Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791–1849

by David Murray
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ENDOWED WITH A MILD CLIMATE, fertile soil, and scenic beauty, the Niagara district of Upper Canada in the first half of the nineteenth century was often portrayed as a paradise. From the perspective of local elites, British laws and governmental institutions complemented the area's natural riches. This legal inheritance, it was believed, would help to preserve social order, thereby precluding the types of excesses associated with American republicanism. For many, however, including women, minorities, the poor, and people with mental illness, the Niagara district in that period was far from idyllic. Often on the economic margins of society, members of these groups could expect unfair or unsympathetic treatment in their dealings with district magistrates, who administered local law and government. In *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791–1849*,[1] David Murray pays particular attention to the disparity of experience that separated those who controlled and benefited from law and its institutions, from those on the periphery of societal power. Using the Niagara district as a case study, Murray considers the character of British criminal justice and local government that took root in Upper Canada from 1791 to 1849. He is especially interested in examining whether the ideals of British justice were put into practice. In doing so, he calls into question a number of long-standing received ideas about the nature of crime and quality of criminal justice in early Upper Canada.

The author organizes the text into three major sections, derived from the themes of justice, morality and crime, which Lieutenant-Governor John Graves Simcoe had identified in a 1793 speech. In the justice section, Murray discusses the functions, both judicial and administrative, of local magistrates and situates those functions in the context of the court of quarter sessions. In addition to administering criminal justice, the magistrates controlled district finances, appointed local officials, issued licences, approved applications for social welfare and supervised road work. The text emphasizes the discretion and autonomy which the magistrates enjoyed in exercising their combined judicial and administrative functions. It includes biographical details, to provide an idea of the background one would expect

1. David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849* (Toronto: University of Toronto Press, 2002).

of a magistrate. Most had no legal training.[2] This section also identifies the integral role in criminal justice played by the district sheriff. In addition, the author examines the selection and duties of juries, both grand and trial. He points out their independence, which could take the form of presentments contrary to the views of magistrates. The constable, the district's primary peace officer until the 1840s, is the other major criminal justice system participant introduced in this section. Often travelling long distances to fulfil their duties, constables made arrests, executed search warrants, served subpoenas and escorted prisoners to jail.[3]

Part two of the book involves the theme of morality. A state-sponsored Christian religion anchored the rule of law in early nineteenth century Upper Canada. Murray uses the subjects of Sabbath-breaking, treatment of the mentally-ill and the provision of public charity to examine the relationship between Christian morality and local law and government. In terms of Sabbath-breaking and related offences, the author depicts a community in which disparity prevailed, not only between the expected and actual behaviour of certain citizens, but also between prescribed and recorded sentences, which the magistrates tended to apply unevenly. Moreover, this was a community in which popular support for providing public charity, as reflected in grand jury presentments, was often resisted by the magistrates, who relied upon a lack of statutory authority and concerns about the adequacy of district tax revenues in denying applications for aid, or at least, in restricting the amounts awarded. For instance, in what seems to have been a typical case, an 1832 grand jury "'by every feeling of humanity and pity'"[4] unsuccessfully implored the magistrates to approve public assistance for an elderly woman and her two daughters, one blind and the other mentally-ill.

In part three, which relates to crime, the author examines the types of crimes and punishments associated with the Niagara district. He emphasizes the inadequacy of the district jail, as a catch-all institution for criminals, imprisoned debtors and the mentally-ill. He identifies the victims of crime, paying particular attention to battered women and to African Canadians. Murray also considers the implications for criminal activity of the nearby border with the United States. Criminals and officials alike, the author suggests, were able to manipulate the frontier to achieve certain goals. Smugglers, for example, enjoyed a ready market in Upper Canada for American contraband. On the other side of the law, Upper Canadian offi-

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2. See William H. Laurence, "Process and Particulars: The Informational Needs and Sources of a Nineteenth-Century Nova Scotian Sheriff" (1997) 12 Épilogue 1 (discusses how a local justice official untrained in the law would obtain the information necessary for professional success in another British North American colony).
3. See John C. Weaver, *Crimes, Constables, and Courts: Order and Transgression in a Canadian City, 1816–1970* (Montreal: McGill-Queen's University Press, 1995) (provides more details about the history of Ontario constables).
4. Murray, *supra* note 1 at 116.

cials employed the royal pardon on condition of banishment to deposit undesirables on the American border, in the expectation that unwanted persons would enter the United States and remain there. This section concludes with an examination of community reactions to the issue of African American slaves who sought refuge in the Niagara district and pays particular attention to Upper Canada's first race riot. The author reconstructs an 1837 confrontation between local African Canadians, who had gathered outside the Niagara jail in order to prevent the extradition of fugitive slave Solomon Moseby to Kentucky, and a small body of armed constables and soldiers. During the resulting clash, Moseby escaped, but a number of his supporters were killed or wounded.

Murray uses the information which emerges from records of the Niagara district court of quarter sessions to support a number of conclusions. The author suggests, contrary to the writings of certain twentieth century Loyalist historians,[5] that the myth of early Upper Canada being without much crime or non-adherence to moral norms can be laid to rest. He makes his case convincingly, as for example, in relation to domestic violence, which appears to have been a far more serious problem than assize court records or contemporary newspapers would indicate. Second, although Upper Canadian justice comprised British laws and institutions, it responded to local conditions (the effect of geography, the influence of the United States and the realities of life in pioneer settlements) and developed features of its own as time unfolded. In particular, Murray depicts a criminal justice system which was highly dependent on cooperation from the local community. Most significantly, the author finds little evidence of widespread corruption and partiality in the criminal justice system at the local level. Although acknowledging that members of some groups were disadvantaged, and that some egregious, politically-motivated cases did occur, he suggests there was no partiality shown in the majority of cases. Justice in the Niagara district was therefore no better, nor any worse, than what could be expected elsewhere in British North America at that time.

This is a clearly written, engaging and detailed text which underscores the richness of quarter sessions court records as a source of historical information, and which provides a model for future studies of a localized nature. Murray makes apparent the merits of the case study approach, in particular allowing for longstanding assumptions to be tested at the local level. The author's adroit use of his sources produces a living history in which one hears the voices of many participants in the local system of criminal justice and government, but especially members of certain groups who have been

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5. See Lt. Col. George Taylor Denison, "Presidential Address," reproduced in L.F.S. Upton, ed., *The United Empire Loyalists: Men and Myths* (Toronto: Copp Clark, 1967) 139; W. Thomas Matthews, "The Myth of the Peaceable Kingdom: Upper Canadian Society during the Early Victorian Period" (1987) 94(2) Queen's Quarterly 383.

traditionally under-represented in historical studies. One reads, for instance, about the unsuccessful petitions for public charity made by George Martin, an African Canadian who had developed mental illness following the loss of his legs to frostbite. Unable to walk, Martin appealed to the "'cold hand of charity'" so that he might not "'die miserably in the streets,'" a fate he does not seem to have avoided.[6] As an example of domestic violence, the author relates the terrors which Queenston housewife Jane Baker endured at the hands of her husband. After striking her with his knees and fist, he was found to have "'[s]tuck a knife into the wall close to her face as if he intended to strike her with it....'"[7] By including the stories of people such as Martin and Baker, the author connects human characteristics to those who approached local justice and government for assistance and, through their experiences, concretizes deficiencies in the system.

For the most part, the author builds a strong foundation for his themes using many vivid examples. The author effectively establishes the obstacles facing those groups lacking power in the Niagara district. Clearly, if one was a woman, African Canadian, poor or mentally-ill, one could be severely disadvantaged in dealings with local magistrates. On occasion, however, Murray can overstate his case, through the use of generalized statements or speculation without apparent support. For instance, the author mentions the stoning of an African Canadian church by "four presumably white males."[8] He points out that the fines received by these men were double the normal amount. Without identifying any other evidence, he deems this a "racial incident."[9] He goes on to indicate, "[a] similar prosecution occurred three years later, an indication that the racial persecution continued."[10] The author therefore seems to conclude that the offence demonstrated racial animus, simply because an African Canadian church and an exemplary fine were involved. Earlier in the text, however, he describes two individuals who were imprisoned, in addition to being fined, after having fired guns in proximity to another church.[11] Why does the author present the first example as being clearly motivated by racial prejudice? Could it not have been motivated by anti-religious sentiment alone? Perhaps the answer is clear in the historical record, but if so, the text does not reveal this. In the section on spousal abuse, the text uses unnecessary presumptions when relating certain individual occurrences. For example, on separate occasions, the text presumes that a battered wife must have faced earlier abuse for which she did not seek legal redress,[12] that alcohol helped to trigger another

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6. Murray, *supra* note 1 at 120.
7. *Ibid.* at 162.
8. *Ibid.* at 84.
9. *Ibid.*
10. *Ibid.*
11. *Ibid.* at 82.
12. *Ibid.* at 160.

incident[13] and that a third man, fleeing the law, forced his battered wife to accompany him.[14] The incidents which Murray relates are numerous, detailed and striking enough to make a compelling case, without the need to be reinforced by speculative statements.

For local elites, Christianity was the bedrock of the criminal and moral order which applied in the Niagara district. Nonetheless, as the author establishes, "the law proved to be a poor instrument for creating a Christian moral order."[15] The approach of many magistrates, especially when making decisions about social welfare, did not uphold the Christian foundations for law and local government. This apparent and significant contradiction invites certain questions. Is there evidence of magistrates struggling to accommodate Christian duties within legislative and financial constraints? Did supplicants for public assistance invoke Christianity in their petitions? Did grand jury members point out the disparity between Christian ideals and the system as applied by the magistrates? With the exception of one example, which the author presents as "[a] typical case", ostensibly setting out "the context of a Christian moral obligation embracing both the individual and the community", but which does not include any language necessarily connotative of Christianity,[16] we are not told. The historical record may not disclose such answers. However, given the importance of Christianity to the ideals of local law and government, if there was additional information available about participants' express attitudes towards the fulfillment of Christian moral obligations, pursuing this in greater detail would have resulted in a more complete picture.[17]

The text's most noteworthy conclusion is to call into question the prevailing thesis that criminal justice in early nineteenth century Upper Canada was partial and designed to serve as a repressive instrument.[18] The author argues that as long as one was not a member of certain marginalized groups, there is little evidence of widespread corruption and partiality in the justice system. Therefore, "in the vast majority of the cases heard before the courts in the Niagara district, both at the level of the quarter sessions and the

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13. *Ibid.* at 162.
14. *Ibid.* at 165.
15. *Ibid.* at 130.
16. *Ibid.* at 121.
17. In the context of United States judges hearing civil justice appeals, see Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1997), which discusses the influence of Christian morality on nineteenth century justice.
18. Murray's examples of the dominant thesis include Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791–1899* (Toronto: University of Toronto Press for The Osgoode Society, 1986), and Paul Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in Canadian Political Culture" (1989) 7(1) 121. The perceived partiality of magistrates in another colony, Nova Scotia, during the same period is mentioned in Sandra E. Oxner, "The Evolution of the Lower Court of Nova Scotia" in Peter Waite, Sandra Oxner & Thomas Barnes, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto: The Carswell Company Limited, 1984) 59 at 67–70.

assizes, the outcome was based on a determination of the law as understood by magistrates and juries."[19] As for allegations of corruption and partiality, the author suggests that they rely on an amalgam of charges from opponents of the regime in Upper Canada and depend on certain notorious, assize-level cases with political overtones, such as the prosecution of the radical reformer Robert Gourlay. Nonetheless, as the text points out, all of the elements were in place for the state to manipulate the criminal justice system. Only local elites, who could be expected to embrace certain attitudes and ideals, became magistrates. The sheriff similarly had to be scrupulously loyal to the central government. There were instances, as the author acknowledges, when sheriffs seem to have received instructions to manipulate jurors' lists.[20] Clearly this was a system where the state was in a position to influence the results in particular cases. In this light, one incident briefly mentioned in the text, the case of William Forsyth, Jr., is significant, as it may reveal a wider potential for partiality than suggested by the author.

Following an attack on a servant, whom he had severely choked, Forsyth was found guilty of assault and battery. He received a one month jail sentence, in addition to a large fine. Members of both the grand jury, which had referred the matter to trial, and of the trial jury, which had heard the case, petitioned the lieutenant-governor about the severity of Forsyth's punishment. The jurors pointed out that placing Forsyth in jail would deprive his wife and children of their sole source of support. The petition was referred to the local magistrates. They refused to modify their sentence, indicating that "'a full Bench'" had determined Forsyth's punishment for what "'was considered a very aggravated assault.'"[21] The lieutenant-governor then upheld the magistrates' decision. Forsyth's father was a Niagara hotel keeper who had clashed with the government over property rights on the Niagara River. Some four years earlier, the senior Forsyth had unsuccessfully sued government officials for damages.

The author primarily uses the Forsyth, Jr. incident to illustrate the independence of Niagara jurors. He also seems to suggest that the severity of Forsyth's penalty is understandable, given his father's earlier dispute with the government. The episode can also be seen, though, as an indication of more widespread possible deficiencies in the quality of Niagara district criminal justice. It is noteworthy that though serious assaults were supposed to be heard by professional judges at the assize courts,[22] the district magistrates heard Forsyth's case. We are not provided with any indication that Forsyth had personally clashed with the authorities in the manner of his father.

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19. Murray, *supra* note 1 at 223.
20. *Ibid.* at 56–57.
21. *Ibid.* at 60.
22. *Ibid.* at 136.

Forsyth's offence itself had no apparent political connotations. Nonetheless, the magistrates, and by extension, the lieutenant-governor, who approved their sentence, seemed intent on applying an exemplary punishment to a crime, which is brutal by our standards, but which seemed common enough in early nineteenth century Niagara. Given the authorities' willingness to proceed with determination, contrary to public opinion, against the relative of a government opponent over a commonplace criminal offence that occurred four years after the clash with the senior Forsyth, then how far did the magistrates' efforts otherwise extend? Are there comparable Niagara district cases which should have been mentioned? For instance, is there any evidence that friends, neighbours, co-religionists or customers of a perceived political foe had similar experiences? If one wishes to set aside the result in the Forsyth case as a politically-motivated exception to the general tendency for impartial justice, then one should make clear what other factors, and of how direct a connection, are also seen to explain cases attributed to political overtones.

Leaving aside the issue of politically-influenced justice, the text more generally does not specify whether factors such as religion, ethnicity or personal connections were systematically investigated and discounted as possible influences on the quality of justice received. At the conclusion of the book, one may therefore wonder whether the author primarily focused on gender, race, poverty and mental illness in identifying possible correlations to the quality of justice received, or whether other factors were considered, but do not appear significant in the historical record. Although vividly depicting local justice and government in early Upper Canada and making a good case for subjecting to closer scrutiny the prevailing paradigm of corrupt and partial magistrates, this text could have achieved a greater impact by not leaving certain questions unanswered.

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