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978-0-521-79283-7 - Between Law and Custom: “High and Low Legal Cultures” in the Lands of the British Diaspora – The United States, Canada, Australia, and New Zealand, 1600–1900

Peter Karsten

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## Between Law and Custom

When British authorities established “settler” colonies in North America and the Antipodes (New Zealand, Australia, South Africa, Fiji) from the early seventeenth to the late nineteenth centuries, they introduced Law through parliamentary statutes and Colonial Office oversight, and they dispatched governors and judges to the colonies. These jurists set aside some aspects of English Common Law to meet the special conditions of the settler societies, but the “Responsible Governments” that were eventually created in the colonies and (when that lawful engine failed to suffice) the British immigrants themselves set aside even more of the English law, exercising “informal law” – popular norms – in its place. The settler-champions of their newfound property rights fought the Crown’s efforts to stem their attacks upon the customary rights of the native inhabitants. (Ironically, this was the very same fight many of them and their ancestors had fought in the seventeenth and eighteenth centuries in the British Isles against the extinguishing of their ancient customary rights there.)

Law and popular norms clashed over a range of issues, including ready access to land, the property rights of aboriginal people, the taking of property for public purposes, master-servant relationships, and crown/corporate liability for negligent maintenance and operation of roads, bridges, and railways. Drawing on extensive archival and library sources in England, the United States, Canada, Australia, and New Zealand, Karsten explores these collisions and arrives at a number of conclusions that will surprise.

Peter Karsten is Professor of History and Sociology at the University of Pittsburgh.

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and New Zealand, 1600–1900*

**Peter Karsten**

*University of Pittsburgh*



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

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[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521792837](http://www.cambridge.org/9780521792837)

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First published 2002

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Karsten, Peter.

Between law and custom : “high and low legal cultures” in the lands of the British diaspora – the United States, Canada, Australia, and New Zealand, 1600–1900 / Peter Karsten.

p. cm.

Includes bibliographical references and index.

ISBN 0-521-79283-5 (hbk.)

1. Common law – History. 2. Common law – Reception – History.

3. Customary law – History. I. Title.

K588 K37 2001

340.57 – dc21 2001025809

ISBN 978-0-521-79283-7 Hardback

ISBN 978-0-521-09919-6 Paperback

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

An earlier version of the Animal Trespasses section of Chapter 4 appeared in *Law & Society Review* 32 (1998): 63–92.

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For

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

And for

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

\* Professor Ian Hollaway’s apt phrase.

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

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

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

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

Our colonists are becoming fonder of law every day.

– George Moore, diary entry, March 15, 1832

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Laws are sand; customs are rock.

– Mark Twain

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