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Fugitives and the Borderland in North America, 1819–1914

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Zahlreiche Tabellen liefern Daten zu allen untersuchten Teilaspekten, Landkarten erläutern die betroffenen geographischen Räume und Titelpuffer stellen wesentliche zeitgenössische Rechtswerke vor. Insgesamt liegt eine beeindruckende Studie vor, wenn man auch an der einen oder anderen

Stelle Bedenken hat, wenn der Verfasser auf der Basis eines halben Dutzends von Fällen in diesem oder jenem Gebiet beginnt, Prozentberechnungen anzustellen (zwei von sechs sind 33,3 %) und zu generalisieren. ■

Emily Whewell

Fugitives and the Borderland in North America, 1819–1914*

As the numbers of people moving internationally increased in the nineteenth and early twentieth centuries, states tried more rigorously to regulate borders and counteract the problem of fugitives crossing international borders to evade arrest. This presented a legal challenge to domestic state power that increasingly defined its sovereignty on jurisdiction within borders. It is this issue and within this important era of globalization and law formation that Bradley Miller's book examines how British North American colonies and post-Confederation Canada reacted to the problems posed by international fugitives through ideas and practices of extradition. His work goes beyond the traditional perspective of examining extradition treaties to view the practices of extradition in action, the everyday challenges states faced, and how the key concepts of sovereignty and international law were understood in relation to extradition.

Miller's three main arguments resonate convincingly throughout the book. The first is an obvious notion: borders and adherence to territorial sovereignty not only empowered, but also undermined and limited state authority on an everyday basis. What Miller deftly shows in pursuing this argument, however, is how this challenge posed by fugitives and the limits of territorial sovereignty were interlinked with an understand-

ing of international law and how they were negotiated and understood on multiple levels – from local law officers to high judicial officials and law makers. Second, the legal regimes created in response were often in practice defective and its jurisprudential underpinnings amorphous. This idea of the fragility of legal regimes and the limits of law is not a new notion in colonial studies where subaltern perspectives have continually emphasized how individuals could evade colonial law or use it to their own ends. However, this argument provides a useful counter-narrative to an over-emphasis on increasing state power in Canadian legal history and works on extradition. Finally, Miller argues that there was an enduring belief of supranational justice and »legal liberalization« in British North American and Canadian legal thought. Law officers and officials on both sides strived towards international cooperation to combat migration crime, recognizing it as an important factor in upholding their domestic sovereignty.

The layout of the book fits well with his argument and narrative, with seven chapters and three themed parts running broadly chronologically. The first part examines how borders and territorial sovereignty challenged state power. Although cases involving fugitive slaves and political fugitives

* BRADLEY MILLER, *Borderline Crime: Fugitive Criminals and the Challenge of the Border, 1819–1914*, Toronto: University of Toronto Press 2016, 304 p., ISBN 978-1-487-50127-3

were much more controversial and have received more attention in scholarly work, Miller focuses on the cases of fugitives of more mundane and petty crimes show the everyday practices and ideas of the state and its officials towards extradition. As most of these offences were non-extraditable, the legal response rested on a number of techniques, including covert methods: the use of spies and informants, and even kidnapping. Miller devotes the next chapter to this latter practice, »the low and the high laws of abduction in the border zone«, in which he argues kidnapping became part of a customary regime on both sides of the border as a response to limitations of territorial sovereignty. He argues that abductions »... manifested not a contest between law and lawlessness, but rather different practices of legal order«, (50), helping to reinforce state power and underpinned by beliefs of supranational justice. His argument is convincing, offering a fascinating perspective of the actions and thoughts of local officials and communities, and provides a more nuanced understanding of the range of legal practices employed by state officials that were by no means contradictory. This analysis draws an intriguing parallel to other works in colonial history that highlight seemingly illegal or undermining practices, (for example, corruption and extortion) as part of a range of accepted legitimate legal practices supporting the state or understood as being important or necessary part of the functionality of law.

The second part of the book, »Uncertainty, Amorphousness, and Non-Law«, explores the period 1819–1865 and the failure to generate clear and binding extradition law. Chapter four focuses on how judges and policy makers tried to create a formal extradition regime and their understanding of key principles of international law, such as the obligation to extradite, reciprocity and supranational justice. Miller shows that these notions were often amorphous and uncertain, meaning extradition in practice often faltered. The failure to formulate clear ideas and practices is followed in the next chapter on the right of political asylum. Miller argues that British North America highlights how asylum-seekers and others lobbied for asylum rights or to apply what they saw as binding international law for legal protection, but without successes in creating binding principles. This fascinating chapter re-centres people into his narrative – often neglected in similar works – and reaffirms his contention of the amorphousness of key aspects

of extradition. Whereas this argument is perhaps far from ground-breaking, it nevertheless forms a strong part to his overall argument and provides a detailed analysis on the understanding of international legal principles that will appeal to those interested in the intersection of international law and domestic policy formation.

Finally, the last part of the book, »Law Formation in the Treaty Era«, examines how jurists attempted to apply extradition between 1842 and World War One. The first chapter examines the important relationship of Canada and the imperial metropole. He demonstrates the clash of mentalities between Canadian officials lobbying for extradition law and principles that prioritized a supranational ethos, and British officials who were cautious towards a revision of the right to political asylum. Those acquainted with Miller's published article on the topic will be familiar with the arguments presented here. Historians of the British Empire may find the next chapter, »Law Formation in the Common Law World«, an interesting comparative perspective and insight into the issue of connections – and disconnections – of Empire. Miller argues that the common law world »functioned much more as a series of disconnected jurisprudential zones and sub-circuits in which jurists borrowed across some national and colonial borders but not others, and in which English models were often not very influential let alone determinative« (183). He juxtaposes North America, where the interpretation of treaties and statutes formed jurisprudences that prized the purpose of supranational justice in contrast to Australia, New Zealand and South Africa, where jurists construed treaties and statutes more strictly and tended to borrow from each other's case law. As Miller suggests, this helps to de-centre Britain in the legal history of the British Empire and reaffirms the common law world as deeply heterogeneous. However, to those working on the British Empire more broadly, where the de-centering of Britain has been explored for some time, the chapter will perhaps appear more important for its more nuanced understanding of disconnections and structured circuits of Empire.

Miller's excellent book is a welcome addition to work on extradition examining everyday legal practices and their underlying jurisprudential foundations. The role and perspective of various people, such as local state officials and asylum-seekers themselves, are great strengths of the book

and allow for a more nuanced understanding of legal practices and law formation. It provides an important study into the intersection between international, British imperial and Canadian law. It is clear and concisely written, presenting detailed and convincing arguments. The book draws upon numerous cases in every chapter to illuminate his arguments and interweave his narrative. Unfortunately, the book does not have a separate bibliography with which to easily glance over these

sources and reference works. For those looking for a detailed and expanded theory of the borderland, the book will also perhaps offer less than expected. However for legal historians of international law, extradition, North American history and those working on the British Empire, there is much to offer in the detail of his arguments. ■

Alfons Aragoneses

Escribir la historia global del derecho penal moderno*

Reinventar el castigo significa reinventar el derecho penal. Significa replantear sus finalidades, su legitimación, sus métodos y sus fronteras, tanto con otras disciplinas jurídicas como el derecho administrativo y el derecho procesal, como con otras no jurídicas – antropología, medicina, sociología, gestión de prisiones – puestas en relación con el *Rechtsstaat* y los derechos fundamentales. Es por esta razón que la historia de la reinención del castigo, entendida como un proceso que comienza a finales del siglo XIX y llega hasta mediados del XX, es en realidad la historia del derecho penal de nuestros días. En ese periodo, y no en el Estado liberal de comienzos del XIX, encontramos el origen de nuestro derecho penal. En ese largo proceso, encontramos además las categorías con las que operan hoy las ciencias penal y criminológica.

En *Reinventing the Punishment*, Michele Pifferi, historiador del derecho en la Universidad de Ferrara, explica la complejidad de un proceso multi-

dimensional y global en el que interactúan criminología, derecho y otros saberes, proceso que poco tiene que ver con ciertas descripciones simplificadoras que se han ido tejiendo hasta hace poco en la historiografía y la penología. Estos relatos habían sido ya puestos en cuestión por varios autores (Pifferi, Costa, Martín¹). Para hacerlo era necesario, y así lo hace el autor, estudiar de forma conjunta las historias del derecho penal, la criminología y las interacciones entre ambas.

El libro aporta, en segundo lugar, historicidad a conceptos del derecho penal que nos parecen inmutables desde que, a finales del siglo XVIII, se pusieran los cimientos de lo que todavía algunos llaman «derecho penal moderno»: el de los Beccaria y Feuerbach. En sus páginas se explica la génesis de categorías e ideas que resultan directrices en el derecho penal actual, pero no fueron conocidas por los primeros liberales. La obra sirve para entender las tensiones entre teorías retribucionistas e individualizadoras, castigos determinados e inde-

* MICHELE PIFFERI, *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries* (Clarendon Studies in Criminology), Oxford: Oxford University Press 2016, 336 p., ISBN 978-0-19-874321-7

1 V. g. MICHELE PIFFERI, *Difendere i confini, superare le frontiere. Le «zone grigie» della legalità penale tra Otto e Novecento*, in: *Quaderni fiorentini* 36 (2007) 743–799; SEBASTIÁN MARTÍN, *Penalística y penalistas españoles a la luz del principio de le-*

galidad (1874–1944), in: *Quaderni fiorentini* 36 (2007) 503–609; PIETRO COSTA, *Pagina introduttiva (Il principio di legalità: un campo di tensione nella modernità penale)*, in: *Quaderni fiorentini* 36 (2007) 1–39.