ending with another Quebec case in 1906 courts generally rejected the idea that indictments were legal evidence against the prisoner, although prosecutors kept trying.\footnote{Re Israel Rosenbaum, \textit{Lower Canada Jurist}, vol. XVIII, 203; U.S. v. Browne \# 2, \textit{Canadian Criminal Cases}, vol. XI, 174.}

A more fundamental question about the links between Canadian and American law involved the definition of offences. The extradition system was partly premised on a certain similarity of law between Britain and the U.S. – that forgery, for example, was a crime similarly recognizable and recognized in both countries. In making an extradition request, the prosecution clearly had to establish that the evidence would support the charge had it been made in Canada (this was a feature of the treaty and each successive extradition statute). But the issue that emerged in Canadian courts was whether the foreign law had to be proved as well. That is, did the prosecution have to show that the evidence would support the same charge in the U.S., and thus that the offences were more or less the same in both countries? This is now known as the principle of dual criminality and there is a wealth of scholarship and case law elucidating the issue, but in the late nineteenth-century the question was fairly new and far murkier.\footnote{Christopher L. Blakesley, “Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond--Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality,” \textit{Journal of Criminal Law and Criminology}, 91(1), 2000, 1-98; David Levy, “Double Criminality and the U.S.-U.K. Extradition Treaty,” \textit{Brooklyn Journal of International Law}, 8(2), 475-498; Sharon A. Williams, “The Double Criminality Rule and Extradition: A Comparative Analysis,” \textit{Nova Law Review}, 15, 1991, 581-623; Manley O. Hudson, “The Factor Case and Double Criminality in Extradition,” \textit{American Journal of International Law}, 28(2), 1934, 274-306.} In Canada the debate really began with the John Anderson case examined in chapter three. There, lawyers for Anderson argued that Missouri law was simply too different from Canadian law for extradition to be possible – that Anderson had murdered someone attempting to lawfully enslave him, and since those facts could not occur in Canada he could not be committed for trial. Yet the Upper Canada Queen’s Bench disagreed, and Sir John Beverley Robinson found evidence to support a murder charge and held that this was all that was necessary for extradition.\footnote{See chapter three.} As an early and seminal decision this case probably would have exercised great and enduring influence in Canada and led to a more straightforward burden for the prosecution, but it was supplanted in 1865 by the English case \textit{Ex Parte Windsor}, where Lord Chief Justice Alexander Cockburn declared that extradition offences must have “some common element in the legislation of both countries.”\footnote{Ex Parte Windsor, \textit{English Reports}, vol. 122, 1291.} As Patrick Brode has noted, \textit{Windsor} became a powerful force in Canadian law
and sparked decades of debate about how to define crimes in the context of international extradition.  

This was far from being a peripheral question. In the cases of at least nineteen of the sixty-four defendants examined here the issue emerged when lawyers argued it or when judges felt compelled either to take a stand or to at least note the ongoing controversy. Indeed, one of the chief objections made by defence lawyers throughout this period was that the prosecution had not proved that the charge was also an offence under foreign law. We can see in the case law several currents of thought on this question. In the wake of *Windsor*, for example, several jurists quoted the Lord Chief Justice and declared that the offence needed to be in one in the “general law” of both countries.  

(It is worth noting that when Cockburn propounded the “general law” standard he appeared ignorant of the fact that there was not a federal law in the U.S. on most aspects of criminal law, since the states mostly had jurisdiction in this area – a reality which it took Canadian judges decades to point out. Yet whether there was a burden on the prosecution to prove the foreign and Canadian law remained uncertain. In Quebec and Ontario, some judges declared that there was a presumption of similarity between Canadian and American law. In a similar vein, others echoed the *Anderson* court and held that there was no obligation on prosecutors to prove the foreign law at all, as what mattered was the Canadian definition of crimes.

The widespread disagreement on this was clearly evident in the 1894-1895 *Murphy* case in Ontario. On hearing the first *habeas* petition the Chief Justice of the Common Pleas held that proof of foreign law was not necessary. But when the case was brought into the Court of Appeal the four-judge panel evenly divided on the question. In his final reported extradition decision Chief Justice Hagarty once again focused on the imperative of fairly executing the treaty, and contended that since the British and American governments had treated extradition crimes as based on “generally similar principles” in framing the treaty and judges would only frustrate the aims of the convention if they insisted on proof. Nonetheless, two judges

---

801 See the arguments of Chief Justice R.M. Meredith in Re Cornelius Murphy, *Ontario Reports*, vol. XXVI, 173-174.  
802 Ibid.  
803 Re Cornelius Murphy, *Ontario Appeal Reports*, vol. XXII, 391.
disagreed, finding that an offence could not be considered extraditable unless it was an offence in both countries, and thus judges must be assured that this was so in each case.\footnote{Ibid., 396-397.} As a result of the deadlock, the issue remained unsettled and conflicts continued to emerge. For example, in 1904 one Ontario judge held that proof of the foreign law was not necessary, while in 1906 another declared that given the simmering conflict it would be prudent of judges to request and receive such proof.\footnote{Re Cohen, \textit{Ontario Law Reports}, vol. VIII, 252; Re Harsha, \textit{Canadian Criminal Cases}, vol. X, 442.} That same year the Chief Justice of the North West Territories held that the court must be satisfied of the foreign law.\footnote{Re Latimer, \textit{Canadian Criminal Cases}, vol. III, 81.} In a case at the end of this period in 1910 Manitoba judge T.L. Metcalfe noted the mess of conflicting precedents and declared that it was not, fortunately, necessary for him to deal with what he called “this vexed question.”\footnote{Re Moore, 48.} Thus even on a question litigated continually over the course of more than forty years there was little by way of legal certainty by the end of this period.

The question of how closely Canadian law should be integrated with the U.S. was raised in other contexts as well. Examining how American sources and authorities were used in Canadian courts, for example, illustrates both a wide engagement with American legal ideas in some ways and also a deep resistance to them in others. This use of American ideas can be broken down into three distinct issues: the invocation of U.S. decisions as binding authorities for the operation of the Canadian statute, the use of such decisions to create a shared jurisprudence of the treaty (as distinct from the statute), and the more general role of American legal literature in informing debates and broad ideas about extradition. In all three areas a widespread engagement with American jurists and case law is apparent. Citations abound to American judges and legal writers, and on issues like specialty or other open questions lawyers and judges often dealt in some detail with ongoing American debates. This was certainly so in the New Brunswick case of \textit{Cadby} in 1886, noted above, where a sweeping array of imperial, Canadian, and foreign sources were used to inform the debate. Since the case involved specialty, the defence lawyers and judge drew from the conflicted American cases, cited Henry Wheaton’s \textit{Elements of International Law} treatise, as well as diplomatic correspondence between the imperial and American governments. On the formalities of the extradition documents and
questions about the definition of forgery they drew from British, Canadian, as well as American treatises and cases, venturing as far afield as a decision from the Kansas Supreme Court.  

But this cosmopolitanism had its limits. When lawyers tried to shape the operation of the Canadian extradition statute using American jurisprudence they were rebuffed. Indeed, courts in Quebec and Ontario quite bluntly rejected such attempts. For example, defence lawyers in both provinces argued in 1887 and 1899 that in cases involving a private prosecution the judge had to demand proof that the actual extradition request was being made by the foreign government – an obligation declared by the U.S. federal courts on the basis of the American extradition statute. The defence lawyer in the Ontario case told the court that since the Canadian and American statutes were “analogous,” the U.S. decisions were binding, at least on this point. In both cases the courts roundly rejected the move. Justice Cross of the Quebec Queen’s Bench declared that the U.S. cases were not authorities on the Canadian act. “We follow our own law,” he said. Likewise, in the Ontario case Common Pleas Chief Justice W.R. Meredith was at pains to differentiate Canadian and American law. Although the issue was settled in the U.S., he said, Canadian practice was “based upon a different and I venture to think more liberal interpretation.” As a result, we can see that even (or sometimes where the Americans were more inclined towards technicalities, especially) among the proponents of a liberal, pro-extradition approach, there were key limits to the connections between Canadian and American law.

However, in other areas we can see a kind of shared transnational vision of the law. On issues involving the interpretation of the treaty (as distinct from subjects covered by the statute), lawyers and judges were more than willing to consult and apply foreign law and to defer to what they considered to be shared understandings of the convention. When the Quebec commissioner G.E. Rioux was considering a defence objection that would seemingly raise the evidentiary burden on the prosecution, he deferred to what he called the joint Anglo-Canadian-American interpretation of this aspect of the treaty, saying he saw no reason to put a “less liberal construction on it in the present case.” On another question, the decades-long debate over

---

808 Ex Parte Cadby, 456-492.
810 In Re Lazier, 419-420.
811 Re John F. Hoke, 106.
812 In Re Lazier, 422. For another case in which the court rejected the idea of American precedents as binding, see U.S. v. Debaun, 634.
813 U.S. v. Debaun, 634.
whether crimes had to be defined just as they were in 1842 in order to remain extradition offences, jurists often looked to U.S. authorities for guidance. In *Hall*, for example, Ontario judge William Proudfoot drew from the American conflict of laws treatise by famed writer Francis Wharton and from the decisions of the American federal courts in forming his views on treaty construction. Similarly, on the same point in *Burke* Manitoba Chief Justice T.W. Taylor consulted the Canadian case law and then sought out “the eminent writer” Wharton’s views from the conflicts book.

While U.S. decisions might not be binding on the Canadian statute, Canadian jurists readily sought out a wide array of non-Canadian ideas on key points of law. This was especially true as the treatise literature related to extradition developed rapidly during the last quarter of the nineteenth-century. While Samuel R. Clarke’s Canadian treatise dealt with Canadian cases in some detail, it was very infrequently cited. The more influential non-American work was the English lawyer Sir Edward Clarke’s book on extradition, which grew substantially in length from its first publication in 1867 through several editions into the early twentieth-century. Clarke’s work was something of a standard in extradition cases, and he was widely known to be a pre-eminent British expert in the field. Indeed he was retained by the U.S. government as counsel for the J.C.P.C. hearing in the *Gaynor and Greene* case.

But American books were also at the core of the Canadian jurisprudence. This influence is at odds with what Blaine Baker has argued was the declining influence of foreign legal ideas and the ‘re-colonization’ of Canadian legal thought by British books and cases in the late nineteenth-century. Indeed, in the area of extradition that trend was reversed and American literature played an increasing role as its volume and scope grew over the century. As noted, Francis Wharton’s works on conflicts of law and criminal law were undoubtedly influential, and other American books dealing with *habeas corpus* generally and extradition in particular became virtually ubiquitous in Canadian courts. On *habeas corpus* questions, lawyers and judges frequently turned to Rollin C. Hurd’s treatise *On the Right of Personal Liberty and on the Writ of...*

---

814 In Re William A. Hall, 339.
815 R. v. Burke, 133.
817 See *Re Gaynor and Greene # 3, Canadian Criminal Cases*, vol. IX, 205-239.
818 Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire.”
819 See the use of Wharton’s criminal law scholarship by defence lawyers: Re Ellis P. Phipps, 599; R. v. Burke, 122. The work of the American writer Joel Prentiss Bishop was also important, particularly his *Commentaries on the Law of Criminal Procedure*. (Boston: Little Brown, 1866); for examples of its use see: Re John F. Hoke, *La Revue Legale*, vol. XV, 103-106; Re William A. Hall; In the Matter of the Extradition of William A. Hall.
Habeas Corpus, which was first published in 1858 but which remained useful for jurists for decades, and which featured an extensive section on extradition. In cases such as Debaun, Canadian judges looked to Hurd on crucial questions such as the scope of their own power on habeas corpus, and the rights of the prisoner. Likewise, as a substantial American treatise literature specifically devoted to extradition emerged it was quickly incorporated into Canadian case law. This was certainly the case with Samuel T. Spear’s multi-edition Law of Extradition, which like Clarke’s work grew substantially from its first edition length of 448 pages in 1879 to its third edition 766 pages in 1885. (It is worth remembering, as pointed out in chapter two, that Henry Wheaton’s 1836 international law treatise dealt with extradition in less than one hundred words.) Canadian lawyers and judges soon used Spear’s book as an authority alongside Canadian case law on issues ranging from basic procedure during the extradition and habeas hearings, to the requirements of the common law regarding charging documents, to the aims of extradition and international law generally.

This book was soon joined by the massive work of State Department lawyer, Columbia law professor, and future I.C.J. judge John Bassett Moore, long a key figure in America’s practice and scholarship of international law. Moore’s book again demonstrates quite blatantly how the jurisprudence of extradition had developed: together his two volumes on international and inter-state extradition came to nearly 1600 pages. It too was soon used alongside case law to address a sweeping array of questions. In a 1901 Quebec case, for example, Judge J.S.C. Wurtele used the book to define the prosecution’s evidentiary burden and to assess his own jurisdiction as a habeas corpus judge. In addition, jurists drew from works by California lawyer William Church on habeas corpus and from the Detroit police department lawyer John G. Hawley on extradition. In other words, American ideas had a crucial role in defining the administration of justice in Canadian extradition courts.

---

821 Ex Parte Charles Debaun, 152-153. See also its use by counsel, Ex Parte Cadby, 458-459.
823 For examples of its use in these areas, see Re John C. Eno, The Legal News, vol. VII, 202; Ex Parte Cadby, 456-470; Re Cornelius Murphy, Ontario Appeal Reports, vol. XXII, 392.
825 Ex Parte Isaac Feinberg, Canadian Criminal Cases, vol. IV, 273-274.
826 William S. Church, A Treatise of the Writ of Habeas corpus. (San Francisco: A.L. Bancroft, 1884); John G. Hawley, The Law and Practice of International Extradition Between the United States and Those Foreign Countries with which it has Treaties of Extradition. (Chicago: Callaghan and Co., 1893).
Crafting this system could sometimes be a messy business. Overall, judges were seemingly well-disposed to the ideas of liberal transnationalism which often underlay extradition, and they worked within a statutory framework which, as shown in chapter four, was geared towards making extradition relatively efficient. But it is important to appreciate that challenges to this orderly system emerged. Even as the end of slavery and the decline of the specialty issue eliminated asylum-based concerns, the law was pulled in different directions by defence lawyers and prosecutors and serious differences emerged among judges on issues fundamental to the system. On some questions, such as the use of indictments as evidence, a mainstream opinion soon emerged which stifled dissenting views and produced a fairly homogenous approach in line with the liberal view. On other issues, such as the proof of foreign law debate, there was little by way of resolution during this period, despite nearly fifty years of litigation. Looking at this case law as an aspect of federal state formation it is clear that it was one that was both rarefied (being largely generated by learned debates in superior courts) but also contested.

**Defendants, Civil Liberties, and Challenges to Extradition in the Courts**

This section examines the ways in which prisoners tried to challenge their detentions in Canadian courts. It focuses in particular on the kinds of legal issues that these challenges raised and the ways in which they shaped the law. It illustrates the ongoing and often increasing divisions on key points of law. It also highlights that there was an important tension between the ‘liberal spirit’ and resistance to legal technicalities advocated by judges like Hagarty, which was probably the mainstream approach, and the civil liberties concerns enunciated by other jurists. As noted above, one of Hagarty’s Ontario colleagues, John Wellington Gwynne, held in 1874 that defendants had the right according to what he called “impartial justice and the letter and spirit of the law” to raise all possible technical objections to their detention and surrender, especially where prosecutors relied on documentary and not *viva voce* evidence. These two positions were certainly not diametrically and inherently opposed – Hagarty was not in favour of extradition at any cost and Gwynne was not using technicalities to ensure an asylum for fugitives. Yet while the division between the two perspectives was more an issue of emphasis, these positions did translate into different approaches at legal interpretation.

827 In *Re Lewis*, 237.
Sometimes this occurred in largely rhetorical and sometimes in much more substantive and specific ways. We can see that judges sometimes took on this debate in arguing for a broader vision of extradition law, as when Ontario judge J.D. Armour singled out Gwynne’s remarks for criticism while making an argument for a “wide and liberal interpretation” of the treaty generally. On the other hand, there were moments in which the debate manifested itself in more substantive issues of legal interpretation, especially where the law really was uncertain and interpretive lenses were brought to bear. In a 1904 Ontario case, for example, the issue was whether the items which the prisoner had allegedly received unlawfully qualified under the statute – the prosecution urged a broad reading of what “other property” meant while the defence took a much narrower position. Justice F.A. Anglin ultimately decided for the defence and explained his decision in part by saying that the liberal approach of Burley and Morton should not be taken too far. Here, he suggested, such a perspective might mean including an offence in the treaty that was not there and should not be read in. As a result, we can see that although the liberal position was probably the mainstream of legal thought on extradition, it was far from a uniform or uncontested position.

A similar tension played out in many other areas of extradition law, as defendants challenged their detention and surrender. Probably the most frequent defence objection was that the prosecution had failed to meet its evidentiary burden. The enduring standard for doing so was set in the 1842 treaty and followed thereafter in British and Canadian legislation: the evidence had to be sufficient to commit the accused for trial if the offence had been committed in British territory. That meant that judges were to sit on cases as a preliminary magistrate might and apply most of the same standards and procedures they would in deciding whether to commit in an ordinary criminal case where the evidentiary standard was prima facie. As one contemporary law dictionary put it, prima facie evidence was such that it would be believed by a jury and must prevail if not rebutted or disproved by contradictory evidence; this was juxtaposed with conclusive evidence, which excluded the truth of any other view.

The extradition jurisprudence on this point really began in the 1850’s, when Justice R.B. Sullivan delivered one of the first reported Upper Canadian decisions. Sullivan held that extradition could not be done on grounds of suspicion only, and that the evidence must be

---

828 Re Ellis P. Phipps, 607-609.
830 See 6 & 7 Vic, cap. 76, preamble [U.K.]; 39 & 40 Vic, cap. 25, s. 13 [Canada].
sufficient to take to a trial jury.\textsuperscript{832} This approach – the \textit{prima facie} standard and the analogy to a committing magistrate – became the dominant one, guiding jurists for decades. Saskatchewan judge J.H. Lamont summarised his duties this way at the end of the period: to see that the offence was extraditable and that there was \textit{prima facie} evidence that it was committed by the accused.\textsuperscript{833} While there were persistent attempts by defence counsel to modify and complicate this approach, as shown below, there were two powerful currents of thought which reinforced the \textit{prima facie} logic. The first was that Canadian extradition courts were not the proper venue for trying the case – that was for a trial jury. Here there was widespread agreement. Justice Gwynne wrote in 1869 that a jury was “the only constitutional tribunal” to hear the whole case, while Chief Justice Hagarty noted that he had “neither the right nor the desire” to put his own opinions ahead of those of the jurors.\textsuperscript{834} The other underpinning was that the courts were not the final arbiters of the case even within Canada, as the final decision rested with the federal cabinet. Several judges in the 1880’s, 1890’s, and early 1900’s noted this as both another layer of protection for the prisoner’s rights and a reason why judicial involvement should not be as rigorous as defence counsel constantly suggested.\textsuperscript{835} Indeed in 1868 Chief Justice Draper wondered aloud whether the courts even had a role in reviewing the evidence at all, or whether the statute transferred that function entirely to the executive branch.\textsuperscript{836}

This mainstream was, however, frequently pulled in different directions by lawyers on both sides and by some judges as well. Defence lawyers in Manitoba and Quebec, for example, argued for a much higher burden of proof. In the Manitoba case the defence told the judge that he must be satisfied that the prisoner “would be convicted without any reasonable doubt.”\textsuperscript{837} Likewise, in Quebec defence lawyers in the 1888 \textit{Debaun} case argued that the evidence must be “conclusive,” a standard they imported from a U.S. Supreme Court decision, again illustrating the degree of influence which American legal ideas sometimes had among Canadian jurists.\textsuperscript{838} But there was scant support for such high standards (which was itself probably a reason why Debaun’s lawyers sought out U.S. authorities). In the reported cases, there was really only the

\textsuperscript{832} In Re John Wesley Kermott, \textit{Upper Canada Chamber Reports}, vol. I, 253-257.
\textsuperscript{833} Re Claude McCready, \textit{Saskatchewan Law Reports}, vol. II, 47. For another example near the end of this period, see the 1902 New Brunswick case Re Kelly, \textit{Canadian Criminal Cases}, vol V, 541-543.
\textsuperscript{834} R. v. Gould, \textit{U.C.C.P.}, vol. XX, 159, 163.
\textsuperscript{835} See Ex Parte Charles Debaun, 153; Ex Parte Lanctot, \textit{Les Rapports Judicaires de Quebec}, vol. V, 427; Re Harsha, 450.
\textsuperscript{836} R. v. Frank Reno and Charles Anderson, 298.
\textsuperscript{837} Re George A. Stanbro, \textit{Manitoba Reports}, vol. I, 276.
\textsuperscript{838} U.S. v. Debaun, 634.
assertion of Justice G.W. Burton of the Ontario Court of Appeal in *Phipps* to support a higher burden. Burton had observed in a largely rhetorical paragraph that the evidence ought to establish “beyond all reasonable doubt” that the prisoner was guilty of an extraditable crime; this view did not prevail among judges.\(^{839}\)

On the other side, some prosecutors and judges worked to lower the burden of proof. As noted above, one facet of this effort was to contend that grand jury indictments should be accepted as evidence of criminality, a change which would have profoundly altered the role of the courts in extradition. But beginning in the early twentieth-century another move was made in the same direction as prosecutors reconceptualized the burden itself as lower than previously supposed. Prosecutors argued in several cases that they only needed to establish “probable cause” that the prisoner was guilty.\(^{840}\) This was a similar but lower standard than *prima facie*, and is now often used in the U.S. as the standard for granting a search warrant. According to one contemporary law dictionary, probable cause was “grounds which justify anyone in suspecting another of a crime,” while another noted that it was frequently used as a defence in false imprisonment cases as basic justification for arrest.\(^{841}\) This found more support among judges than the defence arguments to raise the burden. Quebec judge J.S.C. Wurtele was probably the first to argue for this standard in a 1901 case, but he was followed by B.C. judge Norman Bole in 1904.\(^{842}\) In 1906 Quebec judge Henri Thomas Taschereau also relied on the standard, defining it as “a reasonable ground of suspicion” that the prisoner was guilty.\(^{843}\) As a result, it is apparent that even by the end of this period new ideas were emerging on some important issues in the jurisprudence.

While the probable cause question only emerged at the end of the period it does coincide with longer-term views about the limited role of the courts and the desirability of making the international exchange of fugitives easier. This general set of beliefs fundamentally shaped the scope of the extradition hearing and limited the ways in which prisoners could challenge their detention. The 1877 Extradition Act allowed prisoners to offer defences based on the political offence exception (of which there were none in reported Canadian-American cases during this period), the mis-identification of the accused (also none), or the crime not being an extradition

\(^{839}\) Re Phipps, 91.
\(^{840}\) See the arguments in Re Moore, *Manitoba Reports*, vol. XX, 42-43.
\(^{841}\) *Wharton’s Law-Lexicon*, 640; *Mozley and Whiteley’s Law Dictionary*, 255.
\(^{842}\) *Ex Parte Isaac Feinberg*, *Canadian Criminal Cases*, vol. IV, 272; *Re Horace D. Gates*, *Canadian Criminal Cases*, vol. VIII, 249-250.
offence (an issue which involved the foreign law question discussed above). Together these were of limited utility to defendants.

A more important question for prisoners was whether they could present exculpatory evidence to balance or override that of the prosecution. This was an issue which simmered for decades, though defendants had little success. In the first place, there were debates about whether judges could even receive such evidence if it were offered, with some prosecutors seeking to deny that power entirely. In the 1874 *Rosenbaum* case in Quebec prosecutors told the judge that he had no authority to hear exculpatory evidence from the defence, a view he dismissed as “extreme.” Likewise, in the 1868 *Reno and Anderson* case Draper approved of the committing magistrate’s decision to hear defence witnesses but decisively limited the efficacy of this evidence by declaring that it nonetheless would not have been right to discharge the prisoners because of that evidence, since it was not for the Canadian courts to weigh contradictory facts. Hagarty wrote in 1869 that the courts were not called on to decide which view of a case – the prosecution’s or the defence’s – was best supported. All that was necessary was *prima facie* evidence of guilt fit for a trial jury, the functions of which extradition courts should not usurp. This proved a key and enduring idea, as the Chief Justice of the N.W.T. demonstrated in 1906 when he emphasized that the extradition hearing was “in no manner a trial of the accused.” This odd rule left defendants with little power – they could often present documentary evidence and even call witnesses, but these efforts would mean nothing. Not surprisingly, in other cases judges simply refused to hear defence evidence at all, since they probably regarded any such effort as a waste of time.

The exculpatory evidence question came to the fore in cases where the accused wanted to prove an alibi. Here at least two defendants suggested that this should win some special consideration by the courts to bar their removal from Canada. In other words, they asked why a Canadian court would order their detention if they could prove that it was simply impossible for them to have committed the alleged offence. In the 1896 *Lanctot* case in Quebec it appears that the extradition judge did receive defence evidence that the prisoner could not have been in the

---

844 39 & 40 Vic., cap. 25, s. 12(3).
845 In Re Isaac Rosenbaum, *Lower Canada Jurist*, vol. XX, 166.
846 *Reno and Anderson*, 297.
849 For examples, see *Re George A. Stanbro*, *Manitoba Reports*, vol. I, 263-264; decision of county judge in *Re Ellis P. Phipps*, 591.
small Vermont town when he was alleged to have broken into a shop, but committed the prisoner anyway. The *habeas corpus* court was similarly unmoved and Justice R.N. Hall held that while the judge “may, and should” hear exculpatory evidence for the accused, he had to commit if the prosecution met the *prima facie* burden.\(^{850}\) This question was highlighted even more directly by the 1891 *Garbutt* case where the defendant was facing extradition from Ontario to Texas. It is difficult to get a sense of the details of the case from the law reports, though the *New York Times* and other papers alleged that Garbutt had been part of a gang that defrauded American banks of as much as $100,000 through forged drafts.\(^{851}\) During his hearing Garbutt’s lawyers attempted to submit what they called evidence “of the strongest and most convincing character” that he had been in Wingham, Ontario, when he was said to have committed the offence in Texas.\(^{852}\) Press reports suggest that he intended to call eighteen witnesses from Wingham to this effect.\(^{853}\) Unlike in the Quebec case, though, the hearing judge refused to allow it, and remanded Garbutt for surrender. The defence then petitioned for *habeas* to Justice William Street, arguing in part that the judge had erred by refusing even to hear the witnesses; Street disagreed.\(^{854}\) Garbutt then applied to the Court of Common Pleas, and they too rejected the argument. Justice Hugh MacMahon wrote that the judge had properly appreciated the limits of his power: once the prosecution successfully met its burden the judge’s function was at an end. As a result, the decision of the judge not to hear the witnesses was no grounds for granting *habeas corpus*.\(^{855}\)

Not surprisingly, the scope of *habeas corpus* was itself the focus of much debate in this period. After committal it was the sole mode for a prisoner to block their surrender, and as noted above reports in these proceedings make up the large majority of published extradition decisions. Courts were continually brought back to the meaning of the writ as defence lawyers tried to broaden its limits. But in doing so defendants faced challenges and attitudes similar to those which guided judges in other areas of the law. The chief questions were whether these proceedings amounted to a kind of appeal or comprehensive review of the judge’s committal, whether the prisoner could use it to challenge the judge’s evidentiary findings, and in a more

\(^{850}\) Ex Parte Lanctot, 427.


\(^{852}\) Re Garbutt (#2), *Ontario Reports*, vol. XXI, 466

\(^{853}\) Re Garbutt (#1), *Ontario Reports*, vol. XXI, 181.

\(^{854}\) Re Garbutt (#2), 471-473.
general sense what the courts’ role was in these proceedings. Since this was the prisoner’s only outlet at this point in the extradition process, technicalities took on an enormous importance.

Despite its place in the pantheon of British civil liberties, habeas corpus was not really an appeal of the judge’s decision to commit. Most judges saw the question at issue as not the merits of the decision but the legality of the detention. In other words, the cases turned not on whether the judge rightly detained the prisoner but whether he had the legal power to do so. Many judges quite explicitly said that their role was not that of an appellate court with power to review comprehensively a lower court’s findings. Not surprisingly it was also a view generally urged by prosecutors as well. This position narrowed considerably the scope of what judges could consider and defendants could argue. It meant that defendants could not challenge the decision of the judge on the merits of the committal decision. That is, they could not argue that the judge had wrongly weighed the facts and committed the prisoner on insufficient evidence. Thus in the view of these lawyers and judges the only aspects of the decisions that were at issue on habeas were questions relating to the judge’s jurisdiction and their authority to order the committal.

Yet the debate continued. As the Quebec judge Alexander Cross acknowledged in an 1883 case when pressed by defence counsel, it was still a much-disputed point whether a habeas judge should examine the sufficiency of the evidence. Cross held that he could examine the legality and admissibility of the evidence, or whether there was any at all. But he could not weigh legal evidence properly tendered to see if the committing judge had rightly decided on its sufficiency. This position was common. As a result, on the question of evidence, habeas proved largely unhelpful for defendants – once there was any legal evidence, the courts shied away from granting the writ.

Although that was the mainstream of judicial opinion, here again there were divisions. Even in Burley, a case usually used for its pro-extradition perspective, Chief Justice W.B. Richards remarked that the superior courts could consider if the evidence was sufficient for committal, a position he said was sustained “by general principles of law.” According to Richards, this ability was doubly important because the detention and then extradition of a prisoner (and particularly, as in Burley, a British subject) was a “grave exercise of power, and

---

856 Courts in Manitoba and B.C. were especially clear on this point. See R. v. Burke, 136; Re Horace D. Gates, 249.
858 Ex Parte William Campbell Phelan, 261.
859 See for example the opinion of Chief Justice M.C. Cameron, Re Weir, 396.
ought not to be permitted unless the right to do so is established in the clearest manner."\(^{860}\) After Burley, though, this argument really found a base of support only among Quebec judges. The most important example was probably the 1887 Hoke case, brought before Quebec Chief Justice Antoine-Aime Dorion and Justice Cross. The lawyers made very different submissions on this point, as the defence argued that habeas judges had to be satisfied that there was “conclusive” proof of an extradition offence having been committed, while the prosecution relied on the standard position about legality and not sufficiency being the purview of the court.\(^{861}\) Dorion did not agree with either view. He rejected the standard of conclusive proof but held that “the true rule” was that habeas judges could review the evidence and assess its sufficiency, though they should not lightly overrule the committing judge.\(^{862}\) Interestingly, despite this being a direct reversal of his position from four years previous, Cross did not dispute the point, and simply concurred without comment.\(^{863}\)

Had it been followed, Dorion’s decision would have re-shaped extradition litigation in Canada, transforming the habeas proceedings into something of a comprehensive appeal. But it had no immediate impact. Indeed, in the year following Hoke another Quebec judge disregarded Dorion and reverted to the previous standard of legality and not sufficiency.\(^{864}\) Moreover, there followed at least twelve more decisions, including at least seven from Quebec, in which courts specifically denied the sufficiency standard before another judge took it up. This did not mean that lawyers stopped trying – if they had the question would likely have vanished from the reports.\(^{865}\) In fact, the lawyer for Gaynor and Greene during the J.C.P.C. hearing even claimed that the right to challenge sufficiency on habeas was clearly established in the province of Quebec, a rather puzzling conclusion to draw from the case law at that point.\(^{866}\) But nearly twenty years after Hoke the decision was revived in the province by Justice Taschereau who decided in 1906, as he put it, to satisfy himself on both sufficiency and legality, though since he decided to remand the prisoner there was no conflict between the two.\(^{867}\) The issue re-emerged in another Quebec case in 1910, the final one examined for this chapter. There, Justice Joseph Lavergne found the same way, and this time decided to discharge the prisoner, though the

\(^{860}\) Burley, 46.
\(^{861}\) Re John F. Hoke, 93-94.
\(^{862}\) Ibid., 96-97.
\(^{863}\) Ibid., 98.
\(^{864}\) Ex Parte Charles Debaun, 152-153.
\(^{865}\) See the defence arguments in Ex Parte Lanctot, 423.
\(^{866}\) Re Gaynor and Greene # 3, 224.
\(^{867}\) U.S. v. Browne # 2, 175.
circumstances of the case are unusual since it involved a detention seemingly brought to leverage the payment of a debt. But as a result, as with the evidentiary burden issue, we can see at the end of this period new cleavages emerged over issues at the core of the extradition system and central to prisoners’ civil liberties.

In the early twentieth century another issue emerged in the case law which involved prisoners challenging their detention. This was the question of bail, which was long regarded as a core component of British liberty, embedded both in the 1679 *Habeas Corpus Act* and in the *English Bill of Rights*. Bail did not arise as an issue in any of the reported nineteenth-century extradition cases. The first mention of it in the case law did not come until 1902, and out of the one hundred decisions examined here only seven address the issue at all. Yet coming as it did at the end of the period, this new issue helps illustrate the continuing and indeed emerging challenges to the extradition system. The debate in this respect was two-fold: whether bail could be granted at all, and if so whether it ever ought to be. There was disagreement on the first question. In 1902 Justice Osler of the Ontario Court of Appeal remarked that he would be very slow to admit an extradition prisoner to bail and could not recall an instance of its ever being done before. Likewise, in 1903, 1904, and 1905 lower-level extradition judges denied that they had the power to grant bail. In the 1903 *Stern* case, the only one in which we have the committing judge’s full consideration of the issue, the defence argued that extradition judges were to consider the case as a magistrate would in an ordinary case under the Criminal Code, and in such cases magistrates had bail power; the prosecution argued that the Code was irrelevant and that since bail was not mentioned in the extradition treaty or statute it could not be granted. The judge sided with the latter position, though more because he felt that as a county judge he lacked the inherent jurisdiction in such matters that a superior court possessed. If any such power existed, he wrote, he did not have it.

It appears that at least two committing judges in Quebec made similar decisions, but it was from the Quebec superior courts that change on this question began to occur, both on the jurisdiction issue and on intersection of extradition procedure with ordinary criminal procedure under the Code. In the 1904 *Weiss* case Justice R.N. Hall observed that his “impression” was

---

868 Re McTier, *Canadian Criminal Cases*, vol. XVII, 82.
871 Ibid., 193.
872 Their decisions on this point were not published but were mentioned in U.S. v. Weiss, *Canadian Criminal Cases*, vol. VIII, 64; Re Gaynor and Greene # 5, 257.
that the committing judge had too modestly viewed his own powers and that extradition courts had powers equal to those of superior courts. The issue came up again the following year in the Gaynor and Greene case, though not in a proceeding for bail. Here, although it was also in obiter, Hall affirmed his own opinion and was joined by Chief Justice Alexandre Lacoste who declared that the power was vested in committing judges by virtue of the procedure laid out for ordinary preliminary inquiries in the Criminal Code. A few months later when the prisoners actually petitioned for bail Justice J.A. Ouimet was clear in saying that he did, in fact, have power to grant bail.

Yet that did not settle the bail issue. The question remained whether it ever ought to be granted in extradition cases. Here broader ideas of the duty of extradition and the role of the courts were brought to bear, and the result was much murkier. On one hand there were clear civil liberties issues to consider. Justice Hall made this point in Gaynor and Greene, writing that it must be remembered that foreign governments could request the extradition of Canadians as well as aliens and to deny bail altogether might be a “great injustice” since extradition cases could drag on for many months while prisoners were held in custody. The spectre of Canadians sitting in Canadian jails for months at the behest of a foreign government was a not-inconsiderable concern. On the other hand there was an obvious worry, since these cases involved prisoners who had allegedly already fled the jurisdiction where the offence occurred. Writing alongside Hall and Lacoste in Gaynor, Justice N.W. Trenholme called this concern “obvious but important” and said that while in ordinary cases the rule was to accept bail, in extradition cases it should be reversed. That is, only when great injustice would be done by holding the prisoners in custody should bail be granted.

Trenholme’s primary focus was on fulfilling the international obligation of extradition. In ordinary criminal cases, he said, the Crown was dealing with its own rights and so could risk those rights by granting bail to prisoners who might flee. In extradition cases the rights of another state were involved, and the government was under an obligation to respect them. Indeed, he wrote that a belief that extradition judges were as free to grant bail as magistrates in ordinary cases would lead to a failure of this international duty. As a result, when Ouimet

---

873 U.S. v. Weiss, 64-65.
874 Re Gaynor and Greene # 5, 257-258.
875 Re Gaynor and Greene # 9, 543.
876 Re Gaynor and Greene # 5, 261-262.
877 Ibid., 263.
878 Ibid.
heard the *Gaynor* bail application a few months later he found both that he had the power to grant bail and that since the prisoners could not be trusted he should not exercise it. A belief in the primacy of international cooperation and of maintaining goodwill with the U.S. was at the core of this decision.879

As a result, we can see in the bail issue the kind of tension apparent throughout the case law. Civil liberties worries were prominent and they found some strong proponents among judges, but they were largely trumped by the imperatives of international harmony and the mutual and transnational cooperation against crime. Yet the challenges which prisoners raised again highlight the kinds of questions being asked about the system of Canadian-American extradition. There may have been widespread adherence to the idea of a ‘liberal’ extradition law, but how that broad concept applied to the kinds of specific legal issues raised in the courts was often a deeply contested question.

Conclusion

Between 1865 and 1910 Canadian courts were tasked with building a case law of extradition from nearly nothing. Diplomats and policymakers had set the parameters of Canadian-American extradition, but it remained for judges to interpret, apply, and shape the law in the courts. In so doing they confronted fundamental questions about how the law should work, what the rights of the prisoner should be, and what their own role in the process was. The often-espoused ‘liberal’ view which prioritised international cooperation against crime was pervasive and enduring among jurists, and we can see in the decisions of the judges who argued for it a keen awareness of the duties of international law and cross-border justice. It largely remained the mainstream view. But the jurisprudence was not homogenous in this respect. Some judges were suspicious of the extent to which a liberal reading of the law might affect prisoners’ civil liberties or go too far in negating the role of Canadian courts in supervising the process. Moreover, even beyond the broad debate over approaches and ideologies we can see in this pool of decisions some deep divisions on key legal questions, some of which were resolved, some which remained at issue despite decades of litigation, and some which continued to emerge even up to the end of this period. The extradition system, in other words, was both rapidly developing and continually unsettled.

879 *Re Gaynor and Greene # 9*, 543.
It was also more than simply a debate about law conducted by lawyers. As shown in previous chapters, extradition was a key facet of Canadian-American relations and the growing body of law was an aspect of Canadian state formation. We often think of the process of state formation as one best measured in and studied through physical institutions such as prisons, hospitals, and government offices staffed by salaried and often uniformed bureaucrats. But as governments expanded their reach in areas like criminal justice, and as they entered into new types of international relationships, law and legal doctrine themselves became important aspects of state power. The treaty and statutes bound the government to try to extradite fugitives, but the rules for how that should be done – and thus how the government’s power was exercised in this respect – remained largely for lawyers and judges to debate and determine. As they did so in Canada between 1865 and 1910 they built both a national and a transnational rule of law.
Chapter Six:  
“They did not care for Queen Victoria or me”: Legal Orders and Cross-Border Police Abductions, 1820-1910

Introduction

On 4 June 1872 Dr. Rufus Bratton was tackled and handcuffed on a dusty road on the outskirts of London, Ontario. One witness suggested that Bratton was chloroformed in the process, while another said that he was merely threatened with a knife. Whatever happened, Bratton was hauled into a cab by local deputy clerk of the Crown Isaac Cornwall, and together the two men, along with the cab driver who witnessed the whole proceeding, headed towards the train station where the prisoner was taken aboard a train headed for Detroit. Bratton ultimately ended up in South Carolina where he was wanted as a high-ranking Ku Klux Klan leader said to be responsible for the lynching of a black militia officer. What Bratton did not know at that moment was that just before the wagon pulled up behind him on the road U.S. Secret Service agent Joseph Hester gave Cornwall a last set of instructions, and then got out and walked off alone away from the scene.

Though he exerted no physical control over Bratton until the party crossed the Detroit River into the U.S., Hester guided the whole affair from the start. He had arrived in London weeks before, made contact with the local police and Crown clerk’s office, and recruited Cornwall. Over those weeks Hester also stalked Bratton carefully, establishing his routine, and discovering that he took solitary walks each afternoon. According to friends, Bratton knew he was being followed and suspected why. Moreover, once Bratton had been cuffed and taken to the station, Hester used a little boy as an intermediary to send messages about which train to board and where to sit. Even once on board, he sat separately from the men, though that all changed the moment they left Canadian territory. At that point, Hester made a formal arrest.

The Bratton case became a diplomatic cause celebre. Over the next year it was covered in the local, national, and international press, and debated by officials in Canada, Britain, and the U.S. Lawyers in all three countries also pored over its implications for international and domestic law and questioned what responsibility the U.S. and Canadian governments bore for the actions of their agents. Ultimately, Bratton was freed by the U.S. federal government, returned to

---


London, and practiced as a doctor there for several years before returning to South Carolina once the political situation became more favourable. Meanwhile, Cornwall was convicted of kidnapping and sentenced to three years in prison. It is not known what, if any, action was taken against Hester.

This case was both unusual and typical. The sheer volume of official and press attention, Bratton’s status as a purported political refugee, and both his ultimate liberation and the prosecution of his captor mark this case out as relatively unusual, though not unprecedented. On the other hand, it was also typical of an enduring feature of policing along the Canadian-American border during the nineteenth and early twentieth centuries – the violent, cross-border abduction of wanted fugitives without recourse to the formal system of international extradition, which largely occurred through the cooperation of local officials in close proximity on either side of the border. Moreover, the carefulness with which Hester avoided using force until back in the U.S., and the degree to which the case sparked far-reaching debates about international and domestic law were far from uncommon. This chapter examines such abductions using seventy-seven such cases – both alleged and confirmed abductions – which occurred between 1820 and 1910.

This chapter argues that these cases represent a transborder regime of unwritten and non-state law that functioned largely as a supplement to the formal system of international extradition. During most of this period formal extradition was a protracted and expensive process and was only possible for a small number of offences, as shown in chapter four. In this context local officials often acted outside of that treaty process to bring fugitives back across the border. Historians have illustrated key connections between law and such extra-legal community justice. As Jim Phillips and Rosemary Gartner have shown, the view was widely held in nineteenth-century America that where the courts could not or would not enforce the law and punish offenders, communities, families, and individuals had an unwritten, natural law right to do so. A similar view emerges in much of the American literature on vigilantism and lynching.

---

882 On the claim of status as a political refugee, see the LAC files above and also G. Manigault to Sir John A. Macdonald, 5 December 1871, LAC, RG 13, A-2, vol. 26, 1871-1487.
Indeed, Michael Pfeifer’s recent work argues that lynching reflected a contest of ideologies between liberal reformers propounding a vision of due process and individual rights, and those who rejected the state’s claims of exclusive control over criminal justice.885 Those who espoused what he calls “rough justice” often resented the supposed ineffectiveness of the criminal courts and saw a kind of sovereign right in the community to uphold its own values, which might or might not reflect the state’s criminal law, and which were often shaped by racial, gender, or class hierarchies. As a result, Pfeiffer argues that historians need to examine more attentively these different perspectives on law, rather than simply using them to juxtapose law and lawlessness.886

These kinds of views are strongly echoed in the abduction cases. These cases reveal not the contest between law and lawlessness, but rather different perspectives on legal order. Indeed, the cross-border abductions both violated and paralleled the formal systems of domestic and international law. On a basic level, the kidnappings were not carried out to subject a prisoner to an arbitrary punishment, but rather to put a fugitive in the jurisdiction of the court when the formal law could or would not do so. Likewise, we can see in the abductions echoes of the ideas of local and community power and consent, as well as a reliance on custom which mimicked different strains of common law and customary international law. Moreover, this regime was notable for the often keen attention paid to norms and principles of territorial sovereignty, and the kidnappers demonstrated again and again a sophisticated knowledge of both international and domestic law, even while they were arguably violating both. Viewed in this light, the abductions seem much more like examples of ‘low law,’ a term used by legal historians in examining the workings of the legal system on the ground. Work on ‘low law’ focuses more on magistrates’ courts and local police than on reported high court decisions, and more on actual practice than on legal doctrine.887

The abductions also highlight the role of ‘low law’ in the Canadian-American borderlands. Borderlands history has become increasingly prominent in recent decades,

emphasizing cross-border exchanges and influences, and focusing on how borders shaped social relations on both sides. This work often concludes that international boundaries were largely irrelevant for the everyday lives of ordinary people. As J.I. Little and David Murray have shown these border areas were flashpoints for criminal activity, such as smuggling and counterfeiting. But we still know too little about how law worked in the borderlands. Indeed, the concept of a borderlands seems antithetical to the underlying basis of legal order, since the former is premised on cross-border fluidity while the latter is grounded in territorial jurisdiction bounded by borders. Yet at this chapter shows, the borderlands criteria of local cross-border exchanges was central to the abductions, though in a way which took careful notice of the international boundary. To borrow Sheila McManus’s and Peter Sahlins’s terminology, police officials along the border crafted a kind of “zonal” border and a region of law which stressed across it in which cross-border abduction were a widely accepted norm of local law enforcement, even as they were keenly aware of the border’s legal meaning.

However, these cases also became ‘high law’ issues once reported and investigated by governments or brought before the courts through the prosecution of either the prisoners or the kidnappers. Here we can also see a kind of customary legal regime at work. Once a kidnapping was reported or alleged and became the purview of diplomats and elite policymakers, it was treated as an international law incident and dealt with through a system of elaborate rituals designed to stabilise relations between the countries and to affirm the underlying international rule of law. There was no treaty or formal arrangement governing this process of reconciliation – and when one was proposed at the end of this period it appears to have failed – and so the customary norms and principles of international law were key at every stage. Indeed, custom was also at the core of international law, and remains so. As Michael Lobban has argued, English

---


891 See, for an example of the role of custom in the nineteenth-century law of nations, Henry Wheaton, The Elements of International Law [1836, ed.], 38.
judges drew from international custom in forming doctrines of international law in much the same way as they used local custom in developing the common law.\textsuperscript{892}

This chapter proceeds in three parts. First, it offers a largely statistical overview of the cases, assessing what kinds of laws kidnappings were used to enforce, as well as where in Canada and the U.S. these abductions most often occurred. It also assesses what is known about the outcomes of these cases – how governments and courts dealt both with the prisoners and their abductors. Next it examines how the kidnappings were conducted and understood by those who participated in them. This section illustrates the role of legal consciousness in these extra-legal or outright illegal events. Finally, it examines how these cases were dealt with by governments and how the process of protesting, debating, and resolving them involved recurring and powerful themes of sovereignty, individual rights, citizenship, and custom.

\textit{An Overview of the Abduction Cases}

The pool of cases examined for this chapter encompasses seventy-seven allegations or proven occurrences of kidnapping culled from Canadian, American, and British sources. With only two exceptions these kidnappings were staged or conducted by police or other state officials, and as shown below they often involved elaborate cross-border cooperation between these officials. Such arrests and abductions were an enduring feature of policing in Canada and the U.S. The cases examined here show that they occurred both before the 1842 Ashburton extradition treaty (and indeed before statutes such as the 1833 Fugitive Offenders Act in Upper Canada gave the executive branch legal power to deliver fugitives) and after the treaty had been widened to make extradition possible for a wide range of offences. In other words, there is every indication that abductions were fairly common, that they almost always involved the use of local state power, and that they entangled police officials on both sides of the border in a kind of customary regime of law enforcement which pre-dated and survived changes in the more formal extradition system.

These seventy-seven cases are probably only a fragment of those that actually occurred. Abduction allegations turned up in nearly every group of records examined in this thesis, and it is almost certain that if more sources were available more cases would have been found. Moreover,

---

as shown below, many people who commented on or participated in them viewed them as customary and often mentioned previous cases specifically or else the long general history of abduction. Besides which, since many if not most of the abductions examined here were reported by the prisoners themselves it is reasonable to assume that many others chose not to report such an occurrence, or may not even have known that their arrest and return across the border was illegal. There were also several allegations that jailors sometimes stopped prisoners’ written complaints from getting beyond the prison, and in at least one case a prisoner asked his family to stop their protests at his abduction because he was worried that those running the jail would punish him for their efforts.893

A statistical overview of these cases highlights several important issues. The first is that the abduction relationships between provinces and states appear to have been quite mutual. Although the number of abductions to the U.S. from British North America/Canada exceeds those going the other way, the figures are roughly comparable: forty-three cases involved a prisoner’s removal from Canada to the U.S. while thirty others were moved from the U.S. to Canada, with four further cases uncertain. Second is the centrality of Ontario to this system. Even more than in the examination of reported extradition decisions in chapter five, Ontario dominates the known abduction cases. In 51% of the cases Ontario was the jurisdiction where either the arrest was made or where prisoner was wanted when either or both of those locations are known. Moreover, unlike in the extradition cases, Quebec was a distant second, with only 17%, followed by Manitoba (14%), New Brunswick (8%), B.C. (6%), and the Yukon (4%).

The final key theme revealed by the statistics is the importance of very local trans-border connections. Abductions were, by and large, a feature of borderlands policing where the possibility of the international boundary hindering law and order likely seemed immediate and pressing. That is, the vast majority of cases involved only a short commute between the state or province where the arrest occurred and that where the prisoner was wanted. In cases where both localities are known, 83% involved jurisdictions that were contiguous, sharing either a land or water border. Only in 17% of cases did officers have to travel through an additional province or state to arrest or return the prisoner. Although there were occasionally truly transcontinental arrests made – one, for example, involving an arrest in Washington State for a murder in London,

Ontario – most of these cases involved a much more local type of law enforcement. In this, the two most important state-province relationships highlight these local connections: Ontario and New York, between which 20% of the abductions took place, and Ontario and Michigan, which accounted for a further 16%. Moreover, while it is sometimes difficult to know where precisely within the state or province the fugitive was wanted or arrested, border towns such as Windsor, Detroit, Niagara Falls, and Buffalo played a prominent role in both relationships. The next most significant relationship was that between Maine and New Brunswick, which accounted for 7% of the cases, followed by Minnesota and Manitoba with 5%. These close geographical relationships were probably inevitable in abduction cases. Unless the crimes were very serious, involving significant thefts, for example, many of the prisoners might not have had the resources to travel very far. Likewise, in cases of petty crime the cost of tracking and following a fugitive to a distant jurisdiction would have been prohibitive for police. But beyond the reasons for the cases being local, what is more significant is the fact that many of them reveal on-going relationships, shared values, and quid pro quo arrangements between people on each side.

These cases generally concern a very different array of offences from those alleged in the pool of reported extradition decisions. As shown in chapter five, those decisions often centred on charges of forgery, embezzlement or other finance-related crimes in which huge sums of money had frequently been taken. Among the abduction cases the profile of crimes is very different. Almost none involve financial crime – there is a single forgery charge in the pool, for example, and two embezzlement charges. Rather, by far the most common offence was theft or larceny, which made up 26% of the known charges, and these allegations generally involved comparatively small amounts of money. The next most common offence was desertion, which made up 13% of cases. The remainder of offences varied widely, including several cases involving bigamy, seduction, and interracial marriage. Interestingly, and as with the extradition decisions, relatively few of the abductions involved violent crimes. Although they include a surprising number of murders (9% of the known charges), beyond that there were only two other violent offences alleged. The profile of the offences, then, suggests that abduction was an aspect of local law enforcement focused on addressing lesser, property-based crimes.

Abductions also appear to have primarily involved offences which were not actually extraditable. That is, for much of this period when the 1842 Ashburton Treaty limited formal extradition to just seven crimes – murder, assault with intent to murder, forgery, uttering forged

894 In 10% of the seventy-seven cases the offence alleged was not known.
paper, robbery, arson, and piracy – abductions were primarily done in aid of charges outside of this list. From the implementation of the treaty until its enlargement in 1889, there were forty-six abduction cases examined here – and in forty-one of these the charge alleged is known. In 88% of these cases the underlying charge was not extraditable under the treaty. In only five cases, which all involved murder, could extradition have in theory been accomplished lawfully. Yet it is worth noting that after the enlargement of the treaty in 1889 and again in 1901, when large numbers of additional offences were added, including most of those involved in abduction cases, allegations of kidnapping continued. The allegations increasingly concerned offences to which the formal system now applied: of the twenty cases which occurred between 1889 and 1910, eleven involved offences which were, in fact, extraditable.

Another key difference between the abduction cases and the reported extradition cases is the class backgrounds of the prisoners. As shown in chapter five, the extradition cases frequently involved prominent government officials, businessmen, and banking executives. These professions and backgrounds are almost entirely absent from the abduction files where the overall profile of the prisoners was much more working class, which reinforces the point about this being a regime geared towards smaller-scale property crime. Indeed, as discussed below, the backgrounds of prisoners were frequently used by governments to justify their abduction or at least to mitigate its diplomatic ramifications. Governments whose officials had allegedly conducted a kidnapping often pointed out that the prisoner was said to have a bad character, to be generally undesirable, or to have been previously convicted of a crime. Beyond the diplomatic implications, information from the available documents suggests a generally working class profile. In the desertion cases, for example, which account for 13% of those where the alleged offence is known, there is no evidence that the deserters were anything but enlisted men. In most other cases, where the occupation or background of the prisoners is known they ranged widely from small farmers and farm workers, to a miner’s assistants in the Yukon, to a tanner, and frequently to supposedly hardened career criminals. It is also worth noting that the only case examined here in which the prisoner was a female involves an alleged prostitute who had stolen jewellery from a brothel-keeper.895

Another difference from the reported extradition cases is the difficulty of ascertaining the ultimate result of these incidents. In many ways diplomatic practice was inconsistent in coming to final resolutions in abduction cases. Here law and legal arguments were absolutely key, since

an abduction arguably involved a violation of sovereignty and thus of international law – one nation’s officers either crossing the border to make an arrest themselves or else employing agents or acting through local officials to accomplish the capture. Such violations gave rise to an array of diplomatic customs as the governments involved sought to resolve the case. One of these customs was sometimes the return of the prisoner back across the border to the place where they had been detained. Indeed, this kind of restitution is said by some legal scholars to be a standard and binding remedy in customary international law for an abduction. However, such scholars often work from far too little empirical evidence. This chapter show a very murky pattern of state conduct in this respect. Of the seventy-seven cases, the last available evidence shows the prisoner to have been discharged from custody in only thirteen cases – 17% of the total. In 9% of cases the abduction failed to get the prisoner either into custody or across the border, in 5% the prisoner had been released by the time the diplomatic debate took place, and in 27% the outcome is unknown based on the last available files. However, in 39% of cases the evidence suggests that the prisoner was not in fact discharged. Yet given the nature of many of these files, it is unwise to draw too many conclusions. Certainly, some of these cases probably involved allegations of kidnapping that were untrue, likely manufactured by the prisoner as a final effort to avoid imprisonment, and governments may simply have found their claims far-fetched and so disregarded them, an issue discussed below. But more importantly, the limited scope of many of the files means that quantitative conclusions about diplomatic practice and resolution should be tentative, though qualitative and ideological patterns emerge more clearly.

The picture is even murkier when it comes to how governments dealt with the kidnappers. These individuals often violated both international and domestic law, but their governments often explicitly excused or justified their actions, or else implicitly tolerated them by not prosecuting for the violations of domestic kidnapping law. But this was not always the case. In at least ten of the seventy-seven cases the kidnappers faced some consequences for their actions. Again, though, this pattern is inconsistent. For example, in 1863 a U.S. army captain in the volunteer forces was discharged from the military after seizing an apparent deserter in Canadian territory, while in a similar case from 1863 the soldier who made the arrest was only

reprimanded. Likewise, in Canada the government dismissed two magistrates who ordered the 1856 arrest of a black man named Archy Lanton on charges which were not extraditable. The government’s decision sparked considerable local protest, including a petition for their re-instatement signed by many prominent local people and government officials. Indeed, Alexander Murray has argued that after another abduction of a black man in 1857 a magistrate who explicitly aided in the kidnapping faced no consequences at all due to the fall-out from the Lanton firings.

In other cases kidnappers were actually prosecuted for their actions. In at least one case – that of Rufus Bratton described above – the Canadian official involved was tried, convicted, and sentenced to three years in the penitentiary. In another, the 1873 case of the pseudonymous fraudster ‘Lord Gordon Gordon’ in Winnipeg, a group of Americans was brought up on kidnapping charges. Yet in both cases we can see the exigencies of international politics and diplomacy at work. In the Bratton case, the imperial law officers were initially sceptical about Canada’s right to launch a diplomatic complaint over the arrest in light of the central role of the local official. However, they eventually concluded that such a complaint would be legal under international law so long as that official was prosecuted first. Conversely, in the ‘Lord Gordon’ case international politics seemed to mediate the prosecution. Because of concern over strained relations with the U.S. on the prairies, former Manitoba Lieutenant Governor Adams Archibald recommended that the government quietly intervene with the judge to ensure that the defendants were granted bail.

Moreover, kidnappers brought up on prosecutions were sometimes sentenced to minimal punishment if not acquitted. In the Gordon case, for example, the defendants were sentenced to just twenty-four hours. Likewise, a Deputy U.S. Marshal who shot and killed a man while attempting to bring a ship and its crew across from the Canadian side of the St. Clair River (and

---

898 Petition to Sir Edmund Head, 6 December 1856, Charges Against J.A. Wilkinson & T. Woodbridge, Journal of the Legislative Council of the Province of Canada, 1857, no. 3.
900 Cornwall v. The Queen, *Reports of Cases Decided in the Court of Queen’s Bench*, vol. XXXIII,106-128.
903 Archibald to Dufferin, 7 August 1873, LAC, MG 26A, reel C-1514, 30835-30839.
who for various legal reasons was tried in the U.S.) was sentenced to only thirty days in jail and a one dollar fine.\(^905\) Community support for the kidnappers could also sometimes lead to outright acquittals. For example, in an 1899 case involving an abduction from Washington State to B.C. the local American sheriff was tried in the U.S. for his role in the arrest, but acquitted despite clear evidence of guilt. The U.S. consul in Vancouver who investigated the case extensively was not surprised by the result. “I found that the feeling against [the prisoner who had been abducted], and in favor of the sheriff’s action was so strong that I did not expect that a jury would convict the sheriff for his act,” he told the State Department.\(^906\)

Meanwhile, kidnapped prisoners sometimes attempted to use the illegality of their arrests as a bar to their prosecution. These arguments attempted to create an individual rights protection out of an infraction of international law. Here the approach of courts in Canada, Britain, and the U.S. was uniform: these attempts always failed. The foundational case on this issue was the 1829 English decision in the *habeas corpus* petition of Susannah Scott, who had been seized in Brussels by an English police officer and brought back to London by force. Her lawyers made a nuanced but liberty-based argument, telling the Court of King’s Bench that while the courts would not discharge the prisoner in a felony case, Scott was indicted for a misdemeanour. “In favour of the liberty of the subject,” they contended, “the Court ought to refuse to extend the rule established as to charges of felony.”\(^907\) The court brushed this aside, and the Lord Chief Justice concluded that once an individual was in the jurisdiction and charged with an offence the courts could not inquiere into the manner of arrest. The country from which Scott was taken might complain or prosecute those involved, or she might sue the arresting officer in the foreign country, but she had no right vis à vis the prosecution once back in the jurisdiction.\(^908\) This position remained decisive in English law.\(^909\)

It also emerged as the uniform position of the American courts. The first known reported case involved a prisoner abducted in 1834 from the Eastern Townships for shop-breaking in Vermont. Here the defence took a slightly different approach from the *Scott* defence in England, stressing at the forefront the infraction of international law rather than the rights of the accused. The defence lawyer argued that courts had no jurisdiction over prisoners brought before them

---

\(^907\) Ex Parte Susannah Scott, *Barnewall and Cresswell’s King’s Bench Cases*, vol. IX, 447.
\(^908\) Ibid., 448.
“by a violation of the rights of a foreign nation.” But the Vermont court adopted the same position as the English King’s Bench: the prisoner had no rights in the U.S. which were created or violated by the abduction. Rather, any offence was against British territory, and that was beyond the jurisdiction of the court. Similar views were apparent in two other reported trial court rulings involving abductions from Canada. In 1858 the Buffalo Superior Court dealt with the case of a man brought over the suspension bridge by a Canadian and American officer and formally handed over at the U.S. end. The judge held that “whether the dignity of Great Britain has been insulted… we are not called upon to inquire. The question is an international one, and cannot arise unless her Majesty’s government shall see fit to lay the matter before our government.” A federal District Court made a similar ruling in 1886. This was soon settled law across the U.S. after the Supreme Court weighed in a few months later. In Ker v. Illinois the court decisively rejected an array of individual rights arguments and held that the nation whose territory had been violated and not the individual who had been arrested could complain. This decision both entrenched widespread existing doctrine and established an enduring American standard on this aspect of international law.

We know less about how the issue was handled in Canadian courts, in part because only one case on the subject appears to have been published in the law reports, and even then not until the early twentieth-century. But a series of unreported nineteenth-century cases suggests that when defendants in Canada attempted to invoke their arrests as bars to their prosecution courts in the country took positions similar to those of the English and American judges. Indeed, in an 1866 case it appears that when the defence lawyer attempted to raise the issue while cross-examining witnesses the Crown attorney objected and was sustained by the presiding magistrates. In an 1876 B.C. case noted below in which a prisoner being transported through U.S. territory attempted to escape and in so doing assaulted a police officer and was tried for the attack, the self-represented prisoner was allowed to question his kidnappers on whether they had

911 Ibid., 121-122.
913 Ex Parte Brown, Federal Reporter, August-December 1886, 653-656.
been in the U.S. when they subdued him after his escape attempt. 917 But when Justice H.P. Crease charged the jury he instructed them to disregard this element of the case and to assume that the prisoner had been captured either in British territory or in an area where he claimed there was concurrent jurisdiction because of the unsettled Alaska-B.C. boundary. 918 Likewise, in the 1891 Ontario prosecution of 15 year-old Harry Gale, who was charged with assault and had been brought back from New York State by his victim’s brother and local American sheriffs, the judge decided that the abduction “was a question with which I could not deal at the time” and that as a result “I took little notice of it.” 919 The court took a similar view in the ‘Peg Leg’ Brown case in 1898. The judge there refused to grant a delay while the defence attempted to get the U.S. government involved and later observed in passing that he thought Brown had returned to Canada voluntarily, the only mention of the issue in the judge’s capital case report. 920

These issues were finally litigated more thoroughly in the 1905 case of R. v. Walton, the only reported Canadian decision on the subject. In the Ontario Court of Appeal the defence made a strained and convoluted argument about Walton’s arrest in the U.S. precluding charges for any offence other than the one on which he was initially detained and abducted – a position heavily influenced by the specialty doctrine examined in chapters three and four. They offered no apparent support for this position. 921 Yet despite the peculiarity of this approach, Justice Featherston Osler went into the general question of jurisdiction after a kidnapping. He drew from and sided with the Scott decision from England and the Ker decision from the U.S., holding that he could not inquire into the circumstances by which Walton came before the court. “If he is found in this country charged with a crime committed against its laws,” Osler wrote, “it is the duty of our Courts to take care that he shall be amenable to justice.” 922 Clearly, then, the weight of judicial opinion was against the idea of prisoners having a right against abduction which could invalidate their prosecution. Again and again courts, like most policymakers and diplomats, held that the question was an international one in which the individual was nearly irrelevant.

Taken as a whole, then, several tentative conclusions emerge from the abduction cases. First, it seems likely that the cross-border abduction of fugitives by law enforcement officials was fairly common between Canada and the U.S. until at least the early twentieth-century. While

---

918 Ibid., 117.
919 W.P.R. Street to the Deputy Minister of Justice, 19 February 1892, RG 2, Series A-1-a, vol. 597, reel C-3424.
920 Hugh MacMahon to R.W. Scott, 13 April 1899, RG 2, Series A-1-a, vol. 778, Reel C-3770.
922 Ibid., 275.
transnational events, to be sure, these kidnappings primarily involved the cooperation of local officials in adjoining jurisdictions on either side of the border rather than between geographically far-flung states and provinces. As a result, it is important to appreciate the elements of borderland localism which were integral to these occurrences. Moreover, the officers who carried out these events were often doing so in aid of charges for offences that were non-violent and property-based such as theft, and that were not extraditable. Thus in this context abductions likely functioned as a ‘low law’ supplement to a restrictive or, as some called it, ‘defective’ formal treaty-based system of international extradition which required both review in the courts, including the opportunity for the prisoner to challenge their detention by *habeas corpus*, and the permission of the national executive. But the abductions also sometimes became ‘high law’ issues when they were taken up diplomatically as violations of international law or brought into the courts through the prosecution of the prisoners or sometimes even the kidnappers. In these cases policymakers and courts seemingly did little to stamp out this customary system or to liberate the fugitives who had been kidnapped across the border. In this context, it is perhaps not surprising that abductions were such an enduring feature of policing in North America.

“The Reciprocity Principle”: Customs, Tactics, and Kidnapping

This section examines how the abductions were carried out. It suggests that while they represented the circumscription or violation of formal law in both countries, the abductions also reveal attentiveness to legal concepts and norms. In particular, we can see a recurring and keen awareness of international law and territorial sovereignty on the part of the kidnappers, as well as a deep belief in the binding nature of local, reciprocal, transborder custom. Much evidence suggests that these officials well knew the legal significance of the border. They often took care to avoid violating foreign territory and were acutely aware of how best to do so. Yet even while many of the officials demonstrated an awareness of the basic meaning of sovereignty, they also often believed in a system of unwritten and non-state law that both undermined and paralleled the normal mechanisms of domestic and international law. Kidnapping undermined sovereignty in one way because it meant either the use of force inside foreign borders, or involved local officials or military officers doing so at the behest of a foreign officer. Yet the abductions also paralleled and echoed the formal international legal system because they often highlighted the integral role of both international reciprocity and state consent in creating binding custom. In
other words, what might seem evidence of lawless and unbridled police power also demonstrates key elements of legal consciousness.

These abductions highlight the close transnational connections between police forces. The most frequent method of moving fugitives between countries without extradition was through the cooperation of the foreign force where the fugitive was wanted with local officials where the fugitive was thought to be. This was certainly so in the 1899 abduction of Martin Everett from Washington State into B.C., where he was wanted for highway robbery. A B.C. constable from the border town of Grand Forks made contact with the sheriff at Republic, Washington, and heard from him that Everett and another B.C. fugitive were in town. The sheriff then arrested the men and, a few hours later at around 2am, started for the border. An hour after that someone persuaded a local judge to issue a writ of *habeas corpus* for the prisoners, but it was too late. The provincial constable met the party somewhere south of the border and on reaching the boundary at Carson, B.C., took final custody of the two prisoners, who were then taken before a Canadian magistrate and committed to jail.\(^{923}\) The constable later explained to the provincial government in quite plain terms that “I did arrange with the Sheriff that if he placed this man Everett… across the International Boundary Line I would stand the expenses up to the sum of $40.”\(^{924}\) Indeed the constable was primarily worried about an allegation that he had offered a personal reward to the sheriff rather than simply agreeing to cover the cost of his journey.

Similar facts emerge in many other cases. In the Archy Lanton case Michigan police were able to get an arrest warrant from two local magistrates despite the charge of horse-stealing for which the prisoner was wanted not being extraditable. Lanton was duly arrested and after a Canadian constable left him in the custody of the Americans and then conspicuously left the building the prisoner was hustled across the river and into more formal custody. It seems likely that only the fact that Lanton was black (though not an escaped slave) and that this occurred after the Fugitive Slave Act of 1850 imperilled free blacks throughout the U.S. made this case remarkable enough for protests to be lodged and documents to be produced before the legislature.\(^{925}\)

Cooperation was not always limited to local officials. More senior officials sometimes gave quiet and tacit sanction to the practice. In 1900, for example, a N.W.M.P. officer named

---


\(^{924}\) Constable Dinsmore to H.A. Maclean, 12 April1900, LAC, RG2, Series A-1-a, vol. 802, Reel C-3780.

\(^{925}\) See Charges Against J.A. Wilkinson & T. Woodbridge.
J.H. Seeley travelled to Washington State to bring back George ‘Kid’ West, who was wanted both as a chief prosecution witness in a Yukon murder trial and as an accessory defendant in the same case. West was already in custody in Seattle on burglary charges and Seeley asked the local officials to simply turn the prisoner over to him for transportation to the Yukon. According to Seeley, the local District Attorney told him to see the state Attorney General, who sympathised but said that he could not advise the Governor to commit an illegal act. The constable then met with the Governor who said that he could not formally release West but still advised Seeley to “get the Sheriff to turn him over to me,” which soon happened.926 Similar advice was given by the New York Secretary of State in 1839 when Upper Canada wanted the state government to extradite an alleged mail robber. The Secretary told a Canadian official that although the government had no such power, if Canada simply arrested the fugitive and took him back to British territory by force, the “authorities would not be disposed to consider it a breach of amity.”927

Despite the predominance of police cooperation in the kidnapping cases, there were also incidents of a much more unilateral type in which foreign forces simply took a person prisoner and hauled them across the border without contacting local officials at all. As clear violations of foreign territory, these often had a much greater potential to cause diplomatic upheaval than the more cooperative cases, not least because many of them involved military rather than civilian officials and occurred in periods of heightened international tensions. During the period after the 1837-1838 Canadian rebellions, for example, British and Canadian soldiers crossed several times into U.S. territory and seized Canadian rebels or American Hunters’ Lodge members who were allegedly engaging in cross-border raids. Notwithstanding the conciliatory attitude of the New York Secretary of State noted above, once these cases reached an official diplomatic level they aggravated the already enflamed Anglo-American relationship which had suffered from a decade of border disputes and, more recently, from the fallout of the Caroline incident of 1837.928 Likewise, during the U.S. Civil War when Anglo-American relations were again at low ebb several contingents of Union soldiers entered Canadian territory to capture deserters, and at least once a Detroit sheriff seized Canadians on the Canadian side of the Detroit River in order to

---

927 W.H. Griffin to R.A. Tucker, 14 May 1839, “Correspondence Relative to the Affairs of Canada, Part I,” Parliamentary Papers, XXI.1, 1840, 367.
928 On these cases, see Bradley Miller, “Beyond Borders”; Stevens, Border Diplomacy.
impress them into the Union army, probably in order to secure the bounty offered to those who brought in new recruits.⁹²⁹

But such incursions were not limited to military forces. While foreign police officers in search of a fugitive generally made contact with local officials and worked with them, there are several cases in the pool examined here in which officers operated for extensive periods of time inside foreign territory without local support, stalking the fugitive and planning how to get them across the border. This was evident in a 1909 New Brunswick case in which a U.S. customs officer went under cover in the province intermittently over several weeks trying to convince the alleged smuggler William Kelly to go across the border into Maine, where he was wanted on an array of charges. The officer posed as a prospective client, winning Kelly’s trust and hiring him to bring goods up to the border, where he alleged that Kelly had consented to go across while Kelly maintained that he was subdued and hauled over by force.⁹³⁰ While, as noted below, the customs agents were keenly attentive to the legal issues surrounding sovereignty, documents in the case show no sign that the general operation of police inside foreign territory was thought to be an infringement of sovereignty, so long as they used no physical force.

These cases may appear to evidence a kind of borderland lawlessness among police officers and other officials, a reckless disregard for both the border specifically and for law generally. As in the ‘Kid’ West case, many if not most of them knew quite well that fugitives could not be legally removed to foreign territory without recourse to formal extradition and the permission of the national executive, but they chose to do it anyway. Yet this is also very far from lawlessness. Indeed, taken together these cases highlight quite the opposite – namely that the officials who engaged in these abductions often had a quite keen concern with legality, and that they operated within a kind of customary and reciprocal system which both disobeyed the formal law and, ultimately, aimed to enforce it. They well understood, for example, the meaning of territorial sovereignty and the international boundary and so knew that there could be massive ramifications to using physical force, and guns in particular, inside foreign territory. Likewise, they often drew upon the most formal and explicit tools of the domestic criminal justice system in each country in order to hustle fugitives over the border in clear defiance of its rules.

The international law issues are particularly interesting in this respect. A savvy about territorial sovereignty on the part of police emerges again and again from the abduction files. It

⁹²⁹ See, for example, S.S. Macdonnell to Attorney General, 10 June 1864, LAC, RG 13, A-2, vol. 11, 1864-624; Minute of Executive Council, 29 September 1864, LAC, RG 1, E 1, vol. A.A., reel C-121, 322.
⁹³⁰ See the large Department of External Affairs case file, LAC, RG 25, A-3-a, vol. 1101, 1910-120.
was clearly evident in the kidnapping of Rufus Bratton from London, Ontario, described at the beginning of this chapter. In that case the U.S. Secret Service agent was very careful to exercise no force or explicit control over Bratton until they crossed into American territory. After all, he left the wagon which had been following Bratton just before the arrest was made and walked off by himself. He then communicated directions to the arresting Canadian official through an intermediary as they waited at the train station. Only once the train car had crossed over into the U.S. did the agent take Bratton into his own custody. Nor was this an uncommon degree of carefulness. In an 1864 case a U.S. sheriff seized two men on a sandbar near the Canadian shore of the Detroit River. As their boat docked on the American side the sheriff apparently made sure to say in the presence of witnesses “I have made no arrest but I make my arrest now on American soil.”  

In another case a prisoner seized in 1893 in northern New York State by Canadian and American officers made a similar allegation. According to him, when the party pulled up to a shed on the Canadian-American border, the U.S. officer relinquished control, the Canadian officer took out handcuffs and said “Now we’re in Canada; see that post over there that is the Canada line.” He then produced a Canadian arrest warrant.

Sovereignty concerns were also evident in the cases where the precise physical position of the border in relation to the scene of the arrest was at issue. In the 1909 Kelly case, for example, the key question in the aftermath of his capture was whether the customs agents had overpowered him on one side of a road or the other, since it ran directly alongside the international boundary. The difference between a lawful arrest and a violation of territorial sovereignty and international law, in other words, was a mere few feet. At no stage in the planning or execution of the arrest was this lost on the U.S. officers. In fact, while the customs agents were planning how to lure Kelly into Maine the arresting officer’s superior took him to the site to show him precisely where the boundary was, and allegedly told him to on no account seize control or make the arrest until they had left Canadian territory. A similar debate took place in a 1907 Manitoba case when another U.S. customs officer was said to have commandeered an alleged smuggler’s wagon a few feet from the border on International Avenue,

931 Affidavit of George Bayley/Bailey, 13 August 1864, LAC, RG 7, G 6, vol. 13, reel C-15628, 224.
in Emerson, Manitoba, while the agent said he was careful not to exercise any authority until they had clearly crossed into the U.S. – again, a difference of a few feet at most.\footnote{See the affidavits of the alleged smuggler and the customs officer: Affidavit of Albert Edward Tolton, 16 December 1907, and George E. Foulkes, 6 January 1908, LAC, RG 6, A-1, vol. 130, 2940.}

This concern for international legality appears even in some seemingly clear cases of territorial violation. In several of these incidents, officers who admitted their role in attempting to bring a fugitive back also tried to mitigate the breach by minimizing the nature of the force used. Once caught up in an abduction controversy they sometimes claimed that they had been unarmed at the time, since the use of weapons in foreign territory was an especially significant breach, a point discussed further below. In the 1839 abduction of a Hunters’ Lodge river pirate from northern New York State, for example, the British officers who led the party claimed in statements (the first of which was given just hours after the incident) that they had landed on the U.S. shore without firearms, having taken care to leave them behind.\footnote{Statements of Robert McClure, 4 July 1839, and James Willoughby, 6 July 1839, C.O. 42, Vol. 461, Reel B-357, 384-387, 388-391.} The same plea was made by U.S. soldiers after one of the expeditions to round up Union deserters from inside Canada during the Civil War, and by the U.S. customs agent accused in the 1907 Emerson, Manitoba case.\footnote{E. Buckers to E.D. Townsend, 27 October 1861, LAC, RG 7, G-6, vol. 9, reel C-15627; affidavit of George E. Foulkes, 6 January 1908, RG 6, A-1, vol. 130, 2940.} It is difficult to say if this attentiveness to the nuances of international law was retroactive (i.e. that they were lying in their statements about their intent and actions) or whether it in fact shaped beforehand the tactics used by officials. But either way it suggests an aspect of legal consciousness among some of those committing the kidnappings, even in those incidents which were most outrageous by international law standards.

This legal consciousness also helps explain the single most common excuse offered by officials after an abduction took place: that the prisoner had come over voluntarily. As noted below, this contention often shaped decisively the way diplomats and elite policymakers handled these cases on an official level. After all, a voluntary return left an open question: had a violation of sovereignty really occurred if all a foreign officer did was non-violently induce or convince a fugitive to cross the border, as the allegedly unarmed Union soldiers mentioned above said they had done in 1861?\footnote{E. Buckers to E.D. Townsend, 27 October 1861, LAC, RG 7, G-6, vol. 9, reel C-15627.} While that remained a difficult question, it is clear that tactics used to secure the ostensibly voluntary return of a fugitive ranged widely. In at least five cases there were allegations that police or military officials used alcohol or drugs to secure that compliance.
In 1841, for example, several hours before British soldiers forcibly seized the alleged rebel arsonist James Grogan from northern Vermont they spent much of the day in a border town tavern getting him drunk, presumably with a view to simply walking or carrying him into Lower Canada with little fuss.938 A similar tactic was allegedly used in 1901 to bring a fugitive from New York State to Montreal. Prisoner James Nelson told the U.S. consul there that he had been in Plattsburg, “where, being asked to take a drink in a saloon – I do not remember anything further until finding myself under arrest in the Province of Quebec.”939 While it is not clear whether the consul believed this story, he did apparently believe Nelson’s claim to be innocent of the crime for which he was convicted in Canada.940

This tactic of inducing a fugitive’s voluntary return more often involved the foreign and local police working jointly to threaten a prisoner with prosecution if they did not consent to leave. Or, at least that is what police officers often argued when confronted with a prisoner’s claim to have been outright forced across the border. A case in point occurred in 1879 after 18 year-old James Cahill claimed that he had been dragged across the Niagara Suspension Bridge by Canadian police and handed over to officers from Buffalo. The constables involved offered a plausible counter-narrative: finding that Cahill’s alleged offence in Buffalo was not extraditable they took him before a police magistrate who told him that he was liable to be prosecuted under Canadian law for vagrancy if he did not leave Clifton, upon which Cahill purportedly promised never to be seen there again.941 The story seems more strained when it follows that Cahill asked an officer to show him the way to the bridge because he intended to visit family in Buffalo. On their way across the bridge together he and the officer – in an unexplained coincidence – encountered members of the Buffalo police force who arrested Cahill.

Other evidence suggests that this police tactic was widespread. In an 1893 case, again involving Clifton and the Niagara Suspension Bridge, a prisoner in a New York jail named Harry Perry claimed that he had been taken across by two American officers and “without any preliminary examination whatever and without taking me to the local Police Station.”942 The officers, meanwhile, claimed that they had simply convinced Perry to go back to New York by

940 Ibid.
942 Memorial of Harry A. Perry to the Governor General, May 1893, LAC, RG2, Series A-1-a, vol. 624, reel C-3611.
telling him that he would be charged in Canada for bringing stolen money into the country. The local District Attorney in New York believed them and defended their tactic. He wrote that criminals in the area frequently crossed from one country to the other after committing an offence and argued that it was “to the credit of the authorities on both sides that such criminals receive very little comfort or assistance at the place of their exile.” Instead, Canadian authorities often relieved themselves of the burden of prosecuting on charges of bringing in stolen goods “by pointing out to the culprit the severe manner in which the Canadian courts treat such people, compared with the liberal treatment of the courts on the other side.”

This comment points to one of the key ways in which people explained, justified, and excused their role in purported kidnappings: by citing the extent to which these events were customary. Scholars have long shown how important legal custom was in the Anglo-American world. As Jerry Bannister has argued, custom was at the core of the administration of justice around the British Empire. Indeed, Bannister shows how custom serviced the ends of civil government and colonial state formation, loosing local officials from the constraints of statute law and applying local practices to local questions without recourse to imperial legal edicts.

Likewise, in several of the abduction cases officials specifically used the language of “precedent” or “precedent cases” to describe previous abductions from which they inferred the lawfulness or at least the customary validity of their own actions. In fact, comments to this effect occur frequently both in statements from alleged kidnappers and in reports from higher officials tasked with investigating them.

A good example is an 1876 case involving a U.S. army deserter seized in Emerson, Manitoba, and taken back across the border to his unit. A U.S. lieutenant had asked a Canadian friend of his named T.H. Bevans, who was also a local lawyer, to capture the deserter. Bevans specified in a deposition that he was “not ignorant of the international law upon the subject,” and that he had initially told the lieutenant that no legal authority existed for such a proceeding. But

---

944 Ibid.
945 Ibid.
946 See a recent collection of essays making this point: Perreau-Saussine and Murphy, eds., The Nature of Customary Law. Also, David J. Bederman, Custom as a Source of Law. (Cambridge: Cambridge University Press, 2010).
since the lieutenant as well as the Canadian customs agent and his deputy all told Bevans that this was a matter of routine practice, he agreed to make the arrest. The Winnipeg Free Press even noted that this practice “has been prevalent for years without hindrance or remonstrance.” Likewise, in another deserter case, this one involving British soldiers who absconded to the American side at Sault Ste. Marie in 1850, similar sentiments were deployed by the officers who arrested the men. There the British officer asked his American counterpart to issue a formal written invitation to cross over and seize the men, since he feared his commanding officer “might not understand the subject… in the light that it was understood here.” In another Sault Ste. Marie case, this one involving fugitives wanted on murder and riot charges in 1884, an American village watchman who helped hand them over to the Canadian authorities swore that his “motive in getting such persons out of town was to rid the place of them… they were desperate characters and that as they came from Canada [he] thought the Canada authorities should take care of them.” According to the watchman, “it is and heretofore has been the practice of this place that when suspicious characters removed here from Canada to get them out of this town.”

The pervasiveness of this custom seems to have been well known across British North America/Canada spanning the entire period studied here. In 1842, for example, the Upper Canadian M.L.A. and Huron County magistrate William ‘Tiger’ Dunlop admitted to the legislature that he “had broken the law himself for 16 years, ever since he had the honor of being a justice of the peace,” by sending back American criminals when he was asked to by U.S. authorities. Likewise, in 1900 a man named George Renolds wrote to the U.S. consul in Victoria from New Westminster to complain about the abduction of a friend of his. Renolds laid out his friend’s case and concluded that “he is not the only man that has been served the same way and it is about time that a stop was put to that kind of bisness[sic] for it is getting to be a

---

950 Clipping from the Winnipeg Free Press enclosed as attachment to Taylor to Cadwalader, 7 April 1876, ibid.
953 Ibid.
kind of an every day occurrence.” As one Buffalo paper noted in 1869, the practice was “rather irregular but was winked at by our officials.”

Elite policymakers and diplomats were also well aware of this practice among local officials. Both comments of these elite officials themselves, and reports made to them by more subordinate officers evidence a clear understanding of the extent to which kidnappings went on across the border. For example, in 1864 Governor General Lord Monck observed that it was “a practice [which] has grown up on the part of magistrates and peace officers on both sides of the boundary line.” Indeed, a U.S. consul in Winnipeg described it as “common practice on both sides of the frontier” and in fact told the State Department that since he understood that the two governments desired to establish “a different rule” he had begun an investigation and had already turned up several previous cases. Similarly, after U.S. officials stopped an abduction by Canadian officers along the Yukon/Alaska border in 1898 the resident Crown prosecutor told the Minister of Justice that he was quite surprised at their doing so because it had been customary in the area for U.S. and Canadian officers to facilitate the return of fugitives, and he said that “the practice was found to be most beneficial in helping to maintain law and order.”

Clearly many local officials thought of cross-border abductions as an established and customary aspect of law enforcement. We can also see in the way they understood this practice a set of quasi-legal principles which paralleled more formal understandings of international law even while they seemed to violate many of these formal doctrines. For example, just as nineteenth-century diplomats and legal scholars emphasized reciprocity and state consent in developing the rules of international law (issues examined in chapters two and three), so too did many of those who participated in or commented on the abductions. Indeed, the idea of reciprocity is at the core of many of these cases. The idea that police officers and others who participated were not simply expelling or abducting a fugitive but participating in an ongoing and mutual relationship emerges from many of these files. In 1832, for example, a magistrate from Sandwich, Upper Canada, named Charles Eliot complained to the Attorney General about plans…

---

956 Newspaper clipping sent as attachment by David F. Reynolds, Superintendent of the Niagara Frontier Police, Buffalo, to Freeman Norton Blake, 8 February 1869, Despatches from United States Consuls in Fort Erie, 1865-1906. (Washington: National Archives, 1960), vol. 1, roll 1.
to explicitly bar local officials from unilaterally arresting and surrendering foreign fugitives without the permission of the colonial executive (a plan which ultimately resulted in the 1833 statute examined in chapter two). Eliot’s letter of protest and his view of the role of local officials in surrendering criminals were grounded in an informed view of the law. He quoted from Blackstone’s *Commentaries*, English case law, English statute law, and passages from the Bible selected for their implication that natural law compelled the punishment of all criminals. He also stressed how the reciprocal cooperation of officials on either side of the border was essential to legal order, and how willing the Americans in Michigan had been to comply with Canadian requests for fugitives. The Americans, he said, “have ever evinced extreme eagerness” to help in this regard, and he noted “how merited then would be the reproach upon us, were we in no one instance to alternate with them.” Shortly thereafter, when a high court judge liberated two U.S. prisoners Eliot wrote again to complain that he could not now ask the Governor of Michigan for the return of Canadian fugitives given how the colony had broken up the reciprocal relationship. Eliot’s comments may reflect more on a formal pre-treaty extradition system than on what we might call abductions, but his emphasis on both local power and the bonds of reciprocal custom reflect enduring trends which informed the custom of kidnapping.

The bonds of reciprocity infuse much of the reports on abduction for the remainder of the period. Indeed, the 1842 treaty, which implemented an official extradition process, did little to change that ethos. One Buffalo newspaper commented in 1869 that the practice of abduction was so frequent on both sides of the border that it “had become a sort of method of exchanging civilities between officers.” Likewise, in an 1892 B.C. case a Victoria police officer told the *Daily Colonist* newspaper that the interests of justice were best served by provincial and Puget Sound officers “working on the reciprocity principle” in this respect. In another B.C. case in 1899, as described below, the U.S. consul in Vancouver travelled to the southern interior and interviewed many of the people involved. One officer summarised his view of the issue this way: “I think that in this case your officers have delivered the prisoner to us without due process, and later on the Canadian officers will make that all right and place a man on your side of the border,

---

962 Clipping from *Buffalo Express*, 24 February 1869, included as attachment with Blake to F.W. Seward, 24 February 1869, Despatches from United States Consuls in Fort Erie, 1865-1906. (Washington: National Archives, 1960), vol. 1, roll 1.
when your officers want one.”964 The phrase “make that all right” is especially interesting here, pointing as it does to the explicit and mutual duty between officers being the most important aspect of the case, and not any violation of international or domestic law or individual rights.

We can also see a kind of legal consciousness in other aspects of the abductions. Just as reciprocity was key, so too was the idea of local community consent as justification. Here many of the explanations offered by officials involved in kidnappings echo strongly the ideas of local natural law rights to self-defence which historians of lynching and other forms of community justice have shown were widespread among Americans. A good example of this occurred in 1868 after the Mayor of Cornwall, Ontario, led an expedition across the St. Lawrence River into New York State in pursuit of a group that had broken into a Canadian shop, blown open its safe, and taken some $500 in cash. The Mayor was acutely aware of the potential diplomatic ramifications, telling Sir John A. Macdonald that “if I have acted illegally or contrary to international law I am perfectly willing to make such amends as may be in my power.”965 Yet the Mayor stressed that he acted “with the consent of the American authorities and citizens” and that their “kindly feelings” had induced him to go after the robbers, just as he had done when American criminals escaped into Canada.966 Similarly, in the Emerson, Manitoba, deserters case the U.S. lieutenant who arranged the affair explained that he thought that it was allowed in part because the Canadian who agreed to make the arrest was not only a lawyer but was also a respected citizen of Emerson who “was not only acquainted with the laws but represented the feelings and sentiments of the people of the country.”967 In the same case, the U.S. collector of customs wrote to the American consul to ensure that the Canadian faced no consequences for having done so. The collector stressed that the deserter’s removal was one of many, but also that it was “fully approved by the whole Emerson community.”968 Although quantifying public opinion in these cases is nearly impossible, there is some evidence to suggest that the collector

966 Ibid.
968 Taylor to Cadwalader, 1 April 1876, ibid.
was right. A Manitoba newspaper, for example, commented at the time that Emerson residents thought “it was a pretty good thing” to be rid of the deserter.\textsuperscript{969}

Beliefs about local power and consent and a kind of legality which flowed from them run throughout these cases. We can see in several a sweeping belief in the power of local officials and military commanders to allow foreign forces to use violence inside their borders – certainly an important compromise of the rights of the national government and of the concept of sovereignty. This was evident in the Sault Ste. Marie deserters case discussed above. There both the British and U.S. officers believed the American lieutenant had the authority to invite the use of force by British soldiers on the American side of the river. (As noted below, this was not a belief shared by the governments of the two countries, though the lieutenant’s invitation did mediate the diplomatic fallout from the affair.) An even clearer example of this occurred in the wake of the 1837-1838 rebellions when river pirates on the St. Lawrence were attacking and robbing British boats in the Thousand Islands region. The Royal Navy commander struck a deal with U.S. General Alexander Macomb to create a kind of borderless jurisdiction in the islands for the purpose of catching the pirates. Each force was permitted to land on any island, British or American, and to attack and subdue pirates where they were found, so long as any prisoners taken were ultimately turned over to the government on whose lands they had been caught.\textsuperscript{970} Likewise, in the 1860’s when the American army wanted to attack and seize a band of Sioux allegedly responsible for atrocities in the U.S. but who had gone into Rupert’s Land, the federal government first asked to do so through formal diplomatic channels, but the British government said this could not be allowed. A few months later, however, an American army commander at Pembina wrote directly to the Governor of Rupert’s Land and was this time granted access.\textsuperscript{971}

Clearly local connections across the border were crucial, as was a belief in the authority of local consent and cooperation. There was a keen sense that the presence of the boundary posed a threat to the security of the communities alongside it, a threat these communities had every right to circumvent. But although the regime of kidnappings was not grounded in state law, we must remember that these local officials brought with them key manifestations of state power,

\textsuperscript{969} Clipping from the \textit{Winnipeg Free Press} enclosed as attachment to James W. Taylor to John L. Cadwalader, 7 April 1876, Despatches from United States Consuls in Winnipeg, 1869-1906. (Washington: National Archives, 1954), vol. 5, roll 5.
and that this power played a central role in shaping understandings of the abductions. That is,
many of these cases drew not simply on the person of the local sheriff himself but also on many
of the accoutrements of the state such as jails, weapons, badges, warrants, and the physical force
marshalled by commanding officers in virtue of their command. On a fundamental level, of
course, that nearly all of these kidnappings involved police or other state officials means that
public money funded the arrests, and sometimes on a fairly large scale. In the Rufus Bratton case
noted above the Secret Service agent stayed in London for weeks while he hunted the fugitive,
observed his movements, and recruited local assistance. Likewise, in an 1867 Eastern Townships
case an officer tracked the fugitive from Iowa, to New York State, and into Quebec, and appears
to have offered local people on both sides of the border rewards of $50 to help with the arrest.972
This use of government funds was also quite explicit in the 1899 Martin Everett case in B.C.
where the provincial constable arrived at a formal understanding with the Washington sheriff for
the payment of expenses upon the submission of an itemised bill to the Grand Forks police
detachment.973

The resources of the state were crucial in many other ways. One of the chief ones was the
ability of officers to gather subordinates and then to deploy them as brute force. We can see this
quite graphically in cases like that of the Sault Ste. Marie deserters, where the British officer
gathered his men, positioned some of them around the boarding house where the deserters were
found to be sleeping, and then had the rest kick in the front door and move in en masse to make
the arrests.974 Another important aspect of state power was the use of jails to hold prisoners
before or during the abductions. Examples of this are numerous and point again to the
cooperative atmosphere between officials on either side of the border, including an 1863 case in
which Canadian fugitives were arrested in Michigan and held in the Port Huron jail until the
Canadian constable could come across. Once he arrived, the Michigan officer declared that he
wished to go out into the village for a little while, pointed out the keys to the prisoners’ cell, and
left the building.975 Similarly, in the Sault Ste. Marie riot and murder case the prisoners were
held for hours in the local lock-up, while in another case the fugitive must have been held for

972 William Woods Averell to William Seward, 6 June 1867, and Deposition of Thomas Hazeltine, 4 June 1867,
Despatches from United States Consuls in Montreal, 1850-1906. (Washington: National Archives, 1959), vol. 8, roll
8.
973 Constable Dinsmore to H.A. Maclean, 12 April 1900, LAC, RG2, Series A-1-a, vol. 802, Reel C-3780.
974 Affidavit of Pierre Fleurimont, 2 August 1850, Diplomatic Correspondence of the United States, vol. IV, 27-28;
also Astley P. Cooper to Lt. Col. Young, 18 June 1850, ibid., 371; Russell to Conrad, ibid., 373-375.
975 R.C. McMullen to J.R. Giddings, 17 April 1863, LAC, RG 7, G-6, vol. 11, reel C-15627.
longer, as he was jailed in Tacoma, Washington, while police in Victoria, B.C. had to be notified and then travel down through Puget Sound to take him back.\footnote{976} And as mentioned above, in at least two cases there were allegations that even once transported across the border and imprisoned the prisoner’s attempts at making a formal written complaint were stifled by their jailers who stopped their letters from getting out.

Other aspects of the power of law enforcement officials also emerge in many of these cases. In one Detroit River case depositions show that the Michigan officer conspicuously displayed his sheriff’s star.\footnote{977} In that case and many others the kidnappers were said to have brandished what was probably their service weapon, and in at least one case (that of Deputy U.S. Marshal William Tyler) the officer fired it at a would-be prisoner.\footnote{978} We can also see again and again in the reports that chains, shackles, and hand-cuffs were used to restrain the prisoners, likely tools of office. This use of restraints was often a feature of the experience which prisoners pointed out as evidence of the brutality and illegality of their treatment.\footnote{979} Moreover, police frequently wielded arrest warrants in detaining fugitives, sometimes issued in the foreign country and sometimes emanating from local magistrates – and sometimes the police appear simply to have lied about having any authority at all. These documents, whether real or merely mentioned, were often used to dampen a prisoner’s will to resist, probably because it connoted even to prisoners unfamiliar with the nuances of law a legal process to which they must submit and from which they could expect certain entrenched rights. In the 1879 James Cahill case, for example, police in Niagara Falls, Ontario, lied to Cahill by saying that they had an arrest warrant from Hamilton rather than a complaint from American officers in Buffalo. The arresting officer afterwards admitted frankly why they had taken this approach, declaring that they “did this in order to throw him off his guard so that he would go more easily than he would have done had he known that he was wanted for a robbery in Buffalo.”\footnote{980}

Thus we can see in these cases a variety of tactics on the part of police. In some cases foreign officers ventured across the border and simply took a fugitive into custody themselves,
while in others there were elaborate, formal arrangements made between foreign and local officials. In some prisoners were allegedly subdued by sheer force or even rendered unconscious by drugs or alcohol. In others, the prisoner was said to have been merely induced to go over the border which, as shown below, raised tricky questions of international and domestic law. But despite this variety there was a continuing awareness of territorial sovereignty and the legal significance of the international boundary among local officials, even as they worked to minimize its impact on policing. Even in some cases of forceful, unilateral abduction the officials involved demonstrated a concern to mitigate their violation of sovereignty, and in cases involving cross-border cooperation between officials they often took care to avoid any breach at all. But we can also see in many of these cases not simply attempts to avoid violating the law, but also the construction of or participation in a regime of non-state and unwritten law. Like the formal systems of international law, kidnappers often emphasized the power of reciprocity and the significance of consent. Moreover, for the local people who knew about, participated in, or were prisoners of the kidnapping custom, this regime brought to bear what were often the most visible aspects of state power. In other words, these events often represented the confluence of state and non-state legal orders.

Debating the Abductions as International Law Events

This section examines how kidnappings were understood, debated, and dealt with both by prisoners reporting them and by diplomats and policymakers resolving their cases on a formal international level. While the abductions themselves might have been aspects of ‘low law,’ once reported they were bound up with what we might call the highest of ‘high law.’ That is, they were treated as international law events and a panoply of international law ideas were brought to bear on them by everyone from prisoners to statesmen. Those debating the cases made arguments based on ideas about individual liberties, the rights of citizenship, and the imperatives of territorial sovereignty and international law and their deliberations provide key insights into the meaning of these concepts in popular and official discourses. We can see in these documents powerful recurring ideas and themes that shaped the debates and guided the emergence or deployment of international practices of mediation and resolution. As this section argues, the manner in which these cases were debated and resolved, and in which the different arguments
and ideas were prioritised or not, also highlights the power of customary rituals in making and maintaining international law.

Among elite policymakers these abductions were understood and dealt with first and foremost as violations of territorial sovereignty. That meant that these were both diplomatic incidents which had to be debated and negotiated by diplomatic means as well as cases to which the customs and principles of international law applied. These customs and principles, in fact, added a legal framework to the abductions which helped stabilise relations between the two countries and helped ensure that once certain rituals were complied with there was no further harm to that relationship. Indeed, many of the documents in these cases, from diplomatic exchanges to legal opinions to internal memoranda rely heavily on the language of international law and focus almost solely on the affront to sovereignty which these incidents often represented. This language also remains remarkably consistent during the ninety years studied here, on both sides of the border, and between cases of little diplomatic importance and those with much more gravity in international affairs, such as those that occurred in the aftermath of the 1837-1838 rebellions when Anglo-American relations nearly descended into war. The rhetoric used by Secretary of State John Quincy Adams in the first case studied here – describing the 1820 abduction of Samuel Wilcocke from Vermont to Montreal as an “outrage upon the territorial rights of the United States” – was echoed almost precisely eight decades later by the Canadian Justice Minister who described another kidnapping as a “gross violation of the sovereignty of Her Majesty in the Dominion of Canada.”

This is not to say that concern for the rights of prisoners and other individuals was excluded altogether from official reaction to the abductions. On several occasions both citizens protesting kidnappings or officials reporting on them worried about the implications of this kind of customary and unbridled use of police power. This was certainly true before the U.S. Civil War where blacks in Canada were concerned. In 1856, for example, when the black abolitionist preacher Henry Garrett reported the abduction of Archy Lanton he stressed the potential

---

981 John Quincy Adams to Stratford Canning, 30 January 1821, *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860*, vol. II, 3-4; Memorandum of David Mills, 7 December 1898, *Correspondence Respecting the Proceedings of the Joint Commission for the Settlement of Questions Pending Between the United States and Canada*. (Confidential Print: Printed for the use of the Foreign Office, 1899), 143.
ramifications of the custom. He told the provincial government that if magistrates and police officers allowed such behaviour to continue, “there must at once be an end to that happy feeling of security which the colored inhabitants of this Province have hitherto enjoyed under the Government of Her Majesty.”982 Yet this concern was shared by some who worried about the rights of citizens generally on either side of the border. Forty years after the Lanton case U.S. consul in Vancouver Edwin Dudley took a similar view. He reported on several of these cases during his time in Canada and told the government in Washington in very strong terms that however guilty or unsympathetic the fugitives involved might be, something must be done so that police used only formal extradition to get them across the border and so that the prisoners were allowed due process of law.983 If abductions were allowed to continue, he argued, “the liberty of the citizens of the United States, all along the boundary, will be very much in danger.”984

Yet these two cases are not emblematic of a general concern for individual rights. More often, both prisoners and their allies writing in protest or officials rendering a report depicted the abductions in two inter-related ways. The first was to link explicitly the rights of the individual to the infraction of the sovereignty of the country from whose territory the person was taken, probably because it was widely understood that the latter outweighed the former as a diplomatic issue. The second was to portray the abduction as a slight to the prisoner’s citizenship and thus an insult to the rights of the nation as a whole. In the 1907 abduction of French citizen Louis de Beauval from Canada into the U.S., the prisoner’s lawyer attempted to deploy both of these tactics, writing that “the rights of either France or Great Britain have been wantonly violated.”985

The line of argument linking the prisoner’s rights to the violation of sovereignty was especially common in the reports of government officials. In this correspondence there was often a concern for the individuals, but it always took a secondary role to the sovereignty question, often reflected in the way complaints were phrased. In 1872, for example, a U.S. consul in Winnipeg expressed outrage at the arrest of an alleged Fenian leader south of the border and declared that the U.S. should demand the man’s release since the Canadian government was “guilty of an outrage on international law as well as on individual rights” – and as the case

982 Petition of Henry Garrett to the Governor General, 29 January 1856, Charges Against J.A. Wilkinson & T. Woodbridge, 3.
984 Dudley to Hill, 6 October 1900, ibid.
developed it was the international law issue which took primacy.\textsuperscript{986} Likewise, in an 1836 case the Governor of Lower Canada complained chiefly about what he called an “infraction of the Law of Nations,” which he said was “accompanied by Acts endangering the Lives, & violating the Liberties of His M’s Canadian subjects.”\textsuperscript{987} This link between the offence to the individual and to the law was often made by prisoners themselves protesting their detention. One stressed that his kidnappers had said that they “did not care for Queen Victoria or me” while another declared that he was “harshly treated in open disregard of my country’s sacred rights.”\textsuperscript{988} Likewise, governments often mentioned compensation to the individual involved in their initial letters of protest, but in only one of the cases examined here was there evidence that compensation was in fact insisted upon by the government and ultimately paid.\textsuperscript{989}

More prominent than a concern for individual rights linked to sovereign rights was the stress placed on perceived rights of citizenship. In official discourses the abduction of a citizen from their country’s own soil served as an aggravation of the violation of international law. That is, the seizure of a citizen sometimes took on more weight than the arrest of a non-citizen might have, at least rhetorically and largely only at the outset of the diplomatic exchanges. In fact, where a citizen was taken it is almost always mentioned, and often multiple times, in the official letters.\textsuperscript{990} Interestingly, this theme is even more prominent in letters from prisoners and their allies. We can see in these documents, as in the section in chapter three dealing with the extradition of fugitive slaves in the 1830’s, a profound reliance upon the perceived protections of citizenship, however mistakenly. Again and again in their letters and petitions prisoners stressed their citizenship and argued that the rights which it guaranteed to them had been violated. “I feel as a British subject that I am entitled to that protection due her subjects,” one wrote from jail in Massachusetts.\textsuperscript{991} Another protested what he called “an indignity against a British subject on

\textsuperscript{987} Lord Gosford to Charles Bankhead, 6 February 1836, \textit{Diplomatic Correspondence of the United States}, vol. III, 364.
\textsuperscript{989} See \textit{Foreign Relations of the United States}, vol. II, 1865, 55-56.
\textsuperscript{991} Extract of a letter from William J. Sutherland to Sir Edward Thornton, 2 July 1872, LAC, RG 13, A-2, vol. 28, 1872-968.
British soil.” In another case, by way of trying to interest the Canadian government in his plight, a prisoner stressed that he had been a Canadian resident for two years. The widespread assumption that citizenship could be key in this regard is reflected in other cases where prisoners even lied or misled authorities about their citizenship in an attempt to win that government’s protection. This occurred during the 1884 Sault Ste. Marie riot and murder case. On initially crossing over from Canada to Michigan, where they were later arrested, at least two of the fugitives quickly filed papers stating their intention to become U.S. citizens, a move which began a years-long process of naturalization but certainly did not confer citizenship. Yet after their arrest and return to Canada they protested and their lawyer claimed for them “the rights of American citizenship and the protection of our laws and flag.” The men themselves falsely declared in a shared affidavit that they were naturalized Americans and that the police had ignored their naturalization papers. It was not until later on that they were shown to be not yet full-fledged Americans.

Clearly, then, citizenship and the rights which some thought it implied were key to diplomatic complaints and prisoner protests. But these concepts were much less important in practice once these cases were dealt with by the two governments and they do not appear to have been determinative in the way cases turned out. There is little to show that the prisoner’s citizenship shaped the extent to which governments insisted on their release or agreed to let their prosecution go forward. While it may have served to magnify the infraction of international law, at least in the diplomatic correspondence, this infraction could be alleviated or mediated by the diplomatic rituals or complicating factors discussed below.

Both the rhetorical importance of citizenship and its ultimate practical insignificance are evident in the 1865 Peter Needham case. The prisoner claimed to have been arrested in Guelph, Upper Canada, by Canadian and American police, hustled over the Niagara Suspension Bridge at gunpoint, and eventually taken to Memphis, Tennessee, where he was shackled to the floor of his cell for five months. Needham complained to the British consul and invoked his British citizenship, which sparked an extensive investigation in which the U.S. government disputed

---

994 F. Rogers to the Attorney General of the United States, 7 November 1884, LAC, RG 2, Series A-1-a, vol. 458, reel C-3353.
995 Affidavit of Wallace, Dougherty, Goldsby, and Asselin, 7 November 1884, Ibid.
996 Statement of Peter J. Needham, 13 February 1864, LAC, RG 7, G-6, vol. 12, reel C-15628, 82
Needham’s claims to be British. A former friend and co-worker swore that Needham had never claimed to be British-born and had long been politically active in St. Louis, Missouri, as an organizer and voter, and had exercised other aspects of U.S. citizenship. In fact, he claimed that Needham might be living under an alias and might actually be German. As this evidence emerged and was sent from Washington to Canada, the Canadian government clarified its position, with Lord Monck saying that the only question at issue was the violation of British territory. Monck told the British Ambassador that Needham’s citizenship was ultimately irrelevant – even if he were American Canada would have the right of complaint if a violation of territory had occurred, and if he was British it would give him no special immunity to American justice. This opinion demonstrates the difference between rhetoric and action in the abduction disputes, particularly evident where citizenship was concerned.

Far more important than the rights of the prisoner, whatever their citizenship, was the preservation of peaceful and harmonious relations between Canada/Britain and the U.S. On this front, abductions were dealt with primarily through a set of customs and rituals which appear to have endured across the entire period. These customs were intended to diffuse the cases as potential international incidents, and indeed in most instances that was precisely what happened. Several factors often served to accomplish that, and to shape the debate and mediate the international tension. The first was that the government whose officials had done (or ordered) the kidnapping would acknowledge and apologize for the violation of sovereignty. Since sovereignty was most often the core issue between the governments, the formal ritual of apology for this violation of international law was crucial. As Richard Bilder has shown, apology has long had a central role in international law – more than a diplomatic manoeuvre it was often a legal remedy in itself. In the kidnapping cases the apology served several purposes. It expressed acknowledgment and regret over wrong-doing, it disavowed the act, and it let the government whose territory had been violated know that the offending state was in no way complicit in the occurrence and was not staking any claim of jurisdiction over the territory where it had happened. Thus apologies also served to reinforce respect for sovereignty in general. Typical here is the language one British minister in Washington used in writing to the Secretary of State during an 1821 case. “The British Government,” he said, “would be the last to sanction, as to

997 Affidavit of Emmanuel Stockett, 16 April 1864, ibid., 213.
998 Monck to Lyons, 7 May 1864, ibid., 261.
permit, an wilful infraction of territorial rights.”

Similarly, in an 1863 case the Secretary of State firmly denounced the action of a U.S. soldier who had seized a deserter in Canada, which he called “the violation of the sovereignty of a friendly state.”

The next most important aspect of the diplomatic reaction to abductions was the question of returning the prisoner to the country from which they had been taken by way of making amends for their arrest. In correspondence going back to the 1820’s we can see demands by the country from whose territory a prisoner had been taken for their discharge. These demands continued, in very similar form, to the very end of this period. Likewise, throughout the period in cases where the guilt of the kidnapping country’s officials was clear, that government usually offered to discharge the prisoner from custody and return them back across the border. These offers and demands were part of the process of resolution. The logic was simply that a government guilty of such a violation of sovereignty should not be allowed to benefit from this action. Thus it was much less a vindication of the prisoner’s rights against illegal arrest than a chastisement of a government which had infringed on foreign territory. One state had deprived another of its sovereign right to decide whether to shelter or surrender a fugitive within its territory. The offer to return that prisoner, then, was another way of acknowledging that right and re-affirming the sovereign power from which it stemmed.

As noted above, gauging the extent to which the actual return of a prisoner could be called an international law remedy is difficult. The slim scholarship dealing with the history of international abductions is divided on the subject, with some scholars claiming that international law mandates such restitution and others claiming that it did not in the past and does not now. But it is clear that insofar as these scholars are making arguments about customary international law – law drawn from the practice of states – they do so from a very small basis of cases, and with limited use of primary sources other than reported cases and some published diplomatic correspondence. Yet the numbers cited above suggest that in most cases where an abduction allegation was made the prisoner was probably not returned, and as shown below the discussions which occurred when such a charge was levelled were often protracted and complex. They often

1000 Canning to Adams, 1 February 1821, *Diplomatic Correspondence of the United States*, II, 300.
1002 For example, see Adams to Canning, 30 January 1821, *Diplomatic Correspondence of the United States*, II, 3-4; Adams to Canning, 1 November 1821, ibid., 5-6.
1004 For an example of these offers, see Monck to Lyons, 2 May 1864, *Foreign Relations of the United States*, vol. II, 1863, 603.
1005 See the summary of this scholarship in Gluck, “Customary International Law,” 614-616.
involved very different versions of the facts tendered by prisoners and the police, as well as tricky questions of international and domestic law. It is also clear that the rhetorical positions often taken in the debates by diplomats – and the persistent, even formulaic tenor of ‘outrage’ embodied in their letters – were more about affirming the ideal of sovereignty through a kind of ritual of protest than they were about the real and desired outcome in each particular case.

A related part of this ritual was to distance explicitly the government whose officials had done the kidnapping from the actions of those officers. In various cases of American soldiers or police officers entering Canada to make an arrest themselves, for example, U.S. diplomats leaned heavily on the abduction not being sanctioned either by commanding officers in the military or police forces, or by any executive or judicial authorities.\footnote{1006} This was easier to argue where the arresting officer was a town sheriff or some other purely local official. Cases where the officer was linked to the national government of either country could be thornier. In the case of Deputy U.S. Marshal William Tyler, for example, it was a regular feature of the British and Canadian protests that he was, as one diplomat put it, “a functionary of the United States.”\footnote{1007} But even in the Tyler case, the U.S. Attorney General was able to argue that Tyler acted without executive or judicial sanction, and so he expected that “the proper disclaimer of this Government will no doubt be entirely satisfactory to that of Great Britain.”\footnote{1008} This emphasis on the distance between the abductor and the central government was almost certainly used to downgrade the question from a full-scale international one to one involving a rogue, often local, officer, and to illustrate that the hierarchy above that person remained committed to domestic and international law.

A very different aspect of the official debate over abductions was the frequent partial justification of them, often used in combination with the apology. In many cases both sides mediated the breach of relations by stressing the bad character of the prisoner by way of suggesting that while the officers involved might have violated international law they did so for the admirable reason of enforcing the law against a highly undesirable fugitive. This was clearly on display in an 1898 case where Marion ‘Peg Leg’ Brown killed a police officer in London, Ontario, and fled to Washington State, where he was arrested on a trivial if not fictitious charge, held, and ultimately turned over to an officer from Victoria, B.C., before being transported back

\footnote{1006}{See for example Seward to Burnley, 23 September 1864, LAC, RG 7, G-6, vol. 13, reel C-15628, 218.}
\footnote{1007}{Lord Napier to Sir Edmund Head, 9 December 1858, and Napier to Lewis Cass, 9 December 1858, Tyler Return.}
\footnote{1008}{J.S. Black to Cass, 28 July 1859, Diplomatic Correspondence of the United States, IV, 183.}
to London. Although murder was an extraditable charge Brown’s formal return was not sought. The U.S. consul in London reported the case to the State Department only because of the legal issue involving his abduction, which practice he said was “reprehensible.” In fact, the consul was clear about his disdain for Brown, writing that he “should dislike to place any obstructions in the way of the just punishment of this man unless necessary in order to place the Stamp of disapproval upon a dangerous precedent, for I am induced to believe that the prisoner is a desperate and dangerous criminal.” He continued, writing that Brown “belongs to the genus Tramp,” was of mixed black and aboriginal heritage, and had been a Texan cowboy in his youth. An internal State Department memo suggests that all of this shaped the diplomatic approach to Brown’s case, as one advisor told the Assistant Secretary that “in view of the deep guilt of the man I would not treat the matter diplomatically unless he or his counsel invoke the intervention of this Govt.” Ultimately Brown was convicted and executed and there is little evidence that the U.S. interfered in any significant way because of the abduction. Indeed, in the Canadian Justice Department’s capital case file lawyer Augustus Power alluded in only very oblique terms to the manner of Brown’s return to Canada, writing that he had simply come over from Washington “with” the police officer.

It is tempting to attribute the American restraint in the case to Brown’s race. But his supposed character and particularly his crime of shooting a police officer were probably much more determinative. Many other cases involving white defendants played out in a similar fashion. In the 1860’s several occurred in which British, Canadian, or American officials all used the supposed character of the prisoner or the nature of the offence to justify non-interference with their prosecution. In 1863, for example, Secretary of State William Seward reviewed the evidence and found that two men who had been taken from Michigan were “felons who have violated the laws of Canada.” Under these circumstances, he wrote, the U.S. government “cheerfully leaves them to the penalties which have adjudged against them by a judicial tribunal of the country which they have offended.” A few years later the British ambassador took a

---

1010 Ibid.
1011 Ibid.
1012 Ibid.
1013 W.L.P. to Alvey A. Adee, nd, Ibid.
1015 Seward to Monck, 6 June 1863, LAC, RG 7, G-6, vol. 11, reel C-15628, 172.
1016 Ibid.
similar position after an abduction from Ontario to Michigan. Seward offered to return the prisoner but the ambassador declined, writing that “we can have no sympathy with the individual in question,” who had betrayed a Michigan sheriff and fled the country to avoid paying a fine.\textsuperscript{1017}

It is worth noting that in both of these cases the offending government offered an explicit apology and a disavowal of the abduction on the model noted above, so that once that gesture of contrition was made the apology itself was deemed sufficient, especially given the character of the individuals who had been taken.\textsuperscript{1018}

The egregiousness of the fugitives’ offence and of their character generally was often linked to the admirable ‘zeal’ of the officers in order to partly excuse or at least mediate the international effect of the abductions. This tendency to implicitly admire the kidnappers was clearly present in the 1849 Alfred Wood case. There, after the black Wood married a white woman in New Brunswick (both were from Maine but interracial marriage was banned in the state) and returned to the U.S. the bride’s father pressed seduction charges and the couple fled back across the border. A local sheriff led a group of men – which Wood’s lawyer called an “armed mob” – into the colony, after which Wood was returned to the U.S. to face charges.\textsuperscript{1019}

The Maine official appointed to investigate sympathised with the father, the sheriff, and the posse. He reported in part that the incident arose not from a desire to violate British territory but from “the natural sentiment of repugnance to the commingling of the black and white races by intermarriage.”\textsuperscript{1020} Likewise, even in the Bratton case, which became a high-profile international controversy, Secretary of State Hamilton Fish expressed some support for the officer at fault. He told the British ambassador that because in previous cases Canadians had shielded U.S. fugitives from arrest and formal extradition American police were being pushed to take measures to which “they would not feel justified in resorting” if the treaty obligations were more sincerely respected by Canada.\textsuperscript{1021} Indeed, this aspect of the official discourse probably illustrates a widespread belief that, as one U.S. consul in Canada wrote, the kidnappings “probably have tended to the promotion of justice,” however inconvenient they were diplomatically.\textsuperscript{1022}

\textsuperscript{1018} Seward to Monck, 6 June 1863, LAC, RG 7, G-6, vol. 11, reel C-15628, 172; Seward to Thornton, 17 February 1868, \textit{Congressional Serial Set}, 6 March 1868, Executive Document no. 39, 20.
\textsuperscript{1019} Joseph Granger to Thomas Jones, 18 September 1849, \textit{Diplomatic Correspondence of the United States}, IV, 307-308.
\textsuperscript{1020} Bion Bradbury to John W. Dana, 22 November 1849, ibid., 23.
\textsuperscript{1021} Fish to Thornton, 12 November 1872, LAC, RG 13, A-2, vol. 27, 1872-810.
\textsuperscript{1022} Joshua R. Giddings to Seward, 21 April 1863, \textit{Foreign Relations of the United States}, vol. I, 1863, 574.
Taken together, these factors helped stabilize relations between the governments after a reported kidnapping and an official diplomatic complaint. But this orderly set of rituals and the generally amicable international discourse could sometimes be complicated by issues of domestic and international law. Indeed, it was often uncertain whether a government even had grounds to complain or to demand an apology after the illegal removal of a prisoner from its territory. That is, since so many of these cases involved cooperation between foreign and local officials, with the local officials often doing the abducting themselves at the instigation of the foreigners, the right of the government to complain that its soil had been violated was unclear. Here the answers to this legal question were somewhat inconsistent and we can see a variety of views at play regarding the implications of local officials’ actions for the rights of territorial sovereignty, though the circumstances in the cases on this point often vary. In 1850, for example, after the Sault Ste. Marie deserters case in which the U.S. officer invited his British counterpart across the river, the British Foreign Secretary partly excused the action because of the explicit invitation but nonetheless admitted that a violation of U.S. territory had occurred and apologized for it having happened.\footnote{1023} In 1864, though, the Canadian government reached a somewhat different conclusion after a kidnapping into the U.S. which was done entirely by Canadians. According to the Governor General, the prisoner might have a cause of action against the Canadian officers, but the Canadian government had no grounds for complaining that its territorial rights had been violated by Americans who had instigated the abduction but not participated in it.\footnote{1024}

Another slightly different view emerged in the Bratton case. Since the U.S. detective there had taken care to instigate and guide the arrest and detention of Bratton in Canada but had not actually exerted any force himself, the international law question received considerable attention. At first it was not clear whether the Canadian or British governments could complain or demand Bratton’s return, and the British Ambassador and the imperial government’s legal advisors thought not – that given the lack of physical force on the part of the American and the overriding role of the Canadian in this respect Canada had no right to ask for the standard international law remedy.\footnote{1025} Ultimately, though, as it became clear how integral the detective was to the arrest the government changed its position, with the law officers doing an about-face

\footnote{1023} Lord Palmerston to Abbott Lawrence, 1 November 1850, *Diplomatic Correspondence of the United States*, IV, 370-371. 
\footnote{1024} Monck to Lyons, 7 May 1864, LAC, RG 7, G-6, vol. 12, reel C-15628. 
\footnote{1025} Thornton to Sir Hastings Doyle, 27 June 1872 and J.D. Coleridge and George Jessel to Lord Kimberley, 1 July 1872, LAC, RG 6, A-1, vol. II, 1170.
and calling the incident “contrary to the practice of all civilized Countries” and “a serious violation of the territorial rights, the independence and sovereignty of this Country.”

A similar question about sovereignty emerged from cases in which the police alleged that the prisoner left the country voluntarily. As noted above, this was a routine occurrence – and in at least twenty-two of the cases there was an assertion, most often from local officers who made the arrest or foreign police that received the fugitive, that the prisoner had gone of their own free will after being convinced but not forced to do so. Some of these excuses seem quite plausible, such as in the James Cahill case where the Canadian police argued that he had gone over the suspension bridge of his own accord after the threat of a vagrancy prosecution. But other invocations of the prisoner’s consent seem much less likely, such as in the 1849 Alfred Wood case. The same Maine official who excused the actions of the sheriff and posse by pointing out their “natural sentiment of repugnance” at Wood’s interracial marriage accepted the claims of that officer that the prisoner had left New Brunswick voluntarily. According to the sheriff and the reporting official, the men used no force and Wood agreed to go back with no resistance because the group assured him that he would receive a fair trial if he did. This seems less likely.

Over and above whether the police in these cases were simply lying about their own actions, such cases raised a tricky legal question: what degree of suasion could a police officer use to get a prisoner over the border without violating either domestic or international law. The most substantive available meditation on this issue occurred in the James Cahill case where federal Deputy Minister of Justice Zebulon Lash considered the question at length. Lash conceded that “improper influences” – namely the vagrancy prosecution threat – might well have been used at the behest of U.S. officers to get Cahill over the bridge. But Lash argued that the issue for the federal government was not why Cahill decided to leave Canada but whether he decided to leave of his own accord or was forced across. If he decided for himself, Lash wrote, “no breach of the international relations with the United States has taken place – for it would lead to infinite complications and refinements if the reasons which induced a person to a particular conclusion in a case like the present formed part of the international question involved.”

---

1026 Coleridge and Jessel to Kimberley, 16 July 1872, Ibid.
1027 Bion Bradbury to John W. Dana, 22 November 1849, Ibid., 23.
1029 Ibid.
It could be different, however, if the kidnappers had lied to the prisoner and pretended that they had a legal right to take him across the border. In those cases, the prisoner’s consent may have been little more than an assumption that the arrest and removal was lawful and that anything else would have been criminal resistance. As noted above, this was probably not an infrequent occurrence, and in at least one case the Canadian government decided to discharge a prisoner who had been brought into the country this way. This happened in 1891 when a 15 year-old farm worker named Harry Gale who was wanted for assaulting his employer’s daughter fled across the St. Lawrence River into northern New York. That employer and some local New York sheriffs soon found Gale. After they seized him the boy allegedly said twice that they had no right to take him back to Canada. The sheriff allegedly replied that he did in fact have that legal right and Gale eventually believed him and allowed himself to be shuffled into a row boat and taken back across the river, where he was tried and convicted.\textsuperscript{1030} The government ultimately decided to release Gale from the reformatory and to return him to the U.S. The Justice Department’s report found that while the facts did not fully make out a charge of kidnapping, “it appears highly probable that Gale was decoyed into Canada he being probably in ignorance of his legal rights and status.”\textsuperscript{1031} While it is not specified, it seems at least possible that the boy’s age prompted this comparatively unusual interest in individual rights.

Other tricky legal questions emerged in cases where there was a foundational uncertainty about whether the arrests had, in fact, been made in the foreign country. That is, in several cases it was not clear where the border was in relation to the scene of the arrest. These cases occurred both before and after the formal ratifications of the border by boundary commissions.\textsuperscript{1032} While in the minds of many local authorities this may have created a kind of borderland fluidity or allowed a certain leeway in respect of capturing criminals, the official views of the two governments were much less compromising. As the Secretary of State wrote in 1877, “the absence of a line defined and marked on the surface of the earth… cannot confer upon either [government] a jurisdiction beyond the point where such line should in fact be.”\textsuperscript{1033} As a result, in cases where the border was uncertain it may have mediated the tone of official outrage, but it did not eliminate the controversy altogether. The case involving the U.S. army’s pursuit of a

\textsuperscript{1030} Depositions of Harry Gale and James Killoran, 17 October 1892, LAC, RG 13, A-2, vol. 88, 1897-970.
\textsuperscript{1031} Order in Council of 4 April 1982, RG2, Series A-1-a, vol. 597, reel C-3424.
\textsuperscript{1032} Francis M. Carroll, \textit{A Good and Wise Measure: The Search for the Canadian-American Boundary, 1783-1842}. (Toronto: University of Toronto Press, 2001).
\textsuperscript{1033} Fish to Thornton, 10 January 1877, \textit{Congressional Serial Set}, 3 December 1877, Executive Document no. 1, part 1, 269.
band of allegedly-murderous Sioux, for example, took place prior to the boundary commission settling the border in that area. Major E.A.C. Hatch told the Governor of Rupert’s Land that he knew that he could not pursue the aboriginals in British territory, but since the boundary had not been officially determined he could not tell which government ruled the territory where the band then was, and so asked for permission to enter it anyway. Likewise, in at least two other cases governments had to seek advice to determine in which country the arrest occurred. The Deputy Attorney General of Saskatchewan noted in a 1909 case that a surveyor had been called in to establish where the border was. “Any Police Officer,” he wrote, “might well be excused for having recaptured [the prisoner] under the circumstances South of the International Boundary Line.” But, however excusable the actions of the police might be, the prisoner was ultimately released from Canadian custody.

Yet while an uncertain boundary might not extend a country’s jurisdiction, elite policymakers did occasionally articulate in these cases a more permeable legal view of sovereignty, at least on the very fringes of each country. As I have written elsewhere, during the early decades of the nineteenth-century there were ideas circulating in international law in Canada, Britain, and the United States suggesting that a nation’s borders were violable if that nation could not govern its territory or prevent it from being used as a basis for armed attacks on a neighbouring state. In this view, one state had a right by international law to use force in foreign territory to vanquish a security threat when its neighbour could not or would not do so itself. The ideas of permeable sovereignty which occasionally bubbled up from the abduction cases were much more limited in scope and consequence and much more bounded by particular points of law, but they nonetheless point to aspects of legal thought in which territorial rights were not absolute. This was so in the 1859 case involving Deputy U.S. Marshal Tyler, who boarded a U.S. ship docked on the Canadian side of the St. Clair River and attempted to bring the ship and its crew over to the U.S. in order to serve a warrant. When the captain resisted, the marshal shot him in the face, a wound which later proved fatal.

The case sparked a massive diplomatic and legal debate. Among those who weighed in was a U.S. District Attorney whose report was especially provocative, since it asserted that the

---

1037 Miller, “Beyond Borders.”
U.S. courts might actually have admiralty jurisdiction over Canadian inland waters because British admiralty courts apparently did not. That is, since British jurisdiction was apparently incomplete U.S. law could fill the void, even in Canadian territory, and thus Tyler’s actions might not have been a violation of international law.\(^\text{1038}\) The Canadian and British governments protested this strongly. Governor Sir Edmund Head declared that it would lead to great insecurity in Canadian ports (presumably as U.S. police officers operated as if in U.S. territory and likely sparked confrontations with Canadian officers) and would be a serious encroachment on British sovereignty.\(^\text{1039}\) The British Ambassador, meanwhile, worried that since the U.S. authorities had neither commented on the D.A.’s report nor formally apologized for Tyler’s actions this was the official opinion of the government. As a result, he said, Britain and Canada wished to re-assert British sovereignty over the area where the attack occurred.\(^\text{1040}\)

Similar questions about sovereignty emerged in other cases. In 1876, for example, Canadian police sparked a serious controversy when they attempted to transport a convicted criminal named Peter Martin from the Yukon to prison in B.C. via the Stikine River and thus through Alaskan territory. While on shore at one point, at a spot which was later shown to be inside the U.S., Martin attempted to escape, and in so doing assaulted one of the officers. He was violently re-captured and eventually taken to Victoria where he was convicted for attacking the constable. The case raised two intertwined issues of international law: whether the officers had violated U.S. sovereignty by transporting Martin in custody through the U.S. without official permission, and whether a Canadian court could try an offence probably committed in American territory. The ensuing debate was massive and complex and cannot be dealt with fully here, but the sovereignty question was especially prominent. The U.S. position was that both the transportation by water inside the U.S. and the landing on American territory were illegal, and that the Canadian courts could have no jurisdiction over the assault.\(^\text{1041}\)

\(^\text{1038}\) The report was not reprinted in either British, Canadian, or American diplomatic correspondence, though it was summarised and referred to. See Head to Napier, 12 February 1859, and Napier to Cass, 17 February 1859, William H. Tyler Return.

\(^\text{1039}\) Head to Napier, 12 February 1859, ibid.


\(^\text{1041}\) Fish to Thornton, 10 January 1877, \textit{Congressional Serial Set}, 3 December 1877, Executive Document no. 1, part 1, 268-269.
Minister Edward Blake dissented strongly on the first point. Indeed, Blake declared that since Canadians had a treaty right to navigate the river the basic transportation of Martin was legal. He also argued that the landing on U.S. territory with Martin in custody would not necessarily have violated international law, since the navigation right included some use of the shore, though he admitted that this was an uncertain area of the law.1042

In 1898 these positions were reversed. This happened after a U.S. customs agent boarded a Canadian vessel in the St. Clair River and after the driver apparently steered it into the sand on the Canadian side, subdued the man, and transported him to jail in Michigan. The Canadian and American authorities differed on whether the boat had been in the U.S. when the officer boarded and when the arrest was made, and this difference led to a heated debate over the legality of the arrest. U.S. Attorney General John Griggs assumed that the boat had been on the American side and that the arrest had been made there, and argued that there was no invasion of Canadian sovereignty because there had be no intention to “exercise power” inside Canada or to pursue or retake the prisoner there – rather, the arrest had taken place inside the U.S. and the two men only entered Canada because the prisoner steered the boat there. Thus, he said, the continuity of the U.S. arrest was unbroken and the temporary presence of the two inside Canada was immaterial. This prompted Griggs to ask a very provocative question about the meaning of the border, and one starkly at odds with the U.S. position in the Martin case: “Can it… be successfully contended, under these circumstances, that all punitive process falls absolutely at the boundary-line of the country when that line is crossed by a criminal under arrest endeavouring to escape…?”1043 Thus Griggs was in fact arguing that the use of force by police inside foreign territory could be justified in certain very specific circumstances. Indeed, he argued that it was in the common interest of both governments to allow for what he called the “mutual recognition of their respective process and warrant,” at least in cases like this.1044 In reply the Canadian government took a vastly different approach, reversing its own stance of 1876-1877, and arguing for an absolutist reading of sovereign rights. Justice Minister David Mills held that the officer’s official power, and thus the validity of the punitive process, had indeed vanished when the men

1042 Memorandum of Edward Blake, 5 February 1877, Return of Papers Relative to the Probable Boundary Line between British Columbia and Alaska, Sessional Papers, 1878, no. 125, 97-98.
1043 Memorandum by John Griggs as to the Case of Thomas Meagher, nd, Joint Commission Correspondence, 141.
1044 Ibid.
crossed into Canadian waters. As a result, he said, the arrest was a “gross violation” of Canadian sovereignty.\(^\text{1045}\)

Clearly, then, debate over the abductions by policymakers and diplomats was shaped by a wide range of factors, and could result in uncertain outcomes. This continuing uncertainty prompted British Ambassador to Washington James Bryce to make a seemingly provocative suggestion in 1910. In the midst of two unsettled abduction controversies Bryce met with State Department officials and forwarded a suggestion by which he said “the principles of international law might be maintained without defeating the ends of municipal justice.”\(^\text{1046}\) He meant by this that the accepted concepts of inviolable sovereignty should be somehow reconciled to the recognized importance of punishing criminals. His idea was to develop a formal mechanism by which all future cases could be investigated, adjudged, and settled, and one which removed the issue from the uncertainties of diplomatic pressure. Once a kidnapping was reported, a two-member commission comprised of one magistrate or judge from each country would travel to the scene of the arrest, conduct an inquiry, and tender a joint report to the two governments.\(^\text{1047}\) If they could not agree on the facts, their materials would be turned over to the new International Joint Commission which had been created by the 1909 Anglo-American treaty to settle an array of Canadian-American disputes.\(^\text{1048}\)

The judicial role was to answer two questions: had international law been violated by the arrest, and had the prisoner committed an extraditable offence. If the arrest had violated sovereignty and no extradition crime was charged the kidnapping government would apologize and return the prisoner. But if both questions were answered in the affirmative the government would still apologize and extend the offer of return, but the other government would waive the surrender.\(^\text{1049}\) Clearly, the proposal drew on the customary rituals that had characterized much of the diplomatic practice on this question for decades. It implicitly acknowledged that abductions were often done in the spirit of enforcing the law, but it was predicated on the idea that respect for sovereign rights and the maintenance of good international relations were the primary concerns. According to Bryce his plan would “facilitate and fortify this practice at present based

\(^{1045}\) Memorandum of David Mills, 7 December 1898, ibid., 143.
\(^{1046}\) Bryce to Lord Grey, 14 April 1910, LAC, RG 25, A-3-a, Vol. 1101, 1910-120.
\(^{1047}\) Proposal for Procedure in Alleged Abduction Cases, 13 April 1910, ibid.
\(^{1049}\) Proposal for Procedure in Alleged Abduction Cases, 13 April 1910, LAC, RG 25, A-3-a, Vol. 1101, 1910-120.
merely on courtesy and comity.” In this effort he also reflected so much of the innovation then taking place in European international law, particularly the birth of permanent judicial institutions such as the Permanent Court of Arbitration which emerged from the 1899 Hague Peace Conference.

Yet Bryce’s plan does not appear to have gone beyond this initial stage. Bryce claimed that the proposal had significant American support. The British Foreign Office, however, was more sceptical about what this implied for the twinned ideas of domestic law and order and territorial sovereignty. Foreign Secretary Sir Edward Grey was concerned that it implied that the governments were prepared to acquiesce in such violations of territory by local police. According to Gray, abductions might be more effectively combated by simply issuing more strict instructions to local officials, though he was not prepared to block the idea, so long as the Colonial Office agreed. Shortly thereafter the matter appears to have gone to Ottawa for consideration where little appears to have happened. Searches for further deliberations turned up no result, and there is no sign that the proposal was implemented. As a result, by the end of this period the enduring array of diplomatic customs brought to bear on abduction cases as they occurred remained the only available mechanisms for resolving them.

‘High law’ custom, then, was absolutely key to how these cases were understood and dealt with by policymakers. Customs and customary international law generally shaped how governments packaged their complaints about abductions, how they assessed the responsibility of their own officials, how they viewed the legal significance of the border, and how they made restitution when their governments were found to be at fault. While these customs may not have coalesced into clear-cut rules which were applied in every case, they amounted to a predictable constellation of concerns which shaped the debate. It is difficult, for example, to discern how governments across the period decided when to discharge a prisoner because of their being kidnapped across the border. Likewise, governments sometimes reversed themselves on some of the tricky legal questions raised by many of these cases. Yet we can see powerful recurring themes in their debates. However uncertain the outcome in individual cases, the ideas and principles governing them prioritised territorial sovereignty and the preservation of the

---

1050 Ibid.
international relationship between Britain/Canada and the U.S., and minimized the practical importance of individual rights.

**Conclusion**

During the nineteenth and early twentieth centuries policymakers, judges, and diplomats designed and refined a formal system of international extradition. As chapters four and five suggested, this process could be politically fraught and legally complex, and judges and policymakers were often unhappy with how narrow the law was and how few offences were extraditable. Alongside this formal system another kind of legal regime existed to accomplish similar ends. During the entire period studied here police officers and other state officials in both Canada and the U.S. arrested and removed fugitives across the border without the formalities of extradition and indeed most often for offences not covered by the treaty and in defiance of international and domestic law. Yet it is fair to say that this practice was a kind of legal regime in itself. By looking at the actions of these local officials, we can see that they were clearly knowledgeable about law and the legal significance of the border and the kidnappings which they staged often reflected elaborate and formal arrangements between foreign and local officers. Those officials often explained their actions by reference to enduring custom and the mandates of cross-border reciprocity. In other words, this illegal practice looked very much like a established system of ‘low law.’ This system probably endured in part because elite policymakers, diplomats, and judges did little to stamp it out. In court, prisoners who wielded the illegality of their arrests as a defence always failed, while kidnappers were sometimes acquitted outright or else barely punished. Likewise, when these cases became diplomatic incidents affirming sovereign rights and making amends for their violation were the priorities, not freeing the prisoner or punishing their captors.

The kidnappings and the ensuing debates over them thus highlight two important issues. The first is the multiple meanings of the border. As many historians have argued, the Canadian-American boundary was quintessentially permeable, porous, and fluid, at least to ordinary people who crossed it with little difficulty in the nineteenth and early twentieth centuries. The abductions, however, highlight both the relevance and irrelevance of the border as a bar to the

---

exercise of state (or quasi-state) power. That so many foreign officers were so careful to avoid violating sovereignty suggests the border’s intrinsic meaning to them. On the other hand, that state power so easily and informally stretched across the border and found willing agents in local officials suggests in another way that the boundary was not really a barrier to criminal justice. Likewise, on the diplomatic side a similar duality appears. We can see both a pre-occupation with the concepts of territorial sovereignty which signified exclusive power within a nation’s borders, and a willingness to tolerate or at least no to stamp out the routine violation of those borders by local law enforcement officials.

The second theme is the idea of regions of law, examined in chapter two. As shown there, some of the northern states and British North American colonies adopted a view of international law that was starkly at odds with the imperial and American federal governments – namely that the law of nations imposed a duty to extradite criminals. Thus these sub-sovereign jurisdictions felt themselves bound up an international legal order. With the abductions, we can see again the presence and pervasiveness of legal ideas – transborder if not international – at odds with those of the larger jurisdiction. Instead of colonial and state governments deviating from imperial and national governments, the disjuncture here was between local officials and local communities and federal, state, provincial, and imperial authorities, with each side relying on different notions of law and legal order.
Chapter Seven: Conclusion

In 1867 the Montreal Herald declared that Canada was being overrun by foreign criminals. The country had become, said the paper, a “den of thieves” because of weak extradition laws, poor policing, and diplomatic equivocation. While the Herald and dozens of other colonial newspapers demanded immediate reforms, controversies surrounding foreign fugitives were nothing new. For decades, officials in British North America, Britain, and the United States puzzled over how to craft a legal regime to control fugitive criminals, what to do with prisoners who claimed refugee status, and how to deal with the informal regime of police kidnappings which occurred routinely on both sides of the border. These debates offer insight into different aspects of Canadian law, policy, and statecraft. They involved British North America/Canada in fundamental questions about international law and global legal order and they tested the limits of Canadian power in the British Empire. Examining how these questions played out reveals pervasive ideas of transnationalism among officials at all levels and showcases both an intellectual cosmopolitanism among these officials and the array of international influences brought to bear on Canadian law.

This thesis began by identifying three main overlapping themes on which it would focus. The first was the transnationalism of law. This thesis has examined ways in which law transcended the borders of British North America/Canada and even the authority of the wider empire of which it formed a part. The issues of extradition and abduction highlight the ways in which law – often seen as a central hallmark of sovereign jurisdiction – migrated across borders and enveloped Canada in near-global legal networks. This transnationalism emerged in many ways. It was apparent in the North American debate from the 1820’s to the 1840’s about the obligation to extradite in international law, for example. There, jurists and policymakers in British North America and the U.S. invoked seventeenth and eighteenth-century legal writers such as Hugo Grotius and Emerich de Vattel, and applied them as binding authorities. These jurists and policymakers also invoked each other, looking across the border for interpretations of the law, as the Chief Justice of Montreal did when he adopted the Chancellor of New York’s vision of the law of nations.

---

1054 Montreal Herald, 2 January 1867.
Other types of transnational influences abounded. The arguments made on behalf of the escaped slave John Anderson in the 1860’s illustrate how British North American law could be transcended by arguments grounded in fundamental visions of justice. Anderson’s lawyers relied in large part on natural law, which they said both overrode and underlay any authority vested in colonial courts and officials. They argued that surrendering slaves was inherently – not just legally – wrong. On a more local level, the police abductions illustrate how this ethos of legal order beyond borders shaped community justice, as officials on both sides of the border acted out of common understandings of a reciprocal and customary legal order grounded in beliefs about the inherent rights of communities to protect themselves against crime.

Both pre-Confederation British North America and post-Confederation Canada were also subject to the influences and powers of the wider British Empire. We can see the ideological weight of the empire in the extent to which prisoners appealed to ideas of Britishness throughout the nineteenth and early twentieth-centuries. In the 1830’s, fugitive slaves invoked British justice, British citizenship, and British constitutionalism which they said embodied principles that colonial authorities could not violate by returning them to slavery. But the empire was also an enormously powerful polity in practical terms. It had power over foreign relations, as well as executive authority that it could use to block, delay, and revise colonial law. This is not to say that British North America/Canada always obeyed imperial dictates. Colonial authorities espoused views on the obligation to extradite in the 1820’s and 1830’s and on the political offence exception and wider treaty system in the 1860’s and 1870’s that departed radically from imperial policy. But as we can see from the latter debates, Britain retained its power over Canada well after the onset of Responsible Government and even after Confederation. For most of the period studied here, Britain set the parameters of Canadian extradition through treaties, and its power to reserve and disallow Canadian laws was potent enough to win compliance, as it did during the long debate over Edward Blake’s attempts at extradition law reform. There the imperial government wielded the traditional tools of imperial oversight in order to implant European legal ideas in Canadian statute law.

Transnationalism was also apparent in the role played by international law. Throughout this period international law was a central and powerful force in shaping British North American/Canadian policy. Its frequent use also evidenced a distinct intellectual cosmopolitanism on the part of officials at all levels. In the debates over the obligation to extradite colonial judges and policymakers invoked and applied the law of nations as a set of
binding rules. Both in those debates and in the Civil War extradition cases jurists used a sweeping array of international law writers to shape Canadian law. This deference to international law was apparent even in the abduction cases, where local officials keenly understood the legal significance of the border and constructed a regime of cross-border kidnapings around concepts such as reciprocity and custom which were at the core of international law. Likewise, just as local officials mimicked international law, elite policymakers and diplomats who dealt with the abduction cases reinforced it, and focused their negotiations on preserving the ideals of territorial sovereignty. Their debates reveal a deep belief in law as the bedrock of peaceful international co-existence. As a result, even these local and seemingly-lawless kidnapings highlight the ways that law spread over and beyond borders.

The second theme is a focus on the intellectual history of extradition and abduction and the ways in which the concepts that underpinned these systems were put into practice. This thesis has looked closely at the legal ideas that were at the core of debates over international fugitives, and examined their lineage in European, British, and America ideas. Understanding debates over the obligation to extradite, for example, entails examining seventeenth and eighteenth-century naturalist conceptions of the law of nations and the notion of an international society. Similarly, the invocation of natural law in the John Anderson case must be considered in the context of several centuries of British litigation over slavery in which such conceptions of law and justice played an important part, while invocations of British citizenship by escaped slaves must be considered in light of the role of British identity in the nineteenth-century North American colonies generally. Likewise, the heated intra-imperial negotiations in the 1870’s over the exemption of political offenders from extradition can only be understood in the context of developing Western European notions of how best to protest refugee dissidents, and subsequent efforts in Britain to adopt those ideas and to implant them in British and imperial law.

Perhaps the most important intellectual current affecting Canadian legal approaches to international fugitives was liberal transnationalism. This was espoused by most major British North American/Canadian policymakers and judges during the entire period studied here. It prioritised breaking down domestic barriers to international cooperation and favoured extradition whenever possible, and it is apparent both in the law of extradition and in the regime of cross-border kidnapings. In the nineteenth and early twentieth-century debates over fugitives we can see again and again the idea that a “liberal” approach was called for, one that limited technical difficulties, broadly construed treaties and statutes, and saw surrendering criminals as both a
legal and moral duty of neighbouring states. This liberal approach was largely based on the idea that Canada and the U.S. shared a common civilization and a common sense of the rule of law, a view which was cemented after the end of the U.S. Civil War and the abolition of American slavery. As a result, it was both safe and entirely desirable for these two societies to have as close a relationship as possible when it came to combating crime, since there could be no worries about protecting refugees or political dissidents. This legal continentalism profoundly shaped Canadian views on international law in the context of extradition, and it often made Canadian officials hostile to the kinds of refugee protections espoused by the imperial authorities.

It is clear that concepts like natural law, British justice, and liberal transnationalism were important to debates over extradition and abduction. But this thesis has argued that we do not fully understand such concepts unless we examine them in practice. Certainly arguments about natural rights, British justice, and British citizenship carried great rhetorical force, and drew from centuries of imperial and colonial usage. But they often proved futile. Whatever their ideological weight, these appeals ran counter to the logic of the extradition system. While British citizenship, for example, protected some prisoners in the 1820’s and 1830’s because of the provisions of the 1679 Habeas Corpus Act, it mattered not at all after the ratification of the 1842 Ashburton Treaty, which applied to all people irrespective of their nationality. British citizenship also likely never became a serious factor in the official consideration of fugitive slave petitions. Conversely, in these cases and especially in the forty-five years after the Civil War we can clearly see the substantive power of liberal transnationalism in both theory and practice, which overrode arguments about natural law or British justice or other arguments raised by prisoners. Judges endorsed it as a general ideological lense in their rulings but they also brought it to bear on very specific questions of law. Among the many concepts and ideas examined here, this sense of liberalism most animated the emergence of Canadian law.

The powerful ethos of liberal transnationalism had deep implications for civil liberties. This tension between individual rights and international order is the final main theme this thesis has examined. It was apparent in the refugee debates from the 1830’s to the 1860’s, when both fugitive slaves and Confederate combatants claimed that their extradition would be unjust and illegal. They attempted to separate their cases out from the norms of international extradition, arguing that they were not the kinds of fugitives to which the system should apply, and in so doing they claimed rights that were often little more than murky notions not yet fully accepted as law. Likewise, this tension was certainly at play in the abduction cases. Diplomats and
policymakers who examined these incidents weighed an array of factors, including appeals for assistance and complaints about injustice from prisoners. Some abducted prisoners also tried to use the circumstances of their being taken illegally across the border as a bar to their prosecution, attempting to draw an individual rights protection from that violation of international law.

This tension was also key to the Canadian extradition jurisprudence that emerged after 1865. These cases often attracted little official attention – certainly nothing like the diplomatic havoc which accompanied the Civil War combatant cases or the kind of mass public engagement that was sparked by the John Anderson case – and the points of law around which they revolved were sometimes very technical. But examined together these individual points and doctrinal questions help us to understand the balance struck between individual liberties and international order as the system of Canadian-American extradition developed. In these cases the question was never whether a defendant should be returned to slavery or handed over to their tyrannical political enemies. Instead, the issues to be litigated were about the scope of judicial review on habeas corpus, or whether the law allowed prisoners to present evidence in their defence, or if they could be given bail. These seemingly-mundane debates must be understood as tests of state power and as developments in the history of civil liberties in Canada. Moreover, many of the issues were important on an international level. Technical debates over whether prosecutors could use grand jury indictments as evidence or how foreign documents were to be authenticated shaped the operation of the Anglo-American treaty, on top of laying out rules for how prisoners could challenge their extradition. To understand civil liberties in the context of extradition, in other words, we must examine these detailed doctrinal questions.

For the most part these cases highlight the triumph of liberal transnationalism over individual rights. This was certainly so in the refugee cases. In the 1830’s and 1840’s imperial and colonial officials refused to implement any kind of blanket protection against the surrender of slaves. Instead they offered promises of equal treatment – that blacks would receive the same legal protections as whites, as if whites faced the threat of being returned to slavery. In fact, officials like John Beverley Robinson were willing to surrender slaves in order to keep alive the tenuous system of pre-treaty extradition. Robinson feared that any Canadian refusal to surrender fugitives of any kind would extinguish the idea that extradition was a binding obligation of international law. Similarly, most of the judges in the John Anderson case had little time for arguments about natural rights and were deeply wary of appearing to create an exemption from extradition for slaves that could lead to millions of blacks revolting and coming north. The one
Civil War case in which the courts clearly accepted asylum-based arguments was subsequently marginalized by Canadian judges.

Furthermore, protests on behalf of kidnapped prisoners in the abduction cases most often did not lead to their liberation. What was most important for diplomats and policymakers was territorial sovereignty and international law; individual rights were an incidental concern. Most often, when certain rituals of apology were complied with diplomats seem to have left the prisoner to be tried where they had been taken, and when prisoners attempted to invoke their kidnapping as a bar to their prosecution they always failed. On a more general level, the extradition jurisprudence after 1865 which considered questions of civil liberty largely limited prisoners’ ability to challenge their own detention and surrender. The manta of a liberal interpretation of the law held sway.

This thesis has argued that British North American/Canadian law needs to be understood in the context of transnational and international currents. Only by examining transnational debates, international practices, and imperial policies can we understand how the law surrounding international fugitives developed. While law is often seen as an inherently national issue, the reach of which is bounded by sovereign borders, such a domestic approach is simply not sufficient to grapple with extradition and cross-border abductions. Just as fugitives moved between countries, so too did law and legal order, though its passage was less straightforward than that of those it pursued. Law circulated within the empire, it operated across the border in local communities, it migrated in treatises and judicial decisions, and it was made and re-made in the context of conflicting ideological currents and international pressures. In other words, Canadian law grew out of developments far beyond Responsible Government.
BIBLIOGRAPHY

PRIMARY SOURCES

Archival Sources

Archives of Ontario (Toronto)

CO 42 – Colonial Office Files (Diffusion Material of Library and Archives Canada)

Edward Blake Papers

RG 1 – Upper Canada Executive Council (Diffusion Material of Library and Archives Canada)

RG 5, A-1 – Civil Secretary’s Correspondence, Upper Canada Sundries

RG 7 – Governor General’s Correspondence, 1841-1867

Library and Archives Canada (Ottawa)

R5744-0-6-E – Alexander Mackenzie Papers

MG 26A – Sir John A. Macdonald Papers

RG 2 – Privy Council Office

RG 6 – Secretary of State

RG 13 – Department of Justice

RG 25 – Department of External Affairs

National Archives (Washington, D.C.)

RG 59 – State Department Fonds

Provincial Archives of New Brunswick (Fredericton)

RS344 – Harvey papers

Robarts Library (University of Toronto)

Despatches of United States Consuls in Canada (Diffusion Material of RG 59, National Archives, Washington, D.C.)
Published Primary Sources

Monographs


Clarke, Samuel R. *A Treatise on Criminal Law as Applicable to the Dominion of Canada*. Toronto: Carswell, 1872.


Doucet, Nicolas-Benjamin. *Fundamental Principles of the Laws of Canada, as they existed under the natives, as they were changed under the French kings, and as they were modified and altered under the domination of England*. Vol. I. Montreal: John Lovell, 1841-1843.


Hawley, John G. *The Law and Practice of International Extradition Between the United States and Those Foreign Countries with which it has Treaties of Extradition*. Chicago: Callaghan and Co., 1893.


**Law Reports**

Barnewall and Cresswell’s King’s Bench Cases [England]
British Columbia Reports

Canadian Criminal Cases

Cases on International Law [United States]

Common Law Chambers [Ontario]

Cox’s Criminal Cases [England]

Decisions of the Lords of Council and Session, from 1766 to 1791… Selected from the original Mss. by M.P. Brown [Scotland]

Eden’s Chancery Reports tempore Northington [England] (Eden)

English Reports (E.R.)

Federal Cases [United States]

Federal Reporter [United States]

Johnson’s Chancery Reports [New York] (Johnson’s Chancery)

Keble’s King’s Bench Reports [England] (Keble)

La Revue Legale

Lower Canada Jurist

Manitoba Court of Queen’s Bench

Manitoba Reports

Michigan Reports

Modern Reports [England]

Monthly Law Reporter [Ontario]

Montreal Law Reports

North West Territories Law Reports

Ontario Appeal Reports

Ontario Practice Reports

Ontario Reports
Ontario Weekly Reporter

Parker’s New York Reports

Practice Reports [Ontario]

Queen’s Bench Reports (New Series) [England]

Rapports Judiciaires de Quebec/Quebec Law Reports

Reports of Cases Argued and Determined in the Courts of King’s Bench and in the Provincial Court of Appeals of Lower Canada (Stuart’s King’s Bench)

Reports of Cases Argued and Determined in the Supreme Court of the State of Vermont

Reports of Cases Decided in the Court of Common Pleas of Upper Canada (U.C.C.P.)

Report of Cases Decided in the Court of Queen’s Bench [Upper Canada/Ontario] (Q.B.)

Reports of Criminal Law Cases Decided at the City-hall of the City of New-York (Wheeler’s Criminal Cases)

Reports of Practice Cases [Ontario]

Salkeld’s King's Bench Reports [England] (Salk)

Saskatchewan Law Reports

Strange’s King’s Bench Reports [England] (Strange)

Supreme Court of New Brunswick

Taunton’s Common Pleas Reports [England] (Taunt)


The Decisions of the Court of Session… by William Maxwell Morison [Scotland] (Morison’s Law Dictionary)

The St. Alban’s Raid; or, Investigation Into The Charges Against Lieut. Bennett H. Young And Command… Compiled by L.N. Benjamin, D.C.L. Montreal: Lovell, 1865

Upper Canada Chamber Reports

U.S. Reports
Vermont Reports

Ventris’ King’s Bench Reports [England] (Ventris)

Vesey Senior’s Chancery Reports [England] (Ves. Sen.)

Western Law Reporter [Canada]

Government Documents


British and Foreign State Papers

British Documents on Foreign Affairs

*Colonial Office return of reserved bills from which assent was withheld*. London: Eyre and Spottiswoode, 1894.


Congressional Serial Set (United States)

*Correspondence Respecting the Proceedings of the Joint Commission for the Settlement of Questions Pending Between the United States and Canada*. Confidential Print: Printed for the use of the Foreign Office, 1899.

Debates of the House of Commons of the Dominion of Canada (Commons Debates)

Debates of the Legislative Assembly of United Canada

Debates of the Parliament of the United Kingdom (U.K. Debates)

Debates of the Senate of the Dominion of Canada


Foreign Relations of the United States


Hackworth, Green Haywood. *Digest of International Law*, vol. IV. Washington:
Hodgins, W.E. *Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895*. Ottawa: Government Printing Bureau, 1896.

Journal of the House of Assembly of Newfoundland

Journals of the Legislative Assembly of the Province of Canada

Journal of the Legislative Council of the Province of Nova Scotia


Parliamentary Papers (United Kingdom)


Sessional Papers (Province of Canada)

Sessional Papers (Dominion of Canada)


*Published Non-Governmental Documents*


*Statutes*

Laws of New York

Statutes of the Dominion of Canada

Statutes of the United Kingdom
Statutes of Upper Canada

Periodicals: Law Journals and Newspapers

*Albany Law Journal*

*American Jurist and Law Magazine*

*American Law Review*

*Bismark Daily Tribune*

*Boston Daily Journal*

*Boston Journal*

*Buffalo Express*

*Canadian Law Review*

*Canadian News*

*Daily Globe [Minnesota]*

*Duluth News-Tribune*

*Fort Worth Telegram*

*Galveston Daily News*

*Halifax Citizen*

*Hamilton Evening Times*

*Jackson Citizen*

*Law Intelligencer and Review*

*Law Times*

*Legal News*

*Lower Canada Law Journal*

*Manitoba Free Press*
Milwaukee Sentinel
Montreal Herald
Morning Freeman
New York Evening Post
New York Herald
New York Sun
New York Times
New York Tribune
Ottawa Times
Philadelphia Inquirer
Salem Gazette
The Globe
The National Advocate
Trenton Evening Times
Upper Canada Law Journal
Western Appeal
Winnipeg Free Press
Victoria Daily Colonist
Victoria Daily Standard

SECONDARY SOURCES


Adelman, Jeremy, and Stephen Aron. “From Borderlands to Borders: Empires, Nation-


Blakesley, Christopher L. “Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond--Human Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality,” *Journal of Criminal Law and Criminology*, 91(1), 2000, 1-98


Bovey, John A. “Lord Gordon Gordon.” *Dictionary of Canadian Biography*, vol. X.


Carroll, Francis M. *A Good and Wise Measure: The Search for the Canadian-American


Little, J.I. “American Sinner/Canadian Saint? The Further Adventures of Stephen


McLaren, Kristin. “‘We had no desire to be set apart’: Forced Segregation of Black Students in Canada West Public Schools and Myths of British Egalitarianism,” *Histoire Sociale/Social History*, 37, 2004, 27-50.


Messamore, Barbara J. “‘The line over which he must not pass’: Defining the Office of the Governor General, 1878,” *Canadian Historical Review*, 86(3), 2005, 453-483.


Murray, David. *Colonial Justice: Justice, Morality, and Crime in the Niagara District*,


Sarat, Austin, and Thomas R. Kearns, eds. *Legal Rights: Historical and Philosophical*


Shields, R.A. “Imperial Policy and the Role of Foreign Consuls in Canada, 1870-1911,”


Wiener, Martin J. Reconstructing the Criminal: Culture, Law, and Policy in England,


