
Colonizing Hawai'i and Colonizing Elsewhere: Toward a History of U.S. Imperial Law

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The colonization of Polynesia is usually placed well toward the end of the broader narrative of European and American overseas conquest and colonization. European contact with many island peoples occurred in the late eighteenth century or after, with formal claims to control of the islands coming later. Japanese and U.S. imperial expansion in the region became important forces in the nineteenth and twentieth centuries. Yet characterizing colonizing in Polynesia as peculiarly sudden can create distortions. The preoccupation with the study of first contact has shifted attention from the important decades leading up to formal colonization. The emphasis also threatens to reproduce early European representations of the islands as sheltered, idyllic havens peopled by colorful innocents. And portraying Polynesian colonizing as unique in timing and pattern has distanced it from the comparative analysis of colonial relations, a tendency that echoes colonizers' representations of Pacific island imperialism as unique in its benevolence—an “empire of love,” as contemporary French observers liked to claim.¹ The analytic isolation fits comfortably, too, with an idea of U.S. imperialism as a different historical phenomenon from its European counterpart.

Sally Merry's *Colonizing Hawai'i* (1999) is an original and well-crafted book that goes a long way toward correcting these tendencies. The book focuses attention on Hawaiian legal culture in the context of transnational influences, exploring in particular the links between New England legal culture and Hawaiian institutional change. In analyzing the shifts in law during the period leading up to formal annexation, Merry disrupts the narrative of modern Hawaiian history proceeding logically from dramatic first contact, with its famous cultural dissonance, to formal annexation.

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¹ Matsuda (2003) makes this argument about French attitudes. The British also represented their legal and land policies in Fiji as especially benevolent. See Sohmer (2002).

For Hawaiians, alternatives to annexation were both desirable and possible, and Westernizing legal changes were alternately tolerated and encouraged in an effort to prolong autonomy.

Merry divides the transformation of Hawaiian law into two periods: a transition between 1825 and 1844 from law based in Hawaiian sacred authority to the “religious law” supported by Christian missionaries, and a second, more radical transition between 1845 and 1852 toward the establishment of a secular legal order. While in the first transition, some role remained for Hawaiian legal forums and processes, these were essentially eliminated in the legal system adopted at mid-century. By then, the legal institutions and practices required for the development of Hawaiian plantations were securely in place. The missionaries’ preoccupation with controlling “uncivilized” behavior through the law had given way to a more systematic disciplinary order that controlled Hawaiians’ and immigrants’ labor, transformed gender roles, and promoted ideologies of self-control and self-interest.

This narrative makes a significant contribution to an emerging history of imperial American law. As Merry points out in the introduction, scholars have paid inadequate attention to U.S. colonial legal policy; there is no single work that attempts an overview of the imposition of U.S. law on colonial territories. The history of legal pluralism in the United States has, in addition, been written largely in the tradition of an entrenched American exceptionalism. What would be the materials of a colonial legal history of the United States, and how can we build on Merry’s study to produce one?

One of the first steps in constructing an overview of law as an element of U.S. imperialism would be to link the rich literature on the history of Indian law—itself somewhat isolated from mainstream U.S. legal histories—with the study of legal policy in U.S. colonial possessions acquired in the nineteenth and twentieth centuries.

Consistent across these experiences was a preoccupation, provoked by colonial expansion, with defining intermediate forms of sovereignty in the law. While no one has advanced the argument that colonialism was therefore a central element shaping U.S. legal history—Merry, too, stops short of this assertion—a strong case might be made by pulling together the various historical pieces. Merry’s study forms one important piece of this puzzle.

Consider the peculiar isolation of the rich history of Indian law. Except for occasional unsuccessful attempts to show that Indian, especially Iroquois, legal concepts informed the U.S. Constitution, Indian law has been treated as a topic marginal to legal developments in early America.² This situation has remained unchanged

² See Levy (1996) and the other forum articles on Iroquois legal influence in the same issue of *William and Mary Quarterly*. Williams (1997) makes a compelling case about the

even though recent research has illuminated complex legal interactions between Indians and settlers, complicating the narrative of a rapid and decisive shift after King Philip's war toward the exclusion of Indians from the colonial legal order.³ It is not surprising, by extension, that the debates surrounding the Cherokee cases of the 1830s, including the ruling in *Worcester v. Georgia* (1832) recognizing the limited ("dependent") sovereignty of Indian nations, should be viewed by historians of Indian law mainly as an anomaly in a larger story about the progressive erosion of Indian legal autonomy rather than in relation to other legal or political conflicts.⁴ Oddly, the recentering of Indian law within mainstream legal history may ultimately be achieved by constitutional historians tracing debates from the founding period through to the early nineteenth century.⁵

Certainly, in later debates about the legal framework for territorial acquisitions, participants recognized both the connection between various types of expansion and broader political issues. For example, in the Insular Cases, decided in 1901, which emanated from tariff disputes about goods entering the United States from newly acquired Puerto Rico, the U.S. Supreme Court ruled that Puerto Rico was not a foreign nation but also determined that the island and its inhabitants were not fully subject to the rights and provisions of the Constitution. The apparent outcome, as described by Justice Edward D. White in language echoing that of *Worcester v. Georgia* (1832), was that Puerto Rico was "foreign to the United States in a domestic sense" (Thompson 1989:102). The cases established a new status for Puerto Rico and the Philippines—that of territories not necessarily destined to become states. Jurists were aware that the legal definition of sovereignty was itself in dispute, and that the answers provided to the question of Puerto Rico's peculiar status had implications for both internal U.S. politics and the prospects for future external expansion.⁶

centrality of discourse about Indians as the "other" in European and North American legal discourse but is less convincing in establishing the influence of Indian treaty practices.

³ Washburn (1971), in an overview of Indian law, presents the older narrative. For an account of Indian-settler legal interactions in colonial Massachusetts that features Indians as legal protagonists after King Philip's war, see Plane (2001) and more generally Kupperman (2000:102–4, 106) and White (1991). Despite recent attention, the study of Indian law has been somewhat marginalized within U.S. colonial history. In listing "all the major facets of Indian-European interaction," for example, Axtell (2001:x–xi) conspicuously leaves out law and legal relations.

⁴ The best treatment of the nineteenth-century cases carving out a limited Indian sovereignty is by Harring (1994). See also Wilkins (1997).

⁵ For example, Kramer (2004) views the Cherokee cases as one of many conflicts of the 1830s contributing in the 1830s to the reaffirmation and refinement of the doctrine of judicial review.

⁶ Thompson (1989: Ch. 3) shows, for example, that the U.S. Congress conducted a lengthy debate on the legality and wisdom of making a claim of sovereignty on the

Merry's study reminds us more generally of the open-endedness of U.S. colonial legal politics. Neither the full Anglicization of the law nor annexation and statehood were predetermined by prior U.S. policies on territorial expansion. At the same time, there is much apparent continuity. The discourse about the "uncivilized" nature of Hawaiians was the counterpart to representations of American Indians as separate and inferior "others." And advocacy of a unitary secular legal order resulted from the intersection of outside interests and local elite strategizing. Rather than producing moves toward annexation (and, later, statehood), a different constellation of political forces and legal arguments might have produced a status for Hawai'i closer to that of Puerto Rico or even to that of Indian nations.

That Hawaiian legal change occurred within a framework of alternatives is important also in placing this case of colonizing into a still broader, global context. Merry comments when she can on global colonial comparisons, and as an anthropologist—and anthropology is, at heart, a field of and for comparativists—she is more familiar than many historians with colonial legal politics in other world regions. She tends to emphasize the contrast between Hawai'i's unitary legal order and the dual (or plural) legal orders of British India and much of British colonial Africa. Citing Mamdani's study of African colonizing, Merry contrasts the recognition—and invention—of "traditional" law in colonial Africa with the process in Hawai'i whereby a unitary legal order was created with jurisdiction over all "civilized" subjects.⁷ This distinction appears to mirror the familiar observation about differences between English and French colonizing strategies: indirect rule for the English versus assimilation as a formal policy for the French.

Yet like this generalization, the distinction between Hawaiian legal unity and legal pluralism elsewhere may be overdrawn. Timing, after all, is everything. The legal dualism described by Mamdani, Chanock, and others was a relatively late development of English colonial policy and had its origins in an indeterminate and open legal politics of precisely the kind described by Merry for the earlier period in Hawai'i. While missionaries and their children were beginning to transform Hawaiian law, European settlers in colonial enclaves in Africa and Asia were also engaged in a complex legal politics focusing on the status of indigenous subjects. Between 1810 and 1840, significant policy shifts occurred, for example, in the legal treatment of Khoikhoi in the Cape Colony, Muslims in

Philippines, with both historical references to U.S. Western expansion and an eye to future geopolitical concerns.

⁷ Merry (1999:114). She is citing Mamdani (1996), whose views echo the observations of Chanock (1985).

French Senegal, and Aborigines in New South Wales.⁸ The Cherokee cases in the United States arguably belonged to this period and pattern. Indigenous peoples were not bystanders in these legal shifts but often participated as litigants or in other ways challenged their standing as legal subjects. As in Hawai'i, it could hardly have been predicted at the time that the result would be more expansive claims by states to a monopoly on legal authority. Nor was it clear in which places such claims would be paired with formal recognition of a limited legal authority for subordinate groups.

The picture of an indeterminate politics surrounding the early decades of legal change in Hawai'i therefore fits well with this larger, global pattern. Merry describes the first transition as one of the installation of "religious law," but this label is perhaps a bit misleading since she also makes it clear that the missionaries were not establishing religious law in the sense of church-run legal forums. They were instead experimenting, in part by building on existing Hawaiian models, with state enforcement of laws originating with and supported by missionaries. As in many other settings of incipient or informal colonialism, various groups were seeking to reinforce state legal authority in order to advance particular understandings of cultural and religious difference.

The key force in the second transition in Hawai'i that Merry describes—that toward Westernized, secular law—was the attempt by Hawaiian elites to salvage autonomy by adopting the trappings of a Western nation-state. This strategy also had clear parallels in a wide variety of places in the middle decades of the nineteenth century. Hawaiian elites favored the Westernization of legal institutions as a means of defending Hawaiian autonomy and, in turn, Hawaiian culture. Merry makes a compelling argument that Hawaiian elites were in this sense rebellious conservatives, betting that the best way to preserve their independence from foreign powers was to emulate Western institutions and internalize the standards of "civilized" governance. A similar posture can be found in other colonial and postcolonial settings. In the South American republics at mid-century, law-trained elites responded to demands for weak extraterritorial protections for European subjects by heeding calls for centralizing legal reforms. Stronger extraterritorial claims in China and the Ottoman Empire were associated simultaneously with concessions to foreign powers and a strengthening of claims to legal independence (Benton 2002: Ch. 6). Significantly later, in the mid-twentieth century, urban elites in the U.S. South embraced reforms that would centralize state legal institutions as a means of repelling federal intervention in support of integration (Walker, forthcoming).

⁸ For discussions of these case studies, see Benton (2002).

Indirectly through Merry's study, then, we arrive at a view of certain institutional changes in U.S. history—in particular, the shift toward more expansive claims about the authority of state law and the subordinate status of “other” law—as more similar to than divergent from global patterns of colonial legal change. At the same time, we begin to make connections between the various components of what might be collectively termed U.S. imperial legal policy. These insights arrive without compromising the complexity of Hawai'i's legal history, whose peculiar characteristics derived in no small degree from the islands' cosmopolitan character, the absence of a prior or competing European legal tradition, and the agency of local and transnational legal actors.

It is in the exploration of these local complexities that Merry's research is most impressive. Tracing the close family connections between missionary-reformers and the first generation of Hawaiian plantation owners, Merry shows the ways in which new economic interests informed mid-century legal changes. Hawai'i was a particular kind of global place. At the confluence of Pacific whaling and trade routes, the islands drew both an international population of seamen and merchants and, increasingly, a multinational work force made up of Hawaiians and immigrants from Portugal, Puerto Rico, China, and Japan. As Merry's analysis of case records from Hilo shows, one result is that Hawaiians, though still discriminated against by Anglos, were considered insiders as compared to immigrant workers who bore the brunt of prosecutions for labor violations and other petty offenses. This was no “simple” colonial dynamic of the imposition of law by a dominant foreign power and the subordination of an indigenous group; the legal culture contained a matrix of changing status distinctions and featured a strategic advantage for local residents over newcomers.

One of the most interesting findings of Merry's book is the importance of connections between New England and Hawai'i. These links extended to law. New England legislation (and the Massachusetts Constitution) formed the basis for Hawaiian laws, and law-trained personnel from New England played key roles in staffing the Hawaiian court system. This sort of informal circuit for lawyers within empire is a dimension of legal change that has been insufficiently studied by colonial historians. We know important pieces of the story, but recent histories of the legal profession show how rudimentary our knowledge remains about such connections, despite their evident importance in shaping colonial legal developments.⁹ In Hawai'i, another transnational connection would have yielded a very different mix of legal sources, judicial attitudes, and confluence of interests between judicial and commercial Hawaiian classes.

⁹ See, for example, Pue and Sugarman (2003).

In addition to breaking new ground in the study of Hawaiian legal history, Merry manages to move beyond, without sidestepping, a somewhat tired preoccupation of colonial Polynesian history with the question of islander rationality. In the celebrated debate between Sahlins and Obeyesekere and also more broadly in histories of regional strategies in the face of European power, Polynesian colonial histories have focused on the question of whether Pacific islanders behaved as rational actors, able to defy or modify their own traditions in pragmatic ways, or found themselves caught within a cultural logic that then left them vulnerable to European exploitation.¹⁰ Merry provides a very fair assessment of the strengths of each side of this debate (she gives the victory, on points, to Sahlins, the right conclusion I think). Then, illustrating the complexity of these questions, she shows us social actors—mainly local elites—for whom such stark characterizations are impossible. The non-elite defendants of Hilo's criminal court are depicted much less clearly, reflecting the limitations of Merry's sources and, also, the book's shift at midpoint from a looser narrative style to a quantitative analysis of the Hilo cases. Sample cases presented in the Appendix provide a tantalizing glimpse of the social world of island workers. The dimension of this world that comes into sharpest focus is gender, and it is one of the signal contributions of the book that it compellingly places gender at the center of the analysis of the changing structure and operation of the law. This is an important contribution to colonial legal history, which has tended to pay closer attention to religious and cultural differences. Merry shows us that the importance of gender goes beyond marking women as holding a distinctive, and inferior, legal status; gender encoded broader institutional shifts in the law. Thus the twin transformations of the Hawaiian legal order corresponded to key shifts in the roles and representations of Hawaiian women.

Merry's study of Hawai'i is an important contribution on many levels. As Merry points out in the introduction, Hawai'i is often written about as something other than a case of colonialism, but its history must be understood in this context. She is entirely persuasive in arguing the centrality of law to the construction of colonial power, to the resistance of Hawaiian elites, and to the daily lives of immigrant workers. The book will no doubt be read by legal anthropologists interested in the cultural meanings of law, but it deserves a wide readership, too, among legal historians trying to understand patterns of colonial legal politics. *Colonizing Hawai'i* marks an important step toward a much-needed history of U.S. law and empire.

¹⁰ For an excellent summary of this debate, see Campbell (2003).

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