Voices Unheard: Unveiling Women's Testimony in 19th Century Canadian and American Extradition Courts

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Abstract

This paper examines the role of women's testimony in extradition cases between Canada and the United States from 1868 to 1923. In Canada, only 35 women testified in court in a total of 407 cases. In most instances, the women testifying were married and testifying to their husband's innocence or guilt. In these cases, their husband's extradition, conviction, and liberation were often determined by what they said. Women who testified as victims of crimes, often assaults, saw far more ambiguous success. Ideas about the purity of women influenced whether the courts listened to the testimony of unmarried women and girls or allowed them to testify in the first place. Finally, in rare instances, women appeared in these transnational court cases in a professional capacity (often as doctors or secretaries). While married women were treated with respect and single women with some suspicion, divorced women were scrutinized heavily. This divergence, especially in the Canadian courts, emphasizes the uneven ways the border influenced married life. Divorce was illegal in Canada at this time, and marriage was viewed as the building block of Canada's new society. As such, many divorced women who came from the United States were belittled and overly questioned compared to married women from Canada. As a result, this paper argues that Canadian and American attempts to punish criminals who fled across national borders prioritized looking at a woman's marital status above all other factors when assessing whether a potential witness might have valuable information for the courts.

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"I beg your pardon," Elizabeth G. Ford muttered as the court examiner interrupted her again in the middle of her testimony.[1] For the third time since the trial had begun, the examiner asked whether Elizabeth was aware her husband was already married prior to her own marriage to him. The interruptions and focus on Elizabeth's private life had become so persistent that the judge eventually interrupted the court examiner, noting that his questions were irrelevant, as the Ford case involved forgery, not infidelity. Elizabeth Ford was not alone in her treatment within the Court of the King's Bench.

Revised in 1842 by the Treaty of Webster-Ashburton, the Canada-US extradition system was created to instill a sense of order across a long, complex border.[2] The treaty was a way to control American and Canadian criminals who escaped the law by fleeing to the jurisdiction of their neighbours to the North and South, respectively. Under the extradition system, a criminal who committed a crime in one country and escaped to the other was formally brought back, tried, and convicted if guilty. The extradition system between Canada and the United States was a vast operation. Each cross-border case required police officers, judges, magistrates, court reporters, juries, witnesses, and sometimes even Pinkerton detectives to get a criminal across the border for trial.[3]

Witness testimony was essential in convicting or acquitting the accused. Many cases involved many witnesses, some of whom were examined and cross-examined over multiple days.[4] Throughout the 19th century, Canadian and American women were rarely called to testify as witnesses. When they did, lawyers attempted to discredit the woman's testimony by casting doubt on their sexual purity. At the international level, women faced similar scrutiny when they appeared before extradition courts.

The surviving records from extradition cases between the two countries, which span tens of thousands of pages, provide an opportunity to reconstruct how both nations conceived of justice in international spaces. Between 1868 and 1923, Canadian courts called on at least 34 women during extradition cases. The breadth of the surviving documentation and the importance of the cases themselves (significant enough to require international agreements to ensure punishment) provides a unique opportunity to assess the place of women with respect to transnational law. These cases suggest that in extradition cases, Canadian courts restricted the testimony of women to questions related to (1) their husband's innocence or guilt, (2) whether a female criminal was pregnant prior to the administration of the death penalty, rarely (3) crimes committed against them; and even more rare (4) information pertaining to their profession.

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[1] Hoy, Benjamin. 2024. "Shadows of Sovereignty." Unpublished research project, University of Saskatchewan. The Shadows of Sovereignty project is an ongoing research project by Benjamin Hoy and Sarah Rutley, conducted in the Historical Geographic Information Systems Lab at the University of Saskatchewan. The project makes use of primary source documents located in the LAC (Canada) and NARA (United States – Chicago) transcribed by University of Saskatchewan student researchers. These documents are handwritten correspondence between law enforcement in the United States and Canada. The Shadows of Sovereignty project will map and quantify the growth of formal (extradition) and informal (state-sponsored kidnapping) approaches to transnational justice from the 1840s until the 1930s. Set between the first effective extradition agreement between Britain and the United States (1842) and the moment the Canada-U.S. border became a fully functioning institution (the 1930s), this project studies the growth of transnational justice during its formative years. In doing so, this project sheds light on how nations punished crime in lands they claimed no official jurisdiction over (e.g. US punishing crime on Canadian soil). It also illuminates how federal desires for practical solutions in both countries increased local power in transnational affairs.

[2] Howard Jones, To the Webster-Ashburton Treaty: A Study in Anglo-American Relations, 1783-1843 (Chapel Hill: University of North Carolina Press, 1977), 161.

[3] Hoy, "Shadows of Sovereignty."

[4] Hoy, "Shadows of Sovereignty."

Also notable are the absences. Canadian courts refused to call on women who might provide pertinent information (for example, they were victims in the crime) in many cases, the *Shadows of Sovereignty* team was able to reconstruct. Taken together, these findings suggest that Canada and the United States avoided using testimony from women when resolving transnational cases, except in rare instances where their testimony was framed as being given in their capacity as wives and mothers.

Background

In the late 19th century, American and Canadian extradition courts actively avoided calling on women to testify, even in cases where they were victims of or witnesses to the crime.[5] When the courts allowed women to testify, they used the women's social rank as a proxy for their reliability as witnesses. The courts treated testimony from white married women of unquestioned sexual virtue with respect, especially when those women came from wealthy or high-status families. The testimony of immigrant women, women of colour, poor women, and women whose virtue could be questioned or attacked carried less weight.
Broader conceptions of the family further shaped how courts across North America understood women as witnesses. Throughout the 19th and early 20th century, Americans and Canadians viewed the family (represented by a married couple) as the basic building block of society, with the husband serving as the face and name of the union.[6] As a young nation, Canada placed a high priority on nation-building through marriage.[7] Sexual desire was targeted as both a public health issue and a societal plague that would stop the prosperity of the nation in Canada.[8] Single women also aspired to marriage from a young age to relieve their parents from the burden of caring for them.[9] In the United States, women faced a similar prescribed identity of class and purity, whether married or single.[10] In both countries, marriage transferred belonging, but not dependency. In this environment, a woman's sexual status shaped her place in society. Women who were young, pure, and single had higher status than those tainted with the shame of divorce.

In the 19th century Canadian and United States courtrooms, women possessed few ways to shape the outcome of justice beyond cases that directly implicated them as either defendants or plaintiffs.[11] Women were prohibited from being "voters, legislators, coroners, magistrates, judges, [or] jurors."[12] They rarely appeared as witnesses and their most consistent role in the judicial system was a part

[5] Sarah Carter, The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915 (University of Alberta Press & AU Press, 2008), 4.

[6] Anne Lorene Chambers, Married Women and Property Law in Victorian Ontario (Osgoode Society for Canadian Legal History, 1997), 7.

[7] Mariana Valverde, The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925 (Toronto: McClelland & Stewart Inc., 1991), 2.

[8] Valverde, The Age of Light, Soap, and Water, 21-29.

[9] Patrick Brode, Courted and Abandoned Seduction in Canadian Law (Osgoode Society for Canadian Legal History by University of Toronto Press, 2002), 17.

[10] For a discussion of married life in the United States in the early 19th century, see Rebecca J. Fraser, Gender, Race and Family in Nineteenth Century America From Northern Women to Plantation Mistress, Gender and Sexualities in History (New York: Palgrave Macmillan, 2013).

[11] For a discussion of restrictions on public life of British North American women in the early 1800s, see McKenna, Katherine M.J. "Class, Race and Gender Roles in Early British North America." In Reading Canadian Women's and Gender History, edited by Nancy Janovicek and Carmen Nielson. Toronto: University of Toronto Press, 2019.

[12] Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada (Osgoode Society, 1991), 327.

of a "jury of matrons."[13] The primary purpose of this jury was to determine if a female criminal facing the death penalty was pregnant, in which case she would not be executed. This idea was taken from the legal system in England, where it had been in place since the 14th century.[14] Women on the jury had to have a good reputation as respected community members, and they had to be married or widowed.[15] The courts believed women with these attributes were more likely to have a reputable knowledge of pregnancy than single women and to have far more understanding about fertility than men.[16] Despite being mostly confined to the domestic sphere, the jury of matrons was one of the only places where women were asked for their expertise and held power in the courtroom.[17] These gendered concepts directly informed how extradition courts understood women's relationship to justice.

Extradition

Following the Treaty of Webster Ashburton, Canada and the United States relied on a formalized extradition system to manage deviancy along their shared border. Only a handful of crimes were initially extraditable, including voluntary manslaughter, counterfeiting or altering money, embezzlement, fraud, perjury, rape, kidnapping, and burglary, but more were added with each treaty revision.[18] Extradition cases relied on testimony from witnesses or individuals otherwise important to the case, such as suspects' friends, siblings, and spouses, or from prevalent people in the area where a crime was committed, such as shopkeepers and business owners. Women were hardly among those who testified.

Between 1868 and 1923, Canadian extradition courts rarely called on women to testify. Of the 34 women called (who spoke on cases of forgery, theft, fraud, and murder), 18 were married, five were single, and 11 had an unknown relationship status.[19] The courts treated the testimony of all of the women seriously, although they forced victims of sexual assaults to demonstrate their character before doing so.[20] Proving one's character during an extradition hearing was a balancing act, mirroring the challenges faced by women at other levels of the judicial system. Victims had to demonstrate that they had been previously chaste, had the wisdom to avoid situations where they could be sexually assaulted, and had the courage to resist and fight an attacker, if necessary.[21]

Women had a better chance of being believed and seeing their attacker prosecuted during extradition processes if they were young and thought of as pure.[22] In April 1857, John Varslke, a family farmhand, raped 14 year old Mary Fisher of Chippewa County, Michigan.[23] Fisher was on the way to her neighbour's house to get milk when Varslke found her, took her into the bush, and attacked her. Fisher did not seek justice until she found out that she was pregnant. By that point Varslke had fled to Ontario. Varslke testified that he had seen Mary on the day of her

[13] Jane Bitomsky, "The Jury of Matrons: Their Role in the Early Modern English Classroom," no. 25 (2019), 4.
[14] Bitomsky, "The Jury of Matrons," 5.
[15] Bitomsky, "The Jury of Matrons," 10.
[16] Bitomsky, "The Jury of Matrons," 10.
[17] Katherine M.J. McKenna, "Class, Race and Gender Roles in Early British North America," in Reading Canadian Women's and Gender History, ed. Nancy Janovicek and Carmen Nielson (Toronto: University of Toronto Press, 2019), 110.
[18] United States Government, Treaties and Conventions Between the United States of America and Other Powers since July 4, 1776, Revised Edition (Washington, D.C.: Government Printing Office).
[19] Hoy, "Shadows of Sovereignty."
[20] Constance Backhouse, Carnal Crimes: Sexual Assault Law in Canada, 1900-1975 (Osgoode Society, 2008), 76.
[21] Backhouse, Carnal Crimes, 76.
[22] Hoy, "Shadows of Sovereignty."
[23] RG 13, C1 [A5], Vol 989, Folder 1898, John Felix Varslke.

alleged attack, but they had merely greeted each other in passing and he did not touch her, nor did he have intercourse with her on any other day. Varslke further claimed that he had seen Fisher being intimate with another man some months prior to his alleged attack, and that was how she became pregnant. Varslke testified that he had reported this relationship between Fisher and another man to Fisher's mother, stating that "she raised the devil."[24] Fisher's mother and father testified to her innocence, including the sad story of how they had adopted Mary at 11 months old.

Mary Fisher did everything right. At 14 years old, she could prove that she had never been intimate with a man before. Her testimony emphasized that she had "cried out and tried to get away from [Varslke] but could not."[25] These two distinctions were essential to proving her "sexual reputation" as an innocent girl and not a promiscuous woman.[26] Canadian extradition courts viewed Fisher's testimony as more reliable than Varslke's and concluded that she had been assaulted. Absences in surviving archival records, however, make it unclear if the United States ever extradited Varslke.

While women like Mary Fisher succeeded in having their voices heard by the courts, they were often in the minority. Between 1868 and 1923, Canadian courts handling extradition cases heard 42 testimonies from women compared to 346 from men.[27] In total, women appeared in roughly 6% of the recorded extradition cases (23 out of 407).[28] Despite this limited set of appearances, the breadth of their involvement, however, is notable. Women participated in a wide range of cases including those related to murder, financial crimes, theft, kidnapping, and rape.[29] More often than not, these women testified for or against their husband.[30] Less commonly, they testified as witnesses to the crime and even more rarely as professionals providing advice from the standpoint of their occupation.[31]

Beverly D. Harrison, a physician from Michigan, examined 16-year-old Ellen Colwell in 1897 and determined that she had been sexually assaulted by her father, Leslie Moffatt.[32] Bookkeepers Mary McDevitt and Ethel Perry gave testimony in 1915 that R.O. Conley stole a sewing machine from the Huntington Shop of the Singer Sewing Machine Company in West Virginia. Unfortunately, due to missing or nonexistent documentation, it is unknown whether the expertise and experience of these three women resulted in the extradition or sentencing of Moffatt and Conley. What is clear, however, is that the extradition courts took each woman's testimony seriously as witnesses (McDevitt and Perry) or professionals (Harrison as a physician). Court officials did not interrupt any of these women, nor did they attack their character. Those approaches seemed to have been more commonly used against women testifying in cases about their own family members.

Although limitations in the surviving court records make it difficult to know for certain, the treatment of women in the extradition courts appears to have been tied up in the complex ways Canada and the United States understood family and marriage. Throughout the nineteenth century, Canada and the United States believed marriage and monogamy were the building blocks of a functional, rational, and civilized society. They disagreed, however, on how to approach divorce.[33] Canada made divorce taboo and forbidden. Only Parliament could grant an annulment, which

[24] RG 13, C1 [A5], Vol 989, Folder 1898, John Felix Varslke.
[25] RG 13, C1 [A5], Vol 989, Folder 1898, John Felix Varslke.
[26] Backhouse, Carnal Crimes, 68.
[27] Hoy, "Shadows of Sovereignty."
[28] Hoy, "Shadows of Sovereignty."
[29] Hoy, "Shadows of Sovereignty."
[30] Hoy, "Shadows of Sovereignty."
[31] Hoy, "Shadows of Sovereignty."
[32] RG 13, C1 [A5], Vol 989, Folder 1898, Leslie Moffatt.
[33] Carter, The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915, 26.

came with a $2,000 price tag (roughly a year's salary for a well-to-do civil servant). In addition, couples faced public shame as their names were published in newspapers.[34] The United States, on the other hand, took a much more lenient stance on divorce.[35] English Puritans first introduced divorce to the United States in the 1600s.[36] Not everyone accepted the concept immediately. Some argued that divorce should only be granted when adultery is involved.[37] Others, however, "argued that marriage was a contract, and that parties to any contract had the right to dissolve it."[38] Eventually, those that believed divorced couples posed less harm to American social order than broken marriages got their way.[39] By the mid-20th century, most American states had lenient divorce laws, with 5-10% of all marriages in the US ending in divorce in the 1880s.[40] Differences in American and Canadian attitudes toward divorce made their way into the courts of each country, adding complexity to cases spanning the border.

Married women testified in 11 out of the 34 extradition cases that involved at least one woman.[41] Court documentation recorded these women as being their husband's wife (rather than by their own name), which reinforces the notion that in the late 19th Century, "…marriage, for women, represented civil death" in North America.[42] Extradition courts treated married women's testimony seriously and used it to determine the extradition, conviction, or liberation of their husbands.[43] Judges did not take the testimony of women who were divorced or were caught in cases of infidelity seriously.[44]

Even when a married woman gave her testimony, absences in questioning often stunted the courts' ability to properly adjunct a case. Edward Hards was assaulted in Ogdensburg, New York on September 29, 1892, while walking downtown with his friends.[45] Robert Gilbert happened upon the group of men and kicked Hards several times in the abdomen, unprovoked. This aggravated Hards' pre-existing hernia, which ended his life five days later. Gilbert promptly fled to Canada via the St. Lawrence River and was later issued a warrant of extradition to return to the United States. The St. Lawrence County District Court considered the testimony of seven deponents in deciding the guilt of Gilbert. Men who were with Hards when he was assaulted made up five of the testimonies, and the physician who examined the victim supplied another. All five witnesses gave similar descriptions of how Hards' assault unfolded: he was walking down the street in Ogdensburg with his friends around 7:00 p.m. when suddenly Gilbert appeared and kicked him multiple times in the abdomen. Hards cried out and needed his friends' support to get back home. The physician's testimony revealed his visit to Hards' bedside after the assault, where he determined that Hards had a hernia, now causing extreme bleeding due to the assault, and needed surgery. During surgery, the physician discovered that the hernia had become strangulated and could not save his life.

Hards' widow, Bertha Hards, provided the final deposition in Gilbert's case, almost as an afterthought. She gave a short testimony as to Hards' age (30 years), a description of their three-year marriage, and information about his general good

[34] Carter, The Importance of Being Monogamous, 25.
[35] Carter, The Importance of Being Monogamous, 5.
[36] Glenda Riley, Divorce: An American Tradition (New York: Oxford University Press, 1991), 3.
[37] Riley, Divorce: An American Tradition, 4.
[38] Riley, Divorce: An American Tradition, 4.
[39] Riley, Divorce: An American Tradition, 11.
[40] Riley, Divorce: An American Tradition, 5.
[41] Hoy, "Shadows of Sovereignty."
[42] Chambers, Married Women and Property Law in Victorian Ontario, 3.
[43] Hoy, "Shadows of Sovereignty."
[44] Hoy, "Shadows of Sovereignty."
[45] RG 13, C1 [A5], Vol 988, Folder 1893, Robert Gilbert.

health, besides rheumatism and the hernia. Bertha described how Hards came home with his friends' help on September 29, vomiting continuously and laying immobile until his death five days later. Information on Hards' prior good health aided the other six testimonies, but all other information was previously known or not relevant to the case. The examiners could have asked Bertha if Hards and Gilbert knew each other, or if Gilbert would have had any reason to attack Hards. They might have also benefitted from knowing what Hards did leading up to his assault and if he had planned to meet Gilbert. Bertha's short deposition was limited to basic information about her husband and their marriage, as was typical for women at this time. She could have provided much more to the case if she were asked the correct questions. The legal system determined what role Bertha would play as she was a woman who did not get to decide for herself.[46] Although Bertha was a married woman, she still had little power over the outcome of her husband's case.

Women who were victims and could not prove sexual purity were often treated poorly in extradition cases. In 1915, Milcah Gwynn of Boston, Massachusetts, was robbed and humiliated by conman Frederick Deering.[47] She met him in August of 1913 while working in a millinery store, and the two of them sparked a friendly relationship. Gwynn was a married woman but had a rocky relationship with her husband. The two had separated and had lived apart for a few years, although their divorce was not yet finalized. Gwynn was ready to move on and was charmed by Deering and his incessant visits to her home and work, and she began to get involved with him while still legally married. Deering made grand promises to Gwynn that if she only obtained a divorce from her husband, he would build a home for them, and the two would get married. He painted such a hopeful picture of their future life that Gwynn entrusted Deering with 65 promissory notes, essentially everything she owned. Deering promised to keep her money safe while the divorce was being finalized.

Gwynn never received her money back from Deering, nor did she receive the life he had promised her. Deering took her money and ran to Nova Scotia, and Gwynn found out that he had been previously married, proving that Deering had lied to her about his intentions. Gwynn sought justice with the court in Nova Scotia but was belittled and asked unnecessary questions during her testimony. She was accused of bribing her lawyers while obtaining a divorce from her husband and made to repeat herself many times about how much money Deering had stolen from her. Gwynn's trial lasted days, and she was re-called and cross-examined many times, repeating her story until the court decided that there was insufficient proof that Deering had committed larceny against her. The courts dismissed her case due to her relationship status, even though the crime committed against her had little to do with this piece of her life. Gwynn's story demonstrates the distrust of Canadian courts toward divorced women in the 19th century. Her deviancy to the monogamous marriage model threatened social order and resulted in disrespectful treatment during her advocacy for justice.[48]

Conclusion

In extradition cases between Canada and the United States from 1868-1923, 35 women appeared as witnesses before the Canadian extradition courts. Many of these women were asked to speak only in a narrow capacity. Married women clarified the details of their marriage and were asked to speak to their husband's innocence or guilt. Female victims who appeared before the extradition courts in the 19th and early 20th century faced a far less certain experience. For young women and girls like 14-year-old Mary Fisher, who the courts viewed as sexually pure before she had been assaulted, the courts offered a tool

[46] Michael Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America," Feminist Studies 9, no. 2 (1983): 235.

[47] RG 13, C1 [A5], Vol 991, Folder 1915, Frederick S. Deering.

[48] Carter, The Importance of Being Monogamous, 5.

through which justice could be achieved. For older women, particularly those facing divorce or whose sexual purity could be called into question (e.g. Milcah Gwynn), appearances before extradition court were often a humiliating and fruitless experience. More challenging to assess are women like Bertha Hards who appeared before the courts but were not given the liberty to speak to core parts of the case. The ways these women's testimonies were curtailed and the dozens of other examples where women were not asked to give testimony at all emphasize the ways transnational courts often prioritized reinforcing existing gendered ideals, even if that sometimes came at the cost of justice.

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