

## Law and Order Recent Works on Canadian Legal History

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## Law and Order: Recent Works on Canadian Legal History

THE SIX BOOKS REVIEWED HERE ARE A VARIED GROUP, all relating in different ways to the criminal justice history of Canada generally. Debra Komar's *Ballad of Jacob Peck* and *Lynching of Peter Wheeler* are more popular texts on two specific cases, one in New Brunswick and the other in the Annapolis Valley of Nova Scotia, while Marcel Martel's *Canada the Good: A Short History of Vice Since 1500* is an academic examination of state regulation that depends upon secondary sources. The remaining three – Paul Craven's *Petty Justice*, Michael Boudreau's *City of Order*, and R. Blake Brown's *Arming and Disarming* – are scholarly works drawn from close engagement with archival and other primary sources.<sup>1</sup>

*Jacob Peck* tells the story of a murder in rural New Brunswick, near Shediac, in 1805. Komar aims to correct earlier versions of this troubling, sad story of a farmer, inspired by a religious pretender, who loses his grasp on reality and murders his sister. *Peter Wheeler* tells of the conviction and execution of a man of colour after the murder of a teenaged girl in the Annapolis Valley in the mid-1890s. Applying her training as a forensic anthropologist and working through the evidence from the legal records and the newspapers as the community of Bear River erupted against Peter Wheeler, Komar convincingly makes the case that Wheeler was by no means guilty beyond a reasonable doubt. Because of misunderstandings of the law in *Jacob Peck* and Komar's expertise with forensics – which is much more apparent in *Peter Wheeler* – the latter is the better book. Komar contextualizes both cases through discursive excursions into the backgrounds of the various characters. In both books, and despite uncertainty in the evidentiary record, Komar adopts strong, indignant views of the events. Both books are lightly footnoted, and Komar does not hesitate to tell us what even peripheral characters were thinking – literary strategies that undoubtedly increase their appeal for a popular audience.

Marcel Martel's *Canada the Good*, by contrast, relies largely on secondary literature to provide a history of state and non-state regulation of activities that have been deemed morally problematic over Canada's history. My undergraduate students in Law and Society would love it. Governed by a social control thesis, the book tracks the efforts of individuals, churches, government actors, and voluntary organizations to control troubling activities and substances – including extramarital sex, gambling, contraception, abortion, homosexuality, divorce, and the use of tobacco, liquor and drugs – from the early days of New France to the early 21st century. Martel describes the shift from a moral to a medical understanding of these

1 Debra Komar, *The Ballad of Jacob Peck* (Fredericton: Goose Lane Editions, 2013); Debra Komar, *The Lynching of Peter Wheeler* (Fredericton: Goose Lane Editions, 2014); Marcel Martel, *Canada the Good: A Short History of Vice Since 1500* (Waterloo, ON: Wilfrid Laurier University Press, 2014); Paul Craven, *Petty Justice: Low Law and the Sessions System in Charlotte County, New Brunswick, 1785-1867* (Toronto: University of Toronto Press for the Osgoode Society, 2014); Michael Boudreau, *City of Order: Crime and Society in Halifax, 1918-35* (Vancouver: UBC Press, 2012); R. Blake Brown, *Arming and Disarming: A History of Gun Control in Canada* (Toronto: University of Toronto Press for the Osgoode Society, 2012).

activities, the worries about often-racialized “outsiders” that have characterized the panics of various periods, and the impact of professionalization and liberalization on how we have collectively responded to these social phenomena. The book builds narrative momentum as it moves through the 20th century, but the bibliography seems good for all periods.

Craven’s book is a compendious analysis of archival material that reveals the day-to-day workings of the magistracy system in Charlotte County, New Brunswick, from its earliest days until Confederation. Craven pays close attention to the goals and incentives built into the system, and traces its breakdown in the mid-19th century under the pressures of external forces and new political ideologies. Michael Boudreau focuses on Halifax and its responses to perceptions of an increase in violent crime in the early 20th century; *City of Order* is a fascinating story of a city’s uncertainty in navigating aspects of what we have come to call “modernity.” Blake Brown’s *Arming and Disarming* describes the changing legal and constitutional treatment of troubling, increasingly potent devices – firearms – as Canada became increasingly urban, consumerist, and bureaucratic. After assessing the prevalence of firearms before 1867, Brown describes how the federal government’s pre-First World War commitment to arming Canadians turned to favour disarming them as the 20th century passed. Published by well-regarded academic presses, all three of these books are path-breaking works by academic historians who engage the existing literature and treat evidence with exemplary care.

Read together, these books shed considerable light on the history not only of the Canadian justice system but also on the growth of the regulatory state; changing interpretations of constitutional rights; and the impact of the rise of consumerism, new technologies, and the media. This review essay describes how these books contribute to our knowledge of these different areas and suggests new directions for scholarship that they open up.

### **The state**

These texts tell a remarkably rich story of the evolution of what we have come to call “the state.” It is a story of redrawing boundaries between low and high law (in Paul Craven’s terms), of the centralization of power, of increasing demands on the state and its increasing capacity to respond, and of changing ideas about how individuals should discharge their offices. Craven’s *Petty Justice* takes us to the site of “low law” in Charlotte County in the late 18th century, to the justices of the peace and surveyors. The power exercised in the community was local, personal, and not overly bound up in the concerns of the empire. Craven asserts “The principal objects of low law in Charlotte county were to preserve peaceful social relations, maintain social and economic order, and retain local elite control of local affairs” (320). Craven describes how this system functioned and how it came to an end.

Sitting together and individually, the magistrates of Charlotte County taxed, licensed, enforced credit obligations, administered social welfare, and attempted to preserve order. Criminal justice was a small part of their work, and some justices avoided it completely. Some magistrates sat in the provincial assembly, which Craven argues was not much concerned with local affairs until about the 1830s. Its job was to distribute provincial revenue. Governance was the business of the magistracy. Most of what the justices did had little to do with the “high law” of the

common law and more specialized courts. Being a magistrate was a marker of social prominence. Most – but by no means all – were merchants with some degree of prosperity, although by far the most active magistrate Craven discusses, Charles Reid Hatheway, was not a merchant and could be particularly useful and active precisely because he was not conspicuously entangled in the commercial relations of the area. Magistrates' professional responsibilities and personal interests were intertwined in ways that became problematic and were accordingly separated and regularized as the decades passed, preparing the way for the development of the modern administrative state.

Craven describes how these tensions played out in the evolution of the office of deputy land surveyor as well. The position and the remuneration it afforded changed as land became a source of government revenue rather than a reward for service and loyalty. "The first generation of surveyors," Craven notes, "considered their deputations to be entitlements and their participation in public life to be corollary to the pursuit of conscientious self-interest" (186). Not only did they draw boundaries and suggest solutions to disputes, but they also speculated in land. In the middle decades of the century, after a far-reaching scandal, self-interested practices came to be seen as inconsistent with the role of a public servant. After 1865 the scope of "private entrepreneurship" was reduced so that deputy land surveyors worked "within an increasingly straitened framework of bureaucratic regulation and procedure," even as they "continued to dispense low law, improvise departmental policy, and pursue substantive justice within the emerging institutional and administrative environment" (190). Undoubtedly similar shifts occurred in other offices, which other work will, I hope, unearth.

One of the great strengths of Craven's book is its careful attention to finances. In the early years magistrates could assess the parishes to support paupers, issue liquor licences and fine bootleggers, and collect penalties under various other provincial statutes, which they could use for limited purposes. Funding major public works required the legislature's cooperation. Craven describes in detail how first the county building projects and later the Irish famine migration created financial pressures that strained the sessions system heavily. Encouraged, undoubtedly, by new discourses about governance, the population increasingly demanded greater government transparency and responsibility. As well, as the temperance movement strengthened, revenues from liquor licensing fell, enforcement proved difficult, and concerns about disorderly behaviour increased; the costs of professional policing, however, looked hard to bear. The temperance movement and the emergence of party politics in an increasingly active provincial government led to the multiplication and politicization of magisterial appointments. With the overall centralization of the provincial administration and other financial pressures, the jurisdiction of the county justices was reduced. Municipal government was gradually reshaped and regularized beginning in the early 1850s, with municipal incorporation becoming mandatory in the 1870s.

In the middle decades of the 19th century, much of the magistrates' jurisdiction drifted to the provincial government. The low law the magistrates administered became less and less relevant. Their criminal jurisdiction had been dramatically curtailed by the late 1860s. County and parish courts, subject to appellate review, acquired jurisdiction to hear low-value civil cases. Craven's conclusion, however, is

not that low law – with its commitment to efficient, substantive justice – ended with modernization but that it more likely moved into other regulatory bodies, boards, and agencies that had (and have) proliferated in the modern state and “may have more in common with the local justice of the ancien regime than is generally recognized” (486). He concludes, therefore, with a call for a close examination of these bodies.

The question of the state’s capacity to meet the demands placed on it runs through Michael Boudreau’s *City of Order* and R. Blake Brown’s *Arming and Disarming*. Boudreau captures a period when Haligonians, anxious about crime and disorder, yearned for a stable, peaceful (romanticized) past. They theorized about how best to prevent future crime. Institutions were revised: a juvenile court was established in 1911, one woman police officer was hired in 1917 and a second in 1918, and the first patrol car changed the routine of the beat in 1921. Debates over prison reform demonstrated the mixture of aspirations and assumptions about punishment and rehabilitation that shaped the state’s approaches to different types of offenders. Perhaps crime’s causes lay in poverty, hereditary “degeneracy,” or poor parenting. Perhaps offenders – or maybe only youth offenders – could be reformed, or perhaps not. The state’s capacity grew in fits and starts.

Brown’s book also sheds light on the growth of the state, as it responded to demands made on it. Well before Confederation, colonial governments attempted to restrict the use of firearms by particular people in particular places. Until about 1970, however, government actors expressed doubts about the state’s capacity to exert the degree of control over firearms that some constituents sought, and especially to regulate mere possession as opposed to sales. Despite great public concern about pistols, particularly, in the 1870s and 1880s, the government did not require vendors to keep track of gun sales until 1892 (78).<sup>2</sup> The first gun registry was established for pistols in 1934. It was not until the late 1960s that the federal government started to attempt to require the registration of all firearms, and all firearms owners, rather than only a minority. Still, even when a registry was finally operational in the early 2000s, the difficulties and inefficiencies in implementing it made it a financial debacle. The unhappy political consequences of committing the state to a task that seemed politically necessary but strained its capacity might have seemed more than vaguely familiar to Craven’s magistrates. Brown’s text, like Craven’s and Boudreau’s, shows how specific demands and responses, in the face of broader political necessities, have interacted to cause parts of the apparatus of the Canadian state – local, provincial, and federal – to extend their scope, and how financial exigencies and other factors (such as constitutional sensibilities and consumer preferences, discussed below) have pushed this process in different directions. Martel’s discussion of the regulation of alcohol, gambling, drugs (including thalidomide), and tobacco in the 20th century sheds further light on these processes, because debates about these “vices” – popular, taxable, and also troubling to the consciences of many – show the bargaining over

2 For a discussion of the increasing reach of the surveillance state signalled by the new 1892 Criminal Code, see Desmond H. Brown and Barry Wright, “Codification, Public Order, and the Security Provisions of the Canadian Criminal Code, 1892,” in *Canadian State Trials. Vol. III: Political Trials and Security Measures, 1840-1914*, ed. Barry Wright and Susan Binnie (Toronto: University of Toronto Press for the Osgoode Society, 2009), 516-63.

interests and the changes in the capacity of the modern democratic state. Further work will, I hope, elaborate the ideologies, exigencies, and technologies that have shaped the Canadian state and its ambitions.

### Canadian constitutionalism

Constitutional understandings are an important constraint on the shape and reach of the state, although exactly how determinative they are may be debated. These books tease out understudied threads in Canadian constitutional history, particularly for the pre-Confederation period. As described above, Craven describes forces that pushed New Brunswick from local governance by prominent men combining personal and public interests to centralized, regularized, “responsible” government. These books also shed light on individuals’ rights with respect to the state and signal that important changes took place after Confederation.

First, there is the contribution to existing scholarship on the meaning of liberty.<sup>3</sup> Craven cites the *St. Andrews Standard*, in 1855, calling on its readers to petition the lieutenant governor to veto the statute that brought prohibition into effect on 1 January 1856: “We are still deserving of the name of Britons, and are not to be dictated to, as to what we shall eat, drink, or avoid, by any small minority belonging to Temperance Societies” (452). These assertions – that the heirs of British rights were protected against encroachments on their liberty – failed to persuade the lieutenant governor, although they may well have been in the minds of the shopkeepers in St. Andrews who ignored prohibition completely. This “British liberty” thread persisted into the 20th century in Nova Scotia. According to Boudreau, Haligonians looked to “British justice” to protect an individual’s liberty and safety and to ensure social order. A system that was seen to be providing British justice would be entirely legitimate (79). People seen as non-British became discursively associated with disorder, although they too have at various times in Canada’s history insisted that they rightly bore the full rights of British subjects.<sup>4</sup>

Brown pays considerable attention to the Canadian history of the right to bear arms. He describes how arguments about this specific right had, by about 1900, been supplanted by a more general liberal discourse of property rights and personal protection. In the mid-19th century, though, politicians like Robert Baldwin, Thomas Cushing Aylwin, Joseph-Édouard Cauchon, and John A. Macdonald weighed the dangers of firearms (such as those kept near canal projects) against their conviction that such legislation would encroach on the constitutional right of British subjects to bear arms. Often in these debates the source of the right was a bit murky, but Brown argues persuasively that the English Bill of Rights of 1689, as reiterated

3 See, in particular, E.A. Heaman, “Rights Talk and the Liberal Order Framework,” in *Liberalism and Hegemony: Debating the Canadian Liberal Revolution*, ed. Jean-François Constant and Michel Ducharme (Toronto: University of Toronto Press, 2009) 147-75; Michel Ducharme, *The Idea of Liberty in Canada during the Age of Atlantic Revolutions, 1776-1838*, trans. Peter Feldstein (Montreal and Kingston: McGill-Queen’s University Press, 2014); and Robert L. Fraser, “‘All the Privileges which Englishmen Possess’: Order, Rights, and Constitutionalism in Upper Canada,” in *Provincial Justice: Upper Canadian Legal Portraits from the Dictionary of Canadian Biography*, ed. Robert L. Fraser (Toronto: University of Toronto Press, 1992), xxi-xl, esp. xxxii-xl.

4 For a discussion, see Lyndsay Campbell, “Race, Upper Canadian Constitutionalism, and ‘British Justice,’” *Law & History Review* 33, no. 1 (February 2015): 41-91.



in Blackstone's *Commentaries*, is the most likely source; Macdonald at one point cited the *Commentaries* explicitly (70). As others have noted with respect to other rights in the British constitutional tradition, people were not all entitled to the same rights.<sup>5</sup> Habeas corpus was available to everyone in the sovereign's domain, but the right to bear arms was an entitlement of a more limited class of subjects – "Protestants" in the Bill of Rights and men of property, likely, in debates over disarming canallers in the Canadas (32-5).

Canadian governments have tended to prefer passing general legislation that has allowed for the implementation of executive measures that have targetted particular groups (and, later, particular kinds of firearms). In an interesting discussion of a statute that appears never to have been proclaimed after the Northwest Rebellion, Brown notes that John A. Macdonald's government

refused to completely disarm western Aboriginal Peoples, but passed legislation enabling it to place limitations on the possession or sale of guns in the North-West if necessary. Once proclaimed in any district of the North-West Territories, the act made it an offence to possess, sell, exchange, or barter "improved arms" (all weapons other than smooth-bore shotguns) or ammunition without the permission of the lieutenant governor. . . .

If proclaimed, the act applied to people of all races, but the debates in Parliament made clear that the government's main goal was the disarmament of Aboriginal Peoples. Prime Minister Macdonald chose his words carefully, suggesting that Ottawa's objective was "to collect arms of precision" to prevent them falling into the "hands of certain classes" to "give satisfaction and confidence to the settlers." Macdonald generally disliked firearm regulation, and he thus pointed out that the act imposed temporary measures. While Macdonald referred only to "certain classes," other MPs openly stated that the government sought the ability to disarm Aboriginal Peoples (58).

Canadian constitutional thought evidenced a discomfort about "class legislation" until the later part of the 19th century, when Aboriginal people – transformed into legal minors – and their lands became subjected to intensive regulation.<sup>6</sup> In an increasingly liberal settler colony, the logic of the right to bear arms, as articulated in the 1689 Bill of Rights, must have been uncomfortable. Without a written constitutional bill of rights in the 1867 constitution to reify it, perhaps the emergence of a straightforwardly liberal understanding of this right – guns as a form of property *prima facie* available to anyone, regulated only to prevent harm – made sense. Also notable in this context, of course, is the deep understanding in 19th-century constitutionalism that individual rights were to be protected by legislatures, not courts. Who, if anyone, was in charge of that task after 1867 is murkier; courts stepped into this role gradually over the course of the 20th century. It is encouraging to see a body of research growing on 19th-century constitutionalism.

<sup>5</sup> See, for example, Heaman, "Rights Talk and the Liberal Order Framework."

<sup>6</sup> See Campbell, "Race, Upper Canadian Constitutionalism, and 'British Justice'."

### Doing justice

The books under discussion here together shed light on the civil and criminal justice systems. In early 19th-century New Brunswick, debts were often difficult to pay, and the appearance that justice was impartial would have been hard to sustain had businessmen-magistrates often judged the resulting disputes. In Charlotte County, magistrate Charles Reid Hatheway, a half-pay officer, did the bulk of this work for the middle decades of the century. Working from Hatheway's ledger for April 1840 to April 1841, Craven reconstructs how Hatheway's courtroom functioned as a forum for addressing civil disputes and collecting debts in St. Andrews. Craven concludes that Hatheway delivered inexpensive, accessible, substantive justice. Few lawyers appeared before Craven, and when they did he deferred to them on the law but not the facts.

As to criminal justice, one question that is difficult to answer is how prevalent crime was felt to be in different places at different times. Much depends, notes Craven, on what criminality is understood to be. Conduct that disturbs a hierarchically ordered "peace" is no longer a sufficient definition, if it ever was. Extramarital sex, consuming certain substances, and even some degree of violence, on the other hand, have been legally criminal even when there was disagreement about how unacceptable or immoral they were. Preventing and punishing them posed further difficulties. Smuggling is a similar matter; around 1800, it evidently did not cause any sort of crisis of conscience in the St. Andrews area (1-7, 13). Alcohol attracted a variety of regulatory responses. Both the substance itself and its regulation challenged the ideology and the capacity of the state because, as both Martel and Craven make clear, it has always been an important source of revenue for those entitled to regulate it.<sup>7</sup> In Charlotte County until the mid-19th century, for instance, alcohol was not a serious social or moral issue unless it led to inappropriate behaviour on the Sabbath (413). The moral effects of alcohol started to become a subject of concern in the 1820s, but they were addressed mainly through licensing and civil penalties. By the late 1840s, public drunkenness was considered a moral and social problem such that New Brunswick underwent a brief experiment with prohibition in the mid-1850s before resuming licensing. Enforcing liquor laws during the eras of local option and prohibition in the later 19th and early 20th centuries resulted in significant changes to policing. In Nova Scotia, for instance, prohibition ended after a 1929 plebiscite. Provincial control of the retail sale and public consumption of alcohol took its place, with the province briefly experimenting with a provincial police force that spent half of its energy the first year (1930) on violations of the liquor laws. The RCMP took over most of the duties of the provincial force in 1932, after the provincial force fell victim to weak provincial finances (Boudreau, 50). The difficult question of the costs of using criminal law to address issues over which society is ideologically divided remains with us, as does the related question of how (and whether) the criminal justice system can be used to prevent problematic behaviour or protect potential victims of crime on a fair and equal basis.

7 For example, Martel in *Canada the Good* states that duties "collected by the King of France on wine, rum, and other liquor imports constituted 50 percent of colonial revenues in the 1730s and increased to above 85 percent in the following decade" (40).



These difficulties arise even for violence. Martel notes that a considerable tolerance for violence seems to have existed in New France (32-3). Hints that interpersonal violence was not uncommon appear periodically in Craven's text as well. The goal of the sessions system was to preserve the peace. Arrests for indictable offences did not necessarily lead to committals for trial. Magistrate Hatheway, sometimes sitting with others, disposed of the vast majority of the cases before him summarily, with peace bonds or convictions: "About a third of the complaints before Hatheway ended with the accused entering into sureties to keep the peace to the complainant with no conviction recorded or penalty imposed (peace bonds were also imposed along with fines in most assault, abusive language, and disorderly conduct convictions). Even proceedings in indictable offences could terminate this way" (310). Was violence more accepted in the mid-19th century, or was it too difficult to contain? Did the justice system prevent offences? Were all parts of the community equally satisfied with the punishment meted out? How should we understand variations in rates of prosecution over breaches of moral standards?<sup>8</sup> Should we expect to find efforts to contain violence or address morals offences in the records of high law or low law institutions? Were other individuals and institutions involved?

Related issues run through Boudreau's discussion of Halifax in the inter-war years. As Haligonians assessed what they believed to be increasing rates of crime – or at least violent crime involving guns and knives – they had to articulate an understanding of how policing and the criminal justice system could render Halifax a safer, more orderly place. Craven's justices of the peace had imposed peace bonds in New Brunswick. Halifax, like other cities, hired police officers (only a few, at first) to discourage crime. The night watches and day patrols of the 19th century were supplemented by paid, uniformed police officers enforcing the regularizing, centralizing new Criminal Code of 1892. Haligonian discourse was generally liberal, so the failings of the "criminal element" tended to be attributed to individual choice and weakness with more surveillance and stiffer sentences the prescribed remedy (and little increase in government spending needed). A growing professional class had other ideas: social workers, physicians, ministers, and others saw the environment, new ways of living, poor parenting, and sometimes heredity as dictating criminality; they called for (costlier) penal reform with an emphasis on rehabilitation. Their prescriptions were acted on with respect to juveniles, but adults did not attract similar solicitousness. The increasingly professionalized police force seemed an ambiguous presence: drawn to both philosophies and suspicious of both at the same time, trusted with more impressive powers and technologies and distrusted for failing to pay enough attention to morals offences and for employing the wrong sort of people to carry firearms.

Women have often been disadvantaged by the criminal justice system. Boudreau notes women's increasing public presence in Halifax in the interwar years and the dangers posed to them. After reviewing women's participation in the justice system, Boudreau concludes "hostility towards women was an integral part of daily life in this city" (155). Women were seldom charged with crimes, but those who appeared

8 See Martel, *Canada the Good*, 32.

in certain public spaces (dance halls, disreputable cafes) or who were members of racial or ethnic minorities – especially African-Canadian women – were highly vulnerable to being constructed as criminal. Prostitution was a particular anxiety, especially as it became difficult to distinguish women who were willing to sell sex from those who were simply milling about after work and open to offers of entertainment. Boudreau also discusses abortion, infanticide, and spousal abuse – crimes committed by, for, and against women behind closed doors. The older discretionary solution of binding an offender not to reoffend continued to be used in the context of domestic violence in Halifax, in part because incarcerating a male breadwinner would (it was assumed) penalize a family financially. Vulnerability to violence – and the question of what the criminal justice system could and would do for women – remained. The treatment of minority groups raises similar issues. Boudreau describes the emergence of the idea of a “criminal element” – marked by class, geography, and often race – and requiring greater surveillance.

Suspicion of racialized others – especially Aboriginal people – has affected Canadian gun policy again and again, as Brown shows in *Arming and Disarming*. As different groups have been perceived as threats, regulatory efforts have been made to disarm them. The Irish canallers were targetted in the 1840s in the Province of Canada. Orange-Catholic violence and concerns about working-class unrest inspired calls for legislation in the late 19th century and after the Winnipeg General Strike. Groups of immigrants found their access to firearms and ammunition restricted between 1911 and 1950. Aboriginal people in the west have been particularly targetted for firearms regulation. In 1885, the federal government issued an order in council pursuant to an 1884 amendment to the Indian Act to prohibit the sale or gift of ammunition to any Aboriginal person in the Northwest Territories without the written permission of the superintendent general of Indian Affairs (60).

Debra Komar’s *Lynching of Peter Wheeler* is the story of an outsider, a darker-skinned man with a mysterious past and no local roots hanged for murdering a teenaged girl in Bear River, Nova Scotia, in 1896. Komar explains that she specifically chose to write about a case of a wrongful conviction, in which modern-day forensic science would show that the accused did not commit the crime. The book is strongest when Komar is discussing the forensic evidence and how the various participants who conspired to make sure Wheeler was hanged for murder massaged it. Komar’s disgust with the self-promoting detective at the core of the story, and especially at the salivating, competitive early 20th-century media, make the story a rollicking tale; but her narrative style does not make it easy to see how she evaluated the claims of all of the conflicting assertions in the various newspapers. Nevertheless, Wheeler was certainly not guilty beyond a reasonable doubt. The Crown’s case did not make sense, and the defence was wholly inadequate. The clemency process in Ottawa was inexcusably sloppy. The community, whipped into a frenzy by a group of newspaper reporters desperate to scoop one another at every opportunity, determined that Annie Kempton was an angel and Peter Wheeler the devil incarnate. So he was hanged. The advantages of being white, male, and, if possible, educated and affluent are readily apparent in the text.

*The Ballad of Jacob Peck* is weaker than *Peter Wheeler*. It is the retelling of an extraordinary case that shook a community to its core and brought to town the machinery of high law. Jacob Peck was a self-proclaimed divine, quite likely

illiterate, who blew into Shediac on the heels of other Baptist and New Light itinerants. He held revivals of a sort and acquired some kind of hold over the mind of a farmer named Amos Babcock, who, inspired by words emanating from the mouth of his eldest daughter while she lay prostrate under Peck's influence, murdered his sister, Mercy Hall, in full view of his horrified family. Komar delves into the lives of the various players in the prosecutions that played out (189-92). Unfortunately, Komar misunderstands the law and legal processes too often to recount here. Her discussion of benefit of clergy, for example, misconceives what it was and how it operated. More fundamental to her argument are three significant problems. First, she appears to think that Babcock should not have been hanged because he was under the sway of Jacob Peck. She rightly points out that Babcock had no lawyer to help him and was not entitled to one. However, the surviving evidence could certainly support the jury's conclusion that Babcock was sane enough to be convicted, either under the later 19th-century definition that Komar refers to or under the actual tests for legal insanity applicable in 1805, which prosecutor Ward Chipman apparently presented (166-7).<sup>9</sup> We may certainly feel sympathy for the deluded Babcock, but there was legal justification for convicting him. Second, the crime with which Komar thinks Peck ought to have been charged, "solicitation of murder," does not appear in canonical legal treatises of the period; it can hardly be held an "egregious blunder" not to have charged Peck with it.<sup>10</sup> The usual offence was of being an "accessory before the fact," but, given the facts (particularly the intermediary role played by Babcock's daughter), it likely would have been hard to make that case against Peck.<sup>11</sup> Third, Komar clearly thinks that prosecuting Peck for sedition and blasphemy instead was an unfathomable mistake. The charges may strike us as peculiar, but they were used frequently in the Anglo-American world during the period. Indeed, in his 1803 *Treatise of the Pleas of the Crown*, Sir Edward Hyde East included among those indictable for blasphemy "all impostors in religion; such as falsely pretend to extraordinary missions from God, or terrify or abuse the people with false denunciations of judgments"<sup>12</sup>; this was Peck in a nutshell. Komar has done a lot of valuable research on this incident and its principal actors; but the book is seriously flawed, most importantly because of her misunderstanding of law and legal institutions.

9 See Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* [etc.], ed. Thomas Dogherty (London, 1800), I:\*30-1; William Blackstone, *Commentaries on the Laws of England: In Four Books*, 15th ed., ed. Edward Christian (London, 1809), IV:\*25. The asterisk is used in certain old, canonical legal texts to help the reader follow how the later writer or editor has glossed the original. The page number with the asterisk is the page upon which the glossed text appeared in the original edition.

10 Komar, *Jacob Peck*, 129. There is no such entry in Sir Edward Hyde East's *Treatise of the Pleas of the Crown*, vol. 1 (London, 1803) or in Blackstone's *Commentaries*, vol. 4.

11 An accessory was one who commanded, hired, or counselled someone to commit murder, and "the counselling another is necessarily included in the *exciting, moving* and *procuring* him"; East, *Treatise of the Pleas of the Crown*, I:352-53. See also Hale, *Historia Placitorum Coronae*, I:\*615. Being an accessory before the fact was potentially capital. The charges of blasphemy and sedition did the job of charging Peck with a lesser offence, as neither was capital (contrary to Komar's assumptions on p. 137).

12 East, *Treatise of the Pleas of the Crown*, I:3.

**Material culture: technology, expertise and consumerism**

Two themes emerge in the books that focus on Canada after about 1870: the rise of highly gendered consumerism and the interrelationship among professional expertise, technology, the law, and the state's capacity for surveillance and control. These themes interweave in many interesting ways. Martel notes the redefinition of behaviours formerly considered vices in the early 20th century as health issues. Physicians made claims to particular knowledge and made reputational gains accordingly. Undoubtedly, too, their growing expertise led to greater investment in research, more success in treating ailments, material prosperity, the acquisition and promotion of new technologies, and further reputational gains. They organized and acquired the legal trappings of a self-regulating profession.

Boudreau says that the figure of the female shoplifter arose during this period. She was understood as childlike and unable to resist the lure of possessing attractive objects. Shoplifters, it was thought, could be "respectable" middle-class women seeking the trappings of status, or poor or working-class women stretching their budgets. Female detectives were hired by Eaton's and other stores to watch out for shoplifters (131-2).

One of the villains in Komar's *Lynching of Peter Wheeler* is a detective – a self-promoting bully whose claims to expertise evidently impressed the journalists, who loved the idea that Nova Scotia had its own, real-life Sherlock Holmes even if the flesh and blood man was far less careful about the evidence than his fictional counterpart. Boudreau's book illuminates the larger context, as Halifax's police acquired patrol cars, two-way radios, and fingerprinting technology. Boudreau notes a shift from class control to crime control, although of course certain classes attracted more policing than others. New technologies and the ideology of professional expertise that justified them, however, were not adopted instantly. Firearms were not provided to police officers, even after one died after being shot in 1924. The chief of police did not think all the members of the force should be armed: surveillance of the supposed criminal element was acceptable, but providing this small group of uniformed citizens with the means to injure and kill others was not. According to Brown, Canadian police forces started arming in the late 19th century with the Northwest Mounted Police and provincial police forces leading the way (142). Computers made it possible for the RCMP to make use of the first gun registry.

Firearms were already controversial, as Brown makes clear. They became fashionable after the US Civil War, in part because their manufacturers, finding themselves with stock on hand, sought another market. Canada beckoned, conveniently located and already alarmed by the arming of its southern neighbour. Firearms became more accurate, more lethal, and easier to use. Governments supported firearm acquisition. Newly urbanized men were urged to express their manliness by becoming crack shots and joining shooting associations. Wildlife – "game" – was rendered accessible more for "sportsmen" than for those who needed to eat them, and restrictions on the weapons that could be used to kill them were passed to prevent animal populations from being completely wiped out. Publicists declared that the empire's successes in the Anglo-Boer War had come from British aptitude for guns and invented the myth that the Upper Canadian militia had fended off the Americans in the War of 1812 (it was actually British regulars). Ladies, in 1900-10, were encouraged to take up shooting as a decorous pursuit, less strenuous than golf or tennis. Some kinds of guns were marketed as appropriate toys for boys.

As horrific accidents predictably multiplied, pressure was applied to the state to limit children's access to firearms. The 1892 Criminal Code prohibited the sale or gift of air guns to those under 16 but did not prohibit the possession of either air guns or pistols. Provinces acted in the early 1910s, and Ottawa finally made it an offence to sell or give a firearm to someone under 16 in 1913, although guns could still be made available to them as part of family or group activities (111-13).

Some calls for gun control seem to have rested on a rather anti-consumerist foundation, with voices in the 1870s calling for controls on revolvers on the basis that young men had begun to consider them a necessary part of their outfits and liked swaggering around being dangerous (66). One lesson of the First World War was that crack shots could still be mowed down with machine guns and gas. Concerns about the American love of guns punctuated public discourse about guns in Canada from the late 19th century on. The pistol – so small, so readily concealed, so closely associated with lawless, violent Americans – was suspect from its first appearance on the market, but the long gun has always had friends among those who hunted. In the late 1960s and 1970s registering long guns proved far more politically challenging than registering pistols, especially as these efforts became interconnected with the sense of western alienation that became so strong during the Pierre Trudeau period. Aboriginal and Métis groups strenuously objected to being regulated and disarmed, as they had since first being subjected to this kind of legislation in the later 19th century. White male westerners, however, were the loudest opponents of initiatives that would have required, among other things, registering the ownership of all firearms and providing guarantors for gun licenses. Regulating firearms, then, amounts to regulating an object that is simultaneously associated with healthful (for shooters) outside activities, and highly destructive, with the brunt of the destruction often borne by innocents. The state's capacity and willingness to respond to calls for firearm regulation have depended in part on the availability of surveillance technologies and in part on how it has weighed the risks and costs of different kinds of restrictions. These calculations have been heavily structured by beliefs about gender, race, ethnicity, and Aboriginality.

## **Conclusion**

The books discussed here make significant contributions to Canadian legal history and raise important research questions. The shifting nature of the state and the meaning and function of legal actors and institutions are problematized. Understandings of technological possibilities and professional expertise have affected the public sense of what the legal system can and should do. Gender, class, race, ethnicity, and Aboriginality have structured conversations about harm, responsibility, and appropriate responses. Our constitutional understandings have changed in ways that call for more research. Since Craven's, Boudreau's and Komar's books focus on New Brunswick and Nova Scotia, it may be appropriate to add here that it is heartening to see excellent research on those provinces bringing such important questions into the spotlight. As a westerner (albeit one who has written on Nova Scotia and Ontario), I look forward to more research that illuminates variations in how these various threads have been woven across the country.

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