IMPERIAL BORROWING: THE LAW OF MASTER AND SERVANT

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Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955, Douglas Hay & Paul Craven, editors (Chapel Hill, NC: University of North Carolina Press, 2004, 608 pp. $65.00(U.S.), clothbound).

For most of the past half millennium, the employment relationship in Britain and its far-reaching empire was governed by contracts between individual employers and employees, whose breaches by workers were punishable by imprisonment, whipping, fines, forfeitures, or compelled labor. *Masters, Servants, and Magistrates*, a collection of sixteen essays edited by Douglas Hay and Paul Craven, codirectors of the Master and Servant Project at Canada's York University, is the first installment in a projected two-volume study of master and servant law in Britain and its roughly 100 colonial (and post-colonial) jurisdictions.[1] Representing what is arguably the most ambitious study ever conducted of global statutory transmission, *Masters, Servants, and Magistrates* offers a unique and timely opportunity to examine this issue's theme of legal "borrowing" from a transnational, legal-historical perspective.

At the outset, it is important to recognize the immense geographic, temporal, and methodological scope of this volume, as well as the massive ambition of the project that underlies it. Over the past decade, a worldwide team of scholars, archivists, librarians, and research assistants compiled roughly 2,000 enactments—some

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1. MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1955 (Douglas Hay & Paul Craven eds., 2004). The editors are currently at work on a second volume, which will address more explicitly "the spread of legislation throughout the empire, the borrowing and elaboration of both language and concepts of master and servant law in the statutes, and their relationship to the economic and political structures of each colony." Douglas Hay & Paul Craven, *Introduction*, *in id.*, at 2 n.5 [hereinafter Hay & Craven, *Introduction*].

available only in manuscript form—that, in the aggregate, made up the law of master and servant in Britain, its empire, and associated postcolonial jurisdictions. The project's leaders then identified approximately 700 "core" enactments,[2] entered them into a computerized database in full-text form, and subjected them to a series of rigorous comparative analyses designed to "identify similarities in language," "patterns of statutory borrowing and adaptation," and "the extent of direct metropolitan influence on the language of colonial legislation."[3] Not content with these herculean legislative labors, the contributors to the project also mined an impressive range of other legal-historical sources—including recondite archival records illuminating the practices of the magistrates who resolved master and servant disputes—to demonstrate how the statutory regime of master and servant operated in practice.

To readers accustomed to thinking about legislative developments within the context of national legal traditions, *Masters, Servants, and Magistrates* is an extremely provocative and valuable corrective. As the editors observe, master and servant law operated across the globe in a vast range of workplace settings: "in rural and industrial Britain; in the tobacco fields of colonial America and the sugar plantations of the West Indies; in Canadian forests and Australian sheep stations; in African diamond mines and Indian tea gardens; in merchant ships on the high seas, and in the warehouses and workshops of a thousand towns."[4] The volume's fourteen case studies testify to the breadth and diversity of these locales: essays by Hay and Chris Frank address master and servant law in Britain;[5] contributions by Chris Tomlins, Jerry Bannister, and Paul Craven survey the operation of this body of law in North America;[6] Michael Quinlan addresses developments in Australia;[7] the British Caribbean is treated in essays by Mary Turner, Juanita De Barros, and Prabhu

2. "Core" enactments are defined to exclude legislative amendments and restatements of preexisting law. *Id.* at 10.

3. *Id.* at 16.

4. *Id.* at 3.

5. Douglas Hay, *England, 1562–1875: The Law and Its Uses*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 59–116 and Christopher Frank, *Britain: The Defeat of the 1844 Master and Servants Bill*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 402–21.

6. Christopher Tomlins, *Early British America, 1585–1830: Freedom Bound*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 117-52; Jerry Bannister, *Law and Labor in Eighteenth-Century Newfoundland*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 153–74; and Paul Craven, *Canada, 1670–1935: Symbolic and Instrumental Enforcement in Loyalist North America*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 175–218.

7. Michael Quinlan, *Australia, 1788–1902: A Workingman's Paradise?*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 219–50.

Mohapatra;[8] Michael Anderson examines the history of master and servant law in India in the three generations after the 1857 Rebellion;[9] nineteenth-century Hong Kong forms the subject of a chapter by Christopher Munn;[10] and the African context is explored in essays by Martin Chanock, Richard Rathbone, and David Anderson.[11] Mandy Banton surveys the role of the Colonial Office in supervising labor-related statutes in the colonies from the first quarter of the nineteenth century through 1955, the volume's chronological terminus.[12] An incisive introduction by the editors addresses methodological issues and identifies areas of commonalty and difference in the operation of master and servant laws in the various jurisdictions that are canvassed.[13]

This Review Essay, in contrast, has far more modest goals. Part I surveys the legislative origins of master and servant law in Britain and the functions that this body of law sought to serve in Britain and its empire. Part II then examines in greater detail two issues bearing on the problem of legal "borrowing": first, the mechanisms and patterns of statutory adoption and modification; and, second, the ways that master and servant statutes—once adopted and modified—were actually *used* by employers, employees, and magistrates. Finally, Part III offers some preliminary reflections on the successes and limitations of master and servant law in achieving its goals of regulating both labor markets and the individual workers that supplied them.

I. MASTER AND SERVANT LAW: IMPERIAL CORE AND PERIPHERY

The origins of master and servant law can be traced to the fourteenth century, when England's Parliament first began to take a

8. Mary Turner, *The British Caribbean, 1823–1838: The Transition from Slave to Free Legal Status*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 303–22; Juanita De Barros, *Urban British Guiana, 1838–1924: Wharf Rats, Centipedes, and Pork Knockers*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 323–37; and Prabhu P. Mohapatra, *Assam and the West Indies, 1860–1920: Immobilizing Plantation Labor*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 455–80.

9. Michael Anderson, *India, 1858–1930: The Illusion of Free Labor*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 422–54.

10. Christopher Munn, *Hong Kong, 1841–1870: All the Servants in Prison and Nobody to Take Care of the House*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 365–401.

11. Martin Chanock, *South Africa, 1841–1924: Race, Contract, and Coercion*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 338–64; Richard Rathbone, *West Africa, 1874–1948: Employment Legislation in a Nonsettler Peasant Economy*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 481–97; and David M. Anderson, *Kenya, 1895–1939: Registration and Rough Justice*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 498–528.

12. M.K. Banton, *The Colonial Office, 1820–1955: Constantly the Subject of Small Struggles*, *in* MASTERS, SERVANTS, AND MAGISTRATES, *supra* note 1, at 251–302.

13. Hay & Craven, *Introduction*, *supra* note 1.

keen and sustained interest in the nation's labor markets. In the wake of the Black Death, Parliament "sought to compel service by the idle, curb movement by agricultural servants and artisanal and manufacturing workers, suppress their wage demands by fixing legal rates and by making annual hiring the norm, and tie workers to their employers for the duration of their contracts and to their social status for the duration of their lives."[14] In the 1560s, Parliament recodified these scattered fourteenth-century laws into a single statute: the Elizabethan Statute of Artificers (1562), whose forty-eight provisions continued to govern employment relationships in Britain through the last quarter of the nineteenth century, and in colonial and post-colonial jurisdictions for another three generations.[15]

Although frequently modified by statute, case law, local custom, and private contract, the English law of master and servant embodied in the Elizabethan statute remained reasonably constant across the centuries.[16] First, master and servant law regulated "a large and diverse set" of employees: youthful apprentices; agricultural "servants in husbandry;" artificers and workmen (i.e., craftsmen); day laborers; and so-called "covenant servants" (i.e., skilled workers who entered contracts for particular tasks).[17] Second, contracts were presumed to be for one year and to be terminable upon three months' notice, unless otherwise specified by the parties or altered by custom.[18] Third, workers who breached their contracts for any number of reasons—including "absence, refusing to begin on an agreed contract, working for another, disregarding orders, [or] insubordination"—could be convicted summarily by magistrates and required to complete their term of employment and/or be subjected to penal sanctions, including wage forfeitures, fines, whipping, and terms of imprisonment ranging from one to three months.[19] Finally, although

14. Hay, *supra* note 5, at 62.

15. 5 Eliz. c.4 (1562). Although enacted in 1563, the measure is officially cited as having been passed in the previous year. *See* Hay & Craven, *Introduction*, *supra* note 1, at 1 n.1. On the immediate antecedents to the Elizabethan legislation, see Donald Woodward, *The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558–63*, 33 ECON. HIST. REV. (n.s.) 32 (1980).

16. With this said, "there was no one law of employment common to most or all workers in early modern England: there were important common elements, but much difference in detail." Hay & Craven, *Introduction*, *supra* note 1, at 6.

17. *Id.* at 6–7. Judicial decisions in the late eighteenth century excluded domestic servants in England from the scope of master and servant law. *See* Hay, *supra* note 5, at 89–90.

18. *See* Hay, *supra* note 5, at 66–67. By contrast, it was customary for miners in the coalfields of Durham to enter into a type of agreement known as a "collier's bond," with a typical duration of 11 months and 15 days and with its own "specific terms and penalties." *Id.* at 68.

19. *Id.* at 67.

employers who breached their agreements might be ordered to pay wages, they could not be imprisoned—at least not in the United Kingdom until the middle decades of the nineteenth century, and then only with respect to the failure to pay seamen's wages.[20]

The law of master and servant—a product of statute but reliant on low-level enforcement by magistrates—proved to be highly portable and "immensely adaptable," taking hold in jurisdictions with civil law traditions (such as Quebec and South Africa), others influenced by Islamic and Hindu traditions (such as India), and even those that aggressively resisted other aspects of British colonial rule (such as post-colonial Kenya).[21] As the contributors reveal, however, numerous factors influenced the precise law that these various jurisdictions ultimately adopted, adapted, and used: the date at which British law was deemed to be "received;" the existence (or non-existence) of colonial legislatures; the willingness of such legislatures (if in existence) to alter the law of the imperial "center;" the effect of cases decided by both British and colonial judges; the availability of ancillary regimes of labor control such as vagrancy laws, embezzlement laws, combination laws, or pass laws; and the extent to which both employers and employees relied upon self-help measures undertaken in the "shadow" of formal law.[22]

Yet despite its considerable jurisdictional variations, master and servant law—whether in Britain, the British Empire, or in emerging postcolonial jurisdictions—exhibited the same three "defining characteristics": employment relationships were governed by private contracts; these contracts were enforceable by magistrates; and workers who breached their contracts were subject to specific performance and/or penal sanctions.[23] As Hay and Craven observe, it was the "distinctive conjuncture of civil contract, informal justice, and effective criminalization of the worker's breach" that typified the global law of master and servant, a legal regime that ultimately "defined and controlled employment relations for almost a quarter of the world's population. . . ."[24]

What explains the prevalence and persistence of this body of law over nearly five centuries? Put differently, what functions did this body of law serve? Most obviously, the law of master and servant

20. Legislation enacted in 1844 permitted employers of maritime labor to be imprisoned, though this development only occurred in the final few decades of the centuries-long history of master and servant law in Britain. *See id.* at 67 n.29.

21. *Id.* at 56–57.

22. *See*, *e.g.*, *id.* at 12.

23. *Id.* at 1.

24. *Id.* at 1–2.

sought to provide employers with a predictable, tractable, and relatively inexpensive supply of laborers—whether in the potteries of Staffordshire, the sugar plantations of Mauritius, the tea "gardens" of Assam, the mahogany forests of British Honduras, or the diamond mines of the Cape Colony. As opposition to slavery and "unfree" labor rose in the early decades of the nineteenth century, the legal regime of master and servant also offered a system that was ostensibly based on "free" labor secured through "freely" negotiated contracts.[25] Moreover, in both British and colonial settings, as we shall see, master and servant law could be mobilized by employers and magistrates in an attempt to reinforce distinctions in class, status, ethnicity, and race.

As will be suggested in Part III, it is not clear to what extent master and servant law actually *succeeded* in its ambitious aims of regulating labor markets, fashioning a convincing ideology of "free labor," or putting workers in their place. Before taking up those issues, however, we must first examine how this body of law developed in Britain and then was borrowed, amended, and enforced in the far-reaching possessions of the British Empire and in the postcolonial jurisdictions that emerged from empire.

II. TAKING STATUTES SERIOUSLY . . . BUT NOT TOO SERIOUSLY

Hay and Craven "take . . . statutes seriously."[26] By taking seriously the passage, dissemination, and impact of statutory law, they "search for explanations of similarities or differences in enforcement" of employment laws "not only in political economy or the discourse of doctrine but in the language and policy of the statutes in force."[27] The editors seek to answer a vexing series of questions, all of which bear on the complex problem of statutory "borrowing":

> How consistent was this body of [master and servant] law throughout the empire? To what extent were colonial enactments merely transcripts of the metropolitan statutes? What control did the imperial center exercise over colonial law? How were statutory provisions and policies transmitted? Did colonial enactments influence metropolitan law? Did the master and servant law of the colonies at any time more closely reflect the idiosyncrasies of their local political economies or legislative trends in the metropolis?[28]

25. Slavery was abolished in the British Empire in 1834.
26. Hay & Craven, *Introduction*, *supra* note 1, at 10.
27. *Id.* at 11.
28. *Id.*

Yet while the contributors to *Masters, Servants, and Magistrates* address such questions with exquisite care and sophistication, they are careful "not to hold [the statutes] out as mirrors of what masters, servants, and magistrates were doing on the ground."[29] Indeed, as Hay and Craven astutely recognize, "the statute law was sometimes ignored, sometimes willfully misapplied, and often stated in terms so broad as to allow the justices an almost infinite discretion."[30]

What do the essays in *Masters, Servants, and Magistrates* tell us about the nature of both statutory borrowing and practical enforcement in the realm of master and servant law?

A. Statutory Borrowing

The problem of legal "borrowing," of course, has occupied comparative lawyers and legal historians for some time and in a range of settings. The products of this scholarship include studies of a series of different "receptions," including the European reception of Roman law,[31] the English reception of civil law,[32] the American reception of English law,[33] and the reception in various jurisdictions of continental and American codes.[34] Speaking generally, such studies have tended to document the transmission of laws and legal ideas by employing methods familiar to intellectual historians or students of jurisprudence, focusing on the role of prominent scholars (such as the medieval glossators, commentators, and humanists),[35] distinguished

29. *Id.*

30. *Id.*

31. *See*, *e.g.*, ALAN J. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

32. *See*, *e.g.*, Ernst Rabel, *The Statute of Frauds and Comparative Legal History*, 63 L.Q. REV. 174 (1947) (demonstrating extent to which English Statute of Frauds (1677) relied upon French *Ordonnance de Moulins (*1566)).

33. *See*, *e.g.*, ELIZABETH BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776–1836 (1964).

34. On the experience of codification in America, see generally Robert W. Gordon, Book Review, 36 VAND. L. REV. 431 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981)). In recent years, scholars have increasingly examined the phenomenon of codification from a comparative perspective. *See*, *e.g.*, John W. Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT'L L. 1 (2003) and Daphne Barak-Erez, *Codification and Legal Culture: In Comparative Perspective*, 13 TUL. EUR. & CIV. L.F. 125 (1998).

35. On the exposition of Roman law by civilian scholars, see RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW: CASES – TEXT – MATERIALS 269–75 (5th ed. 1988)

jurists (such as Lord Mansfield),[36] or prominent lawyers (such as David Dudley Field).[37]

The leaders of the York Master and Servant Project, for their part, have pioneered a linguistic and quantitative approach to the problem of statutory transmission. Although the Project's research is ongoing, the basic aspects of this methodology can be summarized. After entering the full texts of the "core" master and servant statutes into a searchable, computerized database, the project leaders identify certain "domain words" (such as "servant," "artificer," and "journeyman") that occur with frequency in the statutes. Searching the statutory texts for these "domain words," they then isolate all 21-word "strings" in which such "domain words" are embedded. Each 21-word "domain word in context" (or "dwic") is then compared in a series of side-by-side (or "pairwise") comparisons with other "dwics" that are designed to identify the precise number of words shared by the two 21-word strings. Using certain simplifying heuristics relating to jurisdiction and date of statutory adoption, the editors then hypothesize that pairwise comparisons exhibiting a high number of words in common are likely to be contained in statutes that bear a familial relationship, i.e., between a statutory "parent" and "child" (or between a more distant statutory "ancestor" and "relative").[38]

The strengths and limitations of this methodology are expertly addressed in the editors' introduction. On the one hand, as the editors posit, "the accumulation of . . . similarities" in "dwics" must be considered "strong internal evidence" for the transmission of statutory language, and "in many cases is the only accessible evidence [of such transmission], especially for large-scale comparisons."[39] On the other hand, the editors concede that "a relatively sparse subset of linked word sequences is standing in for the statutes in this discussion"[40] for purposes of documenting particular statutory "borrowings" and caution that "borrowing" (or even "adaptation")

36. Thus, Lord Mansfield relied on civilian precedents in forging aspects of English commercial law in the eighteenth century. On these developments, and other "borrowings" by Mansfield, see JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 367 (2004) and *idem.*, 1 THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 455 (1992).

37. On Field's struggles with James Coolidge Carter to codify law in New York, see Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 587–90 (2002).

38. *See* Hay & Craven, *Introduction*, supra note 1, at 14–21.

39. *Id.* at 19.

40. *Id.* at 20 n.58.

cannot be proven merely because "two statutes have a sequence of twenty-one words in common, or mostly in common. . . ."[41]

With these qualifications noted, the editors are nonetheless in a position at this stage of their enterprise to reject two opposing hypotheses: first, that the law of the colonies merely copied that of the imperial center; and, second, that colonial legislation developed independently of the metropolitan core.[42] Admittedly, "[t]his leaves a huge middle ground"—namely, the vexing issue of "just how influential were the metropolitan statutes . . . in shaping the specific provisions of the colonial laws."[43] But here, too, the project's painstaking methodology and careful reconstruction of relationships between imperial center and periphery permit several intriguing findings to be advanced. First, the British Parliament, as a general rule, "did not make employment legislation for the colonies."[44] Second, although the Colonial Office took a strong interest in post-abolition conditions in the West Indies and certain other labor-related matters, it did not engage in detailed or sustained oversight of colonial employment laws.[45] Third, the evidence suggests that the influence of British statutes on colonial statutes lessened after 1800, after which time colonies increasingly looked to other similarly situated colonies for legislative models—in large part, to address regulatory challenges occasioned by the abolition of slavery and, later, by the large-scale resort to imported indentured labor from India, China, and Melanesia.[46]

B. Statutory Enforcement

As the editors correctly note, however, "[t]he ultimate historical test of the lived experience of employment law lies in the detailed recovery of the justices' transactions and, beyond that, in the choices

41. *Id.* at 19.

42. *See id.* at 19. "There are two alternative null hypotheses. One is that colonial legislation is a transcript of British legislation. The other is that each colony's legislation is sui generis." *Id.*

43. *Id.*

44. *Id.* at 12. In the 1820s, as Hay and Craven observe, Parliament passed legislation relating to New South Wales and Van Dieman's Land. In the nineteenth century, moreover, Parliament demonstrated interest in matters relating to merchant shipping, the transition from slavery to post-emancipation forms of labor control, and the regulation of Indian indentured workers. *Id.* at 12–13. Yet "in most other respects, particularly later in the history of master and servant, colonies were left to their own devices in legislating for employment relations." *Id.* at 14.

45. *See* Banton, *supra* note 12, at 253.

46. *See* Hay & Craven, *Introduction*, *supra* note 1, at 20–21. The evidence reveals that British "parents" dominated in the period 1562–1792, West Indian "parents" in the period 1834–59, and, increasingly, African and the Far Eastern provisions in the period 1893–1926. *Id.*

made by individual masters and servants, [and] the ways in which their understanding of the law influenced their practice."[47] What use did employers make of the law of master and servant, and how did magistrates resolve the complaints of employers who appeared before them?

Prosecution rates provide some guide to the significance of master and servant law. Hay's British evidence reveals that summary convictions under the master and servant acts accounted for a considerable portion of the proceedings before magistrates in English industrial areas in the nineteenth century. Thus, Hay's survey of house of correction registers in Gloucestershire from roughly 1790 to the 1820s reveals that 26% of persons imprisoned in the house of correction had been committed for breach of contract, and rates in Staffordshire for the comparable period hovered near 40%.[48] Although "[r]eliable comparative figures on enforcement in . . . different jurisdictions over . . . time are extremely difficult to construct," the available evidence suggests that prosecution rates in colonial jurisdictions appear to have been strikingly higher—perhaps fifty times more so—in part, no doubt, because of the desire for cheap labor on colonial plantations, the arduous working conditions prevailing there, and colonial attitudes to indigenous and imported laborers.[49]

In resolving these many prosecutions, magistrates exercised considerable discretion in interpreting the scope of master and servant laws and in fashioning punishments. By way of example, a justice of the peace in Newfoundland in 1790 sentenced an Irish laborer not only to deportation and "twenty four lashes on his bare back"—punishments common to the place and time—but also to the

47. *Id.* at 11.

48. Hay, *supra* note 5, at 95.

49. Hay & Craven, *Introduction*, *supra* note 1, at 43. "In England even those areas with higher rates . . . saw one-fiftieth the rate of servant prosecutions as did the plantation societies." *Id.* By way of example, rates of prosecution per 100,000 population were 48 in England and Wales in the 1860s and 1,349 in British Guiana two decades later. *Id.* at 44 tbl. 1.3. As the editors note, cross-jurisdictional comparisons of prosecution rates are made difficult by the fact that employers could resort to a range of mechanisms to enforce labor discipline, including self-help. *Id.* at 47. Thus, although prosecution rates in Assam were comparatively low, planters were permitted "to arrest an absconder without warrant if found more than ten miles from the nearest magistrate"—a "private arrest" authority that was widely exploited and that led to "horrible excesses." Mohapatra, *supra* note 8, at 475. *See also* Hay & Craven, *Introduction*, *supra* note 1, at 47 ("[W]here [prosecution] rates were low, other forms of coercion to maintain the boundaries of the low-wage sector, including private corporal punishment, were strikingly in evidence").

exemplary punishment of "walk[ing] from place [to place] with a fish hung round his neck."[50]

In previous work, Hay has argued that "the high law" of the central royal courts "effectively protected the low law of most provincial justices [of the peace] from being questioned, curbed, or controlled by those whom they judged."[51] Hay and Craven strike similar themes in *Masters, Servants, and Magistrates*, observing that English magistrates went "largely unsupervised" and their work "largely unexamined" by higher courts.[52] Accordingly, "the law of master and servant existed in large measure as a separate body of imperial law that had remarkably little contact, over long periods, with the high legal regimes in which it was everywhere nested."[53] As Hay and Craven summarize, "there was often a triple disjuncture between the law as enacted by statute, the law as applied by magistrates, and the law as interpreted by the high courts."[54]

III. THE LIMITS OF LAW

As the editors observe, "[t]he clear aim of much master and servant legislation was to make labor supply and performance more reliable and . . . cheaper than it could be obtained otherwise, if it could be obtained at all."[55] In colonial labor markets where cheap and reliable labor was at a premium, the applicable regulations tended to be even harsher than at the imperial core.[56] Irrespective of the statutory regime in which they operated, magistrates in both the Imperial core and periphery often shared the preoccupations and backgrounds of employers. And magistrates resolved master-and-servant cases with little day-to-day interference from organs of the central government, whether in the form of high court judges, legislative committees, or the Colonial Office. Given the stringent

50. Bannister, *supra* note 6, at 170.

51. Douglas Hay, *Dread of the Crown Office: The English Magistracy and King's Bench, 1740–1800*, *in* LAW, CRIME AND ENGLISH SOCIETY, 1660–1830, at 45 (Norma Landau ed., 2002). For a brief assessment of Hay's position, see Bruce P. Smith, Book Review, 22 LAW & HIST. REV. 648 (2004) (reviewing LAW, CRIME AND ENGLISH SOCIETY).

52. Hay & Craven, *Introduction*, *supra* note 1, at 1–2. As the editors note, magistrates "were only on rare occasions required to account for their actions to high-court judges, who in most periods before the mid-nineteenth century rarely questioned their decisions." *Id.* at 5.

53. *Id.* at 3.

54. *Id.* at 6.

55. *Id.* at 26.

56. *See*, *e.g.*, Quinlan, *supra* note 7, at 225 (describing legislation adopted in New South Wales in 1828 as "a more one-sided law with more coercive provisions [than its British counterpart that was] intended to restrain workers from exercising their economic advantage in the understocked colonial labor market").

statutory regime of master and servant law, the typical predispositions of magistrates, and the wide latitude afforded them, how successfully did master and servant law achieve its goals?

Any balanced assessment of the effectiveness of master and servant law in regulating markets and workers can only be offered once the full fruits of the York Master and Servant Project have been made available. On the one hand, there can be little doubt that, especially in colonial settings, master and servant law exposed workers to considerable threat and served to perpetuate invidious racial stereotypes. In the sugar colony of Mauritius, where working conditions were abysmal and labor demand high, prosecution rates exceeded 4,500 per 100,000 population—nearly ten times the per capita incarceration rate in modern-day America.[57] As late as the 1920s, a majority of the commissioners of Kenya's Native Punishments Commission (1921–23) favored flogging for African laborers who violated prevailing labor laws.[58] And in South Africa, the strict system of pass laws was justified both because of the labor demands of the mining industry and the biased view that "Africans were not subject to the disciplines of the market."[59]

In other locales, however, master and servant law had an important, but arguably more limited, grasp on the lives of working people. Whereas prosecution rates in British Guiana exceeded 1,300 per 100,000 population in the 1880s, rates in England in the 1860s hovered around 50 per 100,000 and those in Canada around 44 per 100,000 during roughly the same period.[60] In Hong Kong, despite ongoing struggles between European employers and Chinese servants, annual prosecutions in the 1860s numbered as low as 34 among the roughly 5,000–7,000 Chinese working for Europeans on the island.[61] Examining the evidence from Canada, Craven concludes that "[i]t is difficult to point to more than a small handful of instances in which the actual enforcement of Canadian master and servant acts made an

57. For Mauritius, see Hay & Craven, *Introduction*, *supra* note 1, at 44 tbl. 1.3. For American incarceration rates, see U.S. Dep't of Justice, Bureau of Judicial Statistics, Incarceration Rate, 1980-2003, *available at* http://www.ojp.usdoj.gov/bjs/glance/incrt.htm (last visited Apr. 19, 2005).

58. The Native Punishments Commission was established by Kenya's Legislative Council to address the overcrowding of prisons by petty offenders. On these developments, see D. Anderson, *supra* note 11, at 518–20. In England, by contrast, whipping had been largely abolished as a mode of punishment in master and servant cases by the 1850s. *See* Hay & Craven, *Introduction*, *supra* note 1, at 8.

59. Chanock, *supra* note 11, at 343.

60. Hay & Craven, *Introduction*, *supra* note 1, at 44 tbl. 1.3.

61. *See* Munn, *supra* note 10, at 384 n. 74.

arguable difference in the operation of a local or sectoral labor market."[62]

Prosecution rates, to be sure, only tell part of the story. Evidence strongly suggests that the financial risk, physical pain, and incapacitation of penal sanctions encouraged informal settlements. These threats, and the seemingly inexorable structure of master and servant law, no doubt encouraged other workers who might have bridled at their working conditions to grudgingly comply.

Yet one of the most important—and, to this reader, impressive—aspects of *Masters, Servants, and Magistrates* is the ways that it documents how workers *resisted* concerted efforts to control their labor. In Australia, sheep shearers "failed to appear [for work], absconded, or threatened to leave at the commencement of the shearing season in order to secure higher wages"; others "deserted in droves, engaged in go-slows, and even went on strike"; and even those workers who had been convicted by magistrates "thumbed their noses at courts and employers."[63] In Hong Kong, where the English represented a small and insulated minority, Chinese domestic servants resisted demands for work, stole items, and absconded to the mainland, where the prospects of recapture were remote.[64] Although employers relied on master and servant law to frustrate collective action by workers, workers who pooled their resources could continue to frustrate the mechanisms of the law, whether they were the 4,000 pitmen who struck in Tyneside in 1765,[65] the navvies working on railway lines in Queensland who struck and threatened to march on the capital in 1866,[66] or the workers who deserted Rhodesian gold mines in masses in the 1900s.[67]

62. Craven, *supra* note 6, at 215.

63. Quinlan, *supra* note 7, at 241–42.

64. *See* Munn, *supra* note 10, at 371–77. *See also id.* at 366 (noting that Chinese servants were "quick to assert their interests and resist impositions," occasionally on the grounds that the requested task did not fall within their particular responsibilities) and *id.* at 379 (observing that "it was neither the custom nor a treaty requirement for the Chinese government to return suspected offenders to Hong Kong").

65. Describing the dilemma of punishing "a general Combination of . . . Pitmen to the Number of 4,000," a correspondent of the Earl of Northumberland observed that "the punishment of . . . twenty or forty by a month's confinement in a House of Correction" would permit them "[to] be treated as Martyrs for the good Cause. . . ." Hay, *supra* note 5 at 85 (citing J.L. HAMMOND & BARBARA HAMMOND, THE SKILLED LABOURER 14 (John Rule ed., 1975)). However, the ability of workers to defeat the master and servant laws should not be overstated. At times, employers could lobby for more stringent laws: in 1766, for example, Parliament passed a measure that increased the penalty for breach of contract to three months at hard labor—specifically including "miners, colliers, keelmen, and pitmen." *Id.* at 86 (citing 6 Geo. III, c. 25 (1766)). At other times, smaller strikes could simply be "broken" through multiple prosecutions under the master and servant laws. *Id.* at 101.

66. *See* Quinlan, *supra* note 7, at 227.

67. *See* Hay & Craven, *Introduction*, *supra* note 1, at 52.

The reliance on law to police the employment relationship furnished employers with leverage but also confronted them with limitations. In Natal, "the many cases before the courts did not reflect the true number of desertions because masters condoned the offense to avoid the trouble and time involved in going to court."[68] Writing of the Canadian context, Craven observes that "appeals to penal employment law were often counsels of despair" at "workers' intractability."[69] Moreover, prosecutions could "backfire" and become "a rallying point for public criticism of employer heavy-handedness"[70] and could "inflame resistance and a desire for revenge, including sabotage."[71] At times, workers themselves resorted to law and to lawyers, relying on "technicalities . . . to void contracts,"[72] suing or countersuing for wages and ill-treatment,[73] and even relying on early "cause lawyers" to resist the expansion of master and servant legislation.[74]

IV. CONCLUSION

Masters, Servants, and Magistrates is a monumental achievement that contributes immeasurably to our understanding of several important subjects, including the history of employment law, the process of statutory "borrowing," and the practices of low-level magistrates. The editors, to be sure, are eager to spread their lessons even further afield. Thus, they chide certain economists (presumably those of the "Chicago" school) for allegedly failing to comprehend fully that "imperial legal histories . . . only make sense when freedom to change law, freedom to use law, [and] freedom to resist law are

68. Chanock, *supra* note 11, at 351. Moreover, the demand for labor was so high that "employers had to pay wages in advance to secure workers, many of whom deserted before completing their terms of service." *Id.*

69. Craven, *supra* note 6, at 216.

70. *Id.* at 217.

71. Quinlan, *supra* note 7, at 222 (citation omitted).

72. *Id.* at 243.

73. *Id.* ("Many cases [in Australia] involved a complex web of claims and counterclaims over wages, work behavior, required tasks, ill treatment, and numerous other matters."). Hay's own evidence demonstrates that cases by *servants* accounted for roughly half of the cases heard by JPs for whom data was available. Hay, *supra* note 5, at 76 n.55 (finding 47% of cases brought by servants). It is difficult to assess the degree to which employees challenged their employers, because actions by employees might be brought in civil courts, rather than before magistrates. In British Guiana, for example, such suits could be brought in a "petty-debts court." De Barros, *supra* note 8, at 335. In England after 1846, suits for wages of up to twenty pounds could be brought in the county courts. Hay, *supra* note 5, at 105–06 (noting that "[c]ases, particularly those involving setoffs, which could not be settled before magistrates, appear[ed] immediately").

74. *See* Frank, *supra* note 5, at 408–12 (discussing the career of the Chartist solicitor William Prowting Roberts).

given as much emphasis as the freedom to enter markets."[75] In turn, they apparently seek to disavow "the myth (peculiar to American legal scholars, misled equally by constitutional doctrine and sociological theory) that 'free labor' in the United States and England had fully emerged by the eighteenth century. . . ."[76] Although it is by no means clear that economic historians and legal scholars have been as remiss as the editors suggest, there is certainly considerable benefit in thinking carefully both about the way that the law of master and servant helped constitute markets and how this body of law defined a spectrum of employment statuses vastly more complicated than the constructed ideological categories of "free" to "unfree" labor might suggest.[77]

75. Hay & Craven, *Introduction*, *supra* note 1, at 58. As the authors observe:

> Recently, with the belated recognition that penal sanctions and specific performance of labor contracts were part of English law until 1875, some economic historians have abruptly abandoned the notion that "free labor" (defined by the absence of penal sanctions and specific performance) was the important distinction, turning instead to discussion of "free markets" in labor (defined by the absence of collusion among buyers and/or sellers). Free labor may not be as widespread as we believed, it seems, but free markets are. The definition begins to seem vacuous: the hypostatized "free market" can be as much an incurious imposition on the evidence as the presumptive "free laborer" ever was.

Id. at 32 (internal citation omitted).

76. *Id.* at 9.

77. Tomlins, for his part, acknowledges that "[e]conomic historians have provided considerable evidence for the 'efficiency' of markets in indentured labor, by which is meant the rational adjustment of contract length to costs of passage and maintenance, and variations in human capital." Tomlins, *supra* note 6, at 120 n.6. Moreover, it should be noted that the complexities of "free" and "unfree" labor in nineteenth-century America figure prominently in the works of legal historians such as John Witt and Mary Bilder. *See* John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 631 (2000) (observing that "[a] central contention of the new histories of the law of free labor is that the nineteenth-century law of the employment contract assigned the vast majority of American employees to the subordinate position in a workplace status hierarchy") and Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761 n.67 (1996) (citing to Tomlins' scholarship in noting that "for many so-called 'free' workers, their own labor power remained in reality a property right, a commodity in the employment relationship that they did not control.") Legal scholars have also recognized the extent to which labor compulsion existed even in "free" markets. *See*, *e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) (arguing that post-Emancipation laws regulating labor recruitment and occupational licensing harmed African-American laborers); Catherine L. Fisk, *Removing the "Fuel of Interest" from the "Fire of Genius": Law and the Employee Inventor, 1830–1930*, 65 U. CHI. L. REV. 1127, 1128–29 (1998) (identifying tension between "free labor ideology" associated with nineteenth-century American inventorship and "the hierarchical premises of the law of master and servant" that applied in many employment settings). Of course, the complexities of "free" labor are also expertly addressed in works by David Montgomery and Amy Dru Stanley. *See* DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY (1993) and Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265 (1992).

From my perspective, however, one of the most novel, promising, and welcome aspects of *Masters, Servants, and Magistrates* is the commanding and convincing way that it places law at the centerpiece of the imperial project. In recent years, the study of empire as a sociocultural phenomenon has achieved a certain degree of currency. We have been taught that the dynamics of empire can profitably be understood by understanding Foucault,[78] the nuances of gender relations,[79] and the quest to seduce the sexualized Other.[80] The contributions to *Masters, Servants, and Magistrates* make clear that the imperial project must be understood as having been shaped profoundly by law—law that both defined the conditions of workers and provided a backdrop against which those conditions were negotiated, imposed, and resisted. As Hay and Craven correctly note, the law of master and servant "was one of the many legal ligaments" that connected imperial center to periphery and "helped make the British Empire a thinkable whole by the eighteenth century."[81] In regulating the flow of workers from place to place, in seeking to justify coercive labor controls as an acceptable form of "free" labor, and in punishing workers who resisted such controls, the law of master and servant served not only as a critical ligament linking periphery to core, but as the muscle of empire as well.

78. *See*, *e.g.*, ANN STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002).

79. *See*, *e.g.*, MARY PROCIDA, MARRIED TO THE EMPIRE: GENDER, POLITICS AND IMPERIALISM IN INDIA, 1883–1947 (2002).

80. *See* RONALD HYAM, EMPIRE AND SEXUALITY: THE BRITISH EXPERIENCE (1991).

81. Hay & Craven, *Introduction*, *supra* note 1, at 2. In this respect, the editors contribute to the important reorientation of imperial scholarship initiated and advanced by Linda Colley, who has argued that "the segregation of British domestic history from the history of the varieties of Britons overseas cannot stand." LINDA COLLEY, CAPTIVES 18 (2002).