

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*

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Introduction

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

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

¹ Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926), 127.

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

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

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

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

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

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

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

The Law² as expounded in courts is the forum where ordinary people generally face off against one another (and sometimes against the State) if they are going to do so. I wanted to know how well or poorly certain statutes, Colonial Office instructions, and English Common-Law rules were applied in the lands of the British Diaspora³ by both British- and native-born governors and jurists. What were the norms and rules

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

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

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

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

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

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

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

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

WHAT I ASK ABOUT FORMAL LAW

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

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

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

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

appealed to Queen's Bench where Chief Justice Harrison reviewed English, Canadian, and especially United States authorities to hold that townships put on notice of obstructions left in the road could be deemed liable to those who struck and were injured by them. Harrison observed that "we cannot do better than follow the reasoning of the American Judges" on this issue, and, more particularly, he said that this course was the appropriate one to follow in order to induce townships to exercise care in the maintenance and supervision of the highways, sidewalks, and bridges under their care.⁶

Any other course would, I fear, be destructive of the efficiency of our roads and would be opposed to what I take to be the real intention of the Legislature, which is, to have the roads reasonably fit for travel.

Here Chief Justice Harrison's quite deliberate interpretation of the relevant statute had the "instrumental" effect of *increasing* the liability of Ontario's municipal corporations. What is one to make of this apparent contrast in styles of these two superior courts, exercising, as they did, identical powers and jurisdictions? Did appellate court jurists use such "instrumental" rationales often? When they did, were they more likely to produce procorporate or proplaintiff results? How often did they borrow rationales from what they called "American" courts, the several state (and one federal) supreme courts in the United States? As courts of a British colonial province, were they not strictly bound by English precedent?

I have asked these questions of the courts of Upper Canada as well as those of the courts of six other Canadian provinces, the Supreme Court of the Dominion of Canada, the regional New Zealand supreme courts and its Court of Appeals, and the supreme courts of New South Wales, Victoria, Queensland, South Australia, Tasmania, and Western Australia.⁷ Several of these high courts addressed the same issues with

⁶ *Castor v. Corp. of Town of Uxbridge*, 39 UCQB 113 at 124 (1876). Mr. Castor lost his appeal, however, on the other issue, his driver's contributory negligence.

⁷ I have also given some attention to both the Law and popular norms in Ireland, Wales, South Africa, and Fiji, and I have included Lower Canada (Quebec), which was, by the end of the nineteenth century an explicitly Civil (French)-Law jurisdiction. But I have not chosen to include the decisions of British colonial courts in nineteenth century India in this particular comparative analysis because they draw much more heavily upon systems of law (both Muslim and Hindu) other than that of England than did the courts of Lower Canada/Quebec, and because that conquered British dominion was not populated by a significant percentage of British emigrants who expected (except from the handful of urban East India Company courts) "the Common-Law rights of Englishmen," as many did for some time in Lower

regard to injuries incurred on publicly maintained walks, roads, and bridges as had those of Upper Canada, and some of these also appeared to reason “instrumentally” in fixing the limits of corporate

Canada/Quebec. I also devote less attention (outside of Chapter 1) to Fiji and South Africa. The former never endured more than about 2,000 British Diaspora (largely planters) among its 140,000 native population (albeit it was a British governor who began the process of introducing tens of thousands of Indian laborers to Fiji in the late nineteenth century). Moreover, Fiji did not experience *wholesale* the imposition of British Law.

British settlement in South Africa, while more substantial than in India, still numbered, as late as 1895, less than 200,000 out of a European population of 520,000 (largely Dutch/Boers), in a colony that included nearly another 3,500,000 native Africans. Indeed, by 1904 British Diaspora appear to have outnumbered the Boers in only one of the colony’s four provinces (Natal), where no more than 97,00 Boers and Britons shared the land with hundreds of thousands of Bantus, Zulus, and Basutos. Moreover, South African Law contains substantial elements of European Civil Law because of its Dutch antecedence. (A. F. Hattersley, *The British Settlement of Natal* (1951), 99; W. Basil Warsfold, *South Africa* (1895), 1–2, 21, 27, 241; John Eddy and Deryck Schrender, eds., *The Rise of Colonial Nationalism: Australia, New Zealand, Canada and South Africa. 1880–1914* (Sydney, 1988), 211; Ellison Kahn, “The Role of Doctrine and Judicial Decisions in South African Law,” in *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions*, ed. Joseph Dainow (Baton Rouge, 1974), 224, 233.

My look at India, Nigeria, Malaysia, Jamaica and other such British “plantation, trade and tribute” possessions tomorrow. My tale of “settlement” Diaspora lands, today.

On Quebec, see Vince Masciotra, “Quebec Legal Historiography, 1760–1900,” 32 *McGill Law Journal* 712 (1987); Evelyn Kolish, “The Impact of the Change in Legal Metropolis on the Development of Lower Canada’s Legal System,” 3 *Canadian Journal of Law and Society* 1 (1988); Murray Greenwood, “Lower Canada (Quebec): Transformation of Civil Law, from Higher Morality to Autonomous Will, 1774–1866,” 23 *Manitoba Law Journal* 192 (1996); David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929,” 32 *McGill Law Journal* 523 (1987); and Howes, “Dialogical Jurisprudence,” in *Canadian Perspectives on Law and Society*, ed. W. W. Pue and B. Wright (Ottawa, 1988); on India, see Eric Stokes, *The Peasant and the Raj: Studies in Agrarian Society and Peasant Rebellion in Colonial India* (Cambridge, 1978); Ranajit Guta, *A Rule of Property for Bengal* (Paris, 1963); M. P. Jain, “Custom as a Source of Law in India,” 3 *Jaipur Law Journal* 96 (1963); and Bernard Cohn, “Law and the Colonial State in India,” in *History and Power in the Study of Law*, ed. June Starr and Jane Collier (Ithaca, 1989), 131ff. (on confusing ancient Indian customary law with contemporary rules). See also Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London, 1960), and T. O. Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies* (London, 1962).

liability.⁸ All of them wrestled with the question of how much use they might make of American decisions. But others simply cited what they believed to be the appropriate English precedent and noted that they were bound to follow such precedent.

Canadian, Australian, and New Zealand jurists (hereafter referred to as CANZ jurists) did not formally have available to them an option chosen by some high courts of the United States – that of creating a “principled exception” to the English rule. All of the North American and Antipode colonies had “received” all of the Mother Country’s Common Law, as well as all such parliamentary statutes as had been created prior to the date of the creation of their own Responsible Governments.⁹ But, unlike their American counterparts, these jurists of British colonies, provinces, and dominions were not empowered to make new Common Law for themselves. Their decisions were subject to review by Britain’s Privy Council in the event that the decision of the relevant colonial high court had concerned a damage award greater than a (relatively high) statutory threshold, or had raised an important issue of statutory interpretation.¹⁰ This hindered CANZ jurists then from simply distancing their “judge-made” legal rules from those of the “Mother Country” in the ways that American state supreme courts sometimes did, but it did not totally prevent some from finding other ways around unappealing English precedents.

How common was it for Canadian, Australian, and New Zealand jurists to dismiss American precedents with unfeigned contempt?¹¹ How common, on the contrary, were decisions that drew “on the

⁸ See, for example, *Rayan v. Mayor, etc. of Malmsbury*, 1 VR(L) 23 (1870); *Badenhop v. Mayor, etc. of Sandhurst*, 1W., W., & a’B. (Victoria) 136 (1864); *Featherston Rd. Bd. v. Tate*, 1 GLR (NZSC) 38 (1898); *Kinnealy v. City of St. John*, 30 New Br. R 46 (1890); *Rohan v. Muncip. of St. Peters*, 8 SRNSW 64 (1908); *Geldert v. Muinicip. of Picton*, 23 Nov. Sc. R 483 (1891) (Weatherbe, J., diss.); *Patterson v. Corp. of City of Victoria*, 5 Br. Col. R. 628 (1897); *Taylor v. City of Winnipeg*, 12 Manit. R. 479 (1898).

⁹ See, for example, R. Else-Mitchell, “The Foundation of New South Wales and the Inheritance of the Common Law,” 49 *Journal of the Royal Australian Historical Society* 1 (1963); J. E. Cote, “The Reception of English Law,” 15 *Alberta Law Review* 29 (1977); and Christopher English, “Newfoundland’s Early Laws,” 23 *Manitoba Law Journal* 65 at 71 (1996); Alex Castles, “The Reception and Status of English Law in Australia,” 2 *Adelaide Law Review* (1963).

¹⁰ For most of the critical years that this book addresses, the damages threshold was £500. Privy Council cases were not available in published reports until 1829 (except with regard to high seas prizes (1809)). William Holdsworth, *The Named Reporters, in Anglo-American Legal History Series: Contemporary Law Pamphlets*, ed. Allison Reppy (N.Y. 1943), Series 1, No. 8, p. 12.

¹¹ As did Darley, C. J., in *Patterson v. Borough of Woollahra*, 16 LR (NSW) 228 (1895).

combined authority of both” English and American opinions as if they were of equal weight?¹² The question is worth asking because American jurists in these years were rewriting some Common-Law rules in intriguing ways. How many of these jurists believed, with Justice Burton, of the Supreme Court of New South Wales in 1841, that the more English rules, principles, and customs were “introduced in to this Colony in the administration of justice, the better it would be for its inhabitants?”¹³ We know that while Justice Lutwyche, of Queensland’s Supreme Court believed he would “always” be “guided” by the decisions of English and Scottish courts, he also believed that he and his colleagues “ought to extend a similar comity to the Supreme Courts of the Australasia colonies, whenever it can be shown that the law which they are called upon to administer is the same as that which is in force here.”¹⁴ How common was it for CANZ jurists to extend such recognition and respect? How many, on the contrary, were as willing as Justice Meredith, or Justice Innes, to speak harshly on occasion of a particular English rule?¹⁵ How many others found ways to elude such a rule by pleading the exceptionality of “local conditions,”¹⁶ by distinguishing the facts of the case before them from the offending English precedent,¹⁷ or by simply obfuscating?

The conventional wisdom is that nineteenth century American jurists altered the Common-Law rules they had “received” from English courts in ways that favored corporate defendants, economic efficiency, “market liberalism,” or economic growth.¹⁸ I have recently argued, to the contrary, that when nineteenth century American courts did occasionally alter “received” Common-Law rules, they generally did so out

¹² Wilkins, J., in *Lovatte v. Salter & Twining*, 3 Nov. Sc. R 387 at 399 (1858).

¹³ *The Australian*, Apr. 8, 1841, p. 2, quoted in J. M. Bennett, *A History of the Supreme Court of New South Wales* (Sydney, 1974), 35.

¹⁴ In *MacDonald v. Tully*, 1 *Queensland Law Journal* 26 at 29 (1879).

¹⁵ Meredith, J., in *Cornell v. Town of Prescott*, 20 Ont. C. of A. 49 at 54 (1892); Innes, J., in *Sanderson v. Smith*, 3 LRNSW 31 (1882). Cf. Hagarty, C. J. O., in *Matthews v. Hamilton Powder Co.*, 14 Ont. C. of A. 261 at 265 (1887).

¹⁶ See, for example, Proudfoot, J., in *Church v. Fuller*, 3 Ont. (QB) 417 at 420 (1883); or Galt, J., in *Drake v. Wigle*, 24 UCCP 405 at 409 (1874).

¹⁷ See, for example, the utterly opposite ways that Taschereau, J., and Gwynne, J., interpreted the facts in *Price v. Roy*, 29 Can. S.C. 494 (1899), the one to aid the plaintiff, the other to turn her away. See also the diary entries of Denniston, J., in J. G. Denniston, *A New Zealand Judge* (Wellington, 1939), 124–27.

¹⁸ See, for example, Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977); Richard Posner, *An Economic Analysis of Law* (Boston, 1972); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (N.Y., 1993); Lawrence Friedman, *A History of American Law* (2nd ed., N.Y., 1985).

of a humane sense of compassion for individual plaintiffs who came before them at a considerable disadvantage in the litigation balance-of-power.¹⁹ (I will note these innovations, where relevant, throughout this book.) I believe most American jurists in the nineteenth century were more generous to poorer, weaker, and younger plaintiffs than had previously been allowed, and I attribute this to the evangelical

¹⁹ Thus a substantial number of American jurisdictions moved away from older English proemployer rules regarding breaches of labor contracts to more equity-based rules allowing a worker who quit before his contract was completed to recover the value of his labor (*quantum meruit*). Similarly, many American jurisdictions, especially in the West and South, tended to hold to the seventeenth century English rule that allowed a third-party beneficiary of a contract the right to sue for damages or specific enforcement, while British and New England courts of the nineteenth century united to reject such a litigant that right. Where variations appeared in this regard, American courts tended to be more willing to permit *gift* beneficiaries (spinster daughters, widows, orphans) to sue than *creditor* beneficiaries. In matters of tort law, many of the same American jurisdictions came to reject the New York, Massachusetts, and English rule that allowed a defendant, charged with injuring a child through negligence, to raise the child's contributory negligence as a bar. By the 1860s and 1870s most American high courts had decided that a small child could not be deemed to have sufficient capacity to assess the risks in order to be viewed as behaving in a negligent manner. Furthermore, most of these courts also decided (contrary to the rule in England, New York, Massachusetts, and a handful of other largely eastern states) that any negligence of the child's parent, in permitting the child to venture into a dangerous setting, could not be imputed to the child as contributory negligence. Similarly, most jurisdictions (again, distinctly southern, mid-western, and western) came to reject an English rule that prevented a child, injured on another's negligently managed property, from suing for damages if the child was trespassing. An increasingly child-centered culture that valued youthful play and outdoor activity appears to have produced a "legal fiction": These children, led to wander by "childish instincts," had been "tempted" into danger by "attractive nuisances" such as railroad turntables and other unguarded, whirling machinery; hence the child was no trespasser, but had been "invited" to the danger, and the owner of the machinery was liable if the dangerous object had been negligently maintained. In the 1840s and 1850s American juries began awarding substantially larger damage awards than they had previously granted, that is, as soon as railroads began to injure passenger in derailments or collisions, or to hit "strangers" at railway crossings, and I found that these awards were larger, proportionately, than those of the 1980s. Moreover, appellate courts approved most of these awards to passengers and strangers (despite the contributory negligence rule) and within a generation found enough exceptions to the fellow-servant and assumption of risk rules to uphold similarly large awards to a significant percentage of litigant railroad workers who would have simply been nonsuited by English judges. A "deep pocket" theory of tort compensation was clearly dominant in American jurisdictions

religious movements of the antebellum years and to “humanitarianism,” a quasi-religious force that vied with doctrinal legal reasoning in nineteenth century America, as well as to democratic impulses and the electing of jurists, more evident in the western, southern and mid-western jurisdictions than in at least two of the eastern-seaboard states. This “humane” judicial propensity in civil Common-Law suits can be compared to and is associated with the emergence of the “best interest of the child” doctrine in custody and adoption law, the antislavery movement, and the campaigns against flogging, cruelty to animals, and capital punishment.²⁰

These movements were also powerful in England, resulting in statutes such as those abolishing slavery in the West Indies and regulating Polynesian Island labor contracting for Fiji and Australia, but they

by 1850, and it can be detected simultaneously in the rise of contingency fee arrangements between lawyers and tort plaintiffs (another American innovation), in the rise of medical malpractice cases, and in the expanding of municipal liability (for defective roads, sidewalks, public utilities, and bridges). Peter Karsten, “‘Bottomed on Justice’: A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630–1880,” 34 *American Journal of Legal History* 213 (1990); Karsten, “The ‘Discovery’ of Law by English and American Jurists of the 17th, 18th, and 19th Centuries: Third Party Beneficiary Contracts as a Test Case,” 9 *Law and History Review* 327, (1991); Karsten, “Explaining the Fight over the Attractive Nuisance Rule: A Kinder, Gentler Instrumentalism in the ‘Age of Formalism,’” 10 *Law and History Review* 45, (1992); Karsten, “Heart” versus “Head”: Judge-Made Law in Nineteenth Century America (Chapel Hill, 1997), chs. 3, 5, 8, and 9.

²⁰ On these topics see, generally, Hermann Kantorowitz, *The Spirit of British Policy* (N.Y., 1932), Chapter 3; Frank Klingberg, *The Anti-Slavery Movement in England* (Yale Univ. Press, 1926), chs. 2 and 3; and Crane Brinton, “Humanitarianism,” in *Encyclopedia of the Social Sciences* (N.Y., 1937). More specifically, see Macello Maetro, *Voltaire and Beccaria as Reformers of Criminal Law* (1942); Harold Langley, *Social Reform in the U.S. Navy, 1798–1862* (Urbana, 1967); Seymour Drescher, *Econocide: British Slavery in the Era of Abolition* (Pittsburgh, 1984); Drescher, *Capitalism and Antislavery: British Mobilization in Comparative Perspectives* (N.Y., 1987); James Turner, *Reckoning of the Beast: Animals, Pain, and Humanity in the Victorian Mind* (Johns Hopkins U. Press: Baltimore, 1980), 79–83; William L. Brown, *An Essay on Sensibility: A Poem in Six Parts* (2nd ed, London, 1791); John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* (Chicago, 1977); Peter Karsten, *Law, Soldiers, and Combat* (Westport, Ct., 1978), 21–22; Geoffrey Best, *Humanity in Warfare* (N.Y., 1980); Louis Maser, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* (N.Y., 1989); Alice Felt Tyler, *Freedom’s Ferment* (1944); and Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (Univ. of North Carolina Press, 1985), Ch. 7.