

## Law, Society and History: Whose Frontier?

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## Law, Society and History: Whose Frontier?

LEGAL HISTORY IS ONE OF THE most neglected branches of social history in Canada. Criminal justice history receives even less attention.<sup>1</sup> Ignored by mainstream journals and conferences, legal and criminal justice history researchers have turned instead to the interdisciplinary forum. Much of the legal history of the 1980s, mostly conference papers and articles, was produced not by members of history departments but by graduate students, sessional instructors, social scientists and law school faculty. Of the authors discussed in this review, few are tenured professors of history. The author of a recent major contribution in Canadian legal history holds an LL.B. and an LL.M., not an M.A. or a Ph.D. in history.<sup>2</sup> Historians are thus in danger of letting legal and criminal justice history slip from their grasp. Given the supposed importance of law to economic relations, social control and ideology, this pattern of neglect seems eccentric and short-sighted.

The problem stems partly from the esoteric nature of the subject. Mainstream legal history is not always accessible to those lacking law school training. Indeed purists have argued that social historians simply should not embark on expeditions into the legal past. Legal history, according to this opinion, must be the preserve of specialists trained in the terminology and inner mysteries of the law. In practical terms this means academics attached to law schools, where Canadian legal history has found its niche. Inevitably, the primary historical interests of this constituency have been biographical and institutional, focusing on the bar, legal education, judges and important trials.<sup>3</sup> Canada's leading institutional force in legal history is the Osgoode Society, most of whose members are lawyers. Since 1981 it has produced three collections of essays, three biographies of judges, three studies of important trials and institutional/political studies on the history of the Supreme Court of Canada, the origins of the Criminal Code and the office of attorney general for Ontario. Its first two essay collections, edited by David Flaherty, contained sophisticated and illuminating "new legal history" that was well received by academic historians.<sup>4</sup>

1 One of the few collections of criminal justice history essays is R.C. Macleod, ed., *Lawful Authority: Readings in the History of Canadian Criminal Justice* (Toronto, 1988).

2 Constance A. Backhouse, *Petticoats and Prejudice: Women and the Law in Nineteenth Century Canada* (Toronto, 1991).

3 D.G. Bell, "The Birth of Canadian Legal History", *University of New Brunswick Law Journal*, 33 (1984), pp. 312-8 and "Paths to the Law in the Maritimes: The Bliss Brothers and Their Circle", *Nova Scotia Historical Review*, VIII, 2 (1988), pp. 6-39, "Preface", in Bell and Carole Rosevear, eds., *Guide to the Legal Manuscripts in the New Brunswick Museum Archives* (Saint John, 1990), p. xix, and Barry Wright, "An Introduction to Canadian Law in History", in Barry Wright and W. Wesley Pue, eds., *Canadian Perspectives on Law and Society: Issues in Law and History* (Ottawa, 1988), pp. 7-15.

4 David Flaherty, ed., *Essays in the History of Canadian Law I* (Toronto, 1981) and *Essays in the History of Canadian Law II* (Toronto, 1983). For a Maritime equivalent see P. Waite, Sandra Oxner and T. Barnes, eds., *Law in a Colonial Society: The Nova Scotia Experience* (Toronto, 1984).

One recent effort representative of the Osgoode Society's general approach is Gordon Bale's *William Johnstone Ritchie: Responsible Government and Judicial Review* (Ottawa, Carleton University Press, 1991), a biography of the second Chief Justice of the Supreme Court of Canada. Bale, a Queen's University law professor, has produced this political and legal study to inaugurate a new series by the Supreme Court of Canada Historical Society edited by DeLloyd J. Guth. In it he examines Ritchie's experience both on the Supreme Court of New Brunswick and the national tribunal. The son of an Annapolis lawyer and politician, Ritchie (1813-92), although Anglican, attended the Pictou Academy before studying law in Halifax.<sup>5</sup> He established a lucrative commercial practice in Saint John and was elected a Liberal MLA in the late 1840s. A supporter of the Smasher majority of the mid-1850s, Ritchie endorsed responsible government, law reform and an extended franchise but opposed Prohibition. As a reward for this endorsement, Ritchie was appointed to the New Brunswick Supreme Court in 1855. Among his better-known decisions were the freeing of the *Chesapeake* hijackers in 1864 and *Ex parte Renaud* (1873), which upheld the validity of the divisive Common Schools Act of 1871. Bale argues that Ritchie's most significant ruling, in terms of Canadian constitutional history, was *R. v. Chandler*, which struck down a provincial law (the Insolvent Debtors' Act of 1869) as falling outside of New Brunswick's constitutionally delegated powers. According to Bale, Ritchie was the father of judicial review in Canada. The concept that the courts had the power and obligation to verify the constitutionality of legislation did not always find wide support in 19th-century Canada, where the doctrine of parliamentary sovereignty was firmly entrenched.

In 1875 Ritchie was appointed to the Supreme Court of Canada, a body that was supreme "in name only" because of the right of appeal to the Judicial Committee of the Privy Council in London (p. 263). Originally a critic of the court when it was proposed in 1869, Ritchie was made its Chief Justice in 1879 and knighted shortly thereafter. Ritchie's court suffered mixed reviews owing to the alleged poor quality of its decisions and its anti-provincial biases. As Bale explains, Ritchie and other anglophone judges were largely ignorant of Quebec's Civil Code, a situation that prevented "cross-fertilization" between English and French legal cultures at the national level. The legal training and experience of Ritchie and other anglophones encouraged the application of common-law rules. Bale nonetheless defends the court from both contemporary and more recent detractors and notes that Ritchie's decisions were split evenly in favour of the centralist and provincialist causes. The court's unanimous 1892 ruling against Manitoba's school legislation was a brave attempt to buttress minority rights in the face of English-Canadian nationalism. Although Bale's study at times reads like "lawyers' history", partly because there are no Ritchie papers to flesh out the subject's political and private life, this biography nonetheless reminds us of the importance of Maritimers in the state apparatus of post-Confederation Canada.

5 The Maritime provinces have exerted important influences on our Supreme Court since the 1870s. See James G. Snell, "The Nova Scotia Influence on the Supreme Court of Canada", *Dalhousie Law Journal*, VIII (June 1984), pp. 143-63.

One criticism of legal history has been its neglect of "popular justice", specifically the lower courts, whose influence and volume of business was far greater than that of the better-documented superior tribunals. An article by Philip Girard examines the urban courts which developed in 19th-century Halifax.<sup>6</sup> The police court of the 19th and early 20th centuries was a key urban institution, often under direct or indirect municipal control. As Girard notes, the magistrates in these courts, indispensable to the ordering of urban communities, generally were not trained in law. Lawyers, in fact, rarely attended the lower courts, where the emphasis was more on results than process. Girard suggests that the emphasis on arbitration by "gentleman amateurs" owed much to an older Tory conception of social control that was waning by the 1880s. Stipendiary or police magistrates such as Henry Pryor of Halifax, Humphrey Gilbert and R.J. Ritchie of Saint John and R. Rowan Fitzgerald of Charlottetown, like their counterparts in Central and Western Canada, functioned as paternalistic community arbiters. The close connections between police and magistrate enhanced a "crime control" climate, but also encouraged flexibility and displays of judicial mercy. The circumstances of the offence and the social background and status of the accused outweighed legal formalities. To argue, as Girard does, that the appointment of Robert Motton, a defence lawyer, as Halifax stipendiary magistrate in 1886 reflects a new interest in "a liberal-rights approach to adjudication" may be an exaggeration (p. 69). Only work on post-1880s popular justice in Halifax will set the record straight.<sup>7</sup>

A more practitioner-oriented work is Judge R.E. Kimball's *The Bench: The History of Nova Scotia's Provincial Courts* (Halifax, Province of Nova Scotia, 1989), an official publication commemorating the 50th year of the provincial court system. The volume is organized in four sections: an essay on the development of the provincial court system from 1938 to 1987; short biographies of provincial judges appointed starting in 1938; a brief history of the Nova Scotia Family Court, formally constituted in 1963; and short biographies of Family Court judges. The volume highlights two themes worthy of detailed historical inquiry: the significance of summary justice, including cases involving indictable offenses, and the relatively recent creation of a provincial court system in Nova Scotia — the 18th-century Justice of the Peace survived Confederation and most of the 20th century. Nova Scotia's inferior courts were the most important socially, yet the most neglected in terms of official support and recognition. Following 19th-century patterns, justice was meted out by part-time justices of the peace in the rural areas and stipendiary magistrates in municipalities. The former worked for fees payable upon conviction, the latter for a combination of salary and fees. Few were trained in law. Court sittings and surroundings often were irregular and intermittent, and stipendiary magistrates, because of their links to the local police, often reflected an image that was more prosecutorial than magisterial. Magistrates, because of financial restraint, were forced to act as their own court clerks, a situation not

6 Philip Girard, "The Rise and Fall of Urban Justice in Halifax, 1815-1886", *Nova Scotia Historical Review*, VIII, 2 (1988), pp. 57-71.

7 See also Greg Marquis, "The Contours of Canadian Urban Justice, 1830-1875", *Urban History Review*, XV, 3 (February 1987), pp. 269-73.

conducive to the creation of legal history archives. The legal and political establishment in Halifax, Kimball suggests, tended to look down on local magistrates, who were under the control of the attorney general. Legislation passed in 1938 aimed at establishing minimum standards by creating the new office of Police Magistrate, a salaried official required to have legal training. The improvements under this legislation were slight; 30 years later magistrates in certain parts of the province were still holding court in police stations, church halls and even a bingo parlour: "In reality the police magistrate was a justice of the peace in all but name" (p. 19). In 1976 the participants in Nova Scotia's judicial "minor league" were made judges in a Provincial Magistrates' Court, with no major improvements in facilities. As a judge (his official title is not revealed), Kimball bemoans the continued shabby treatment of the province's judicial workhorses and argues that the question of judicial independence remains unresolved (an important point given the negative publicity accorded to the province's legal establishment). Judge Timothy Daley's essay on the Family Court is a legislative overview on the meeting of law and social welfare. The volume's biographical sections, which include photographs, plainly illustrate the overwhelming masculine nature of Nova Scotia's legal establishment. *The Bench* offers, if nothing else, a skeleton for future research.

The top-down intellectual and institutional approach of the first wave of Canadian legal history in the 1970s and early 1980s clashed with the sensibilities of academic historians weaned on the more inclusive approach of social and working-class history. In a 1988 review essay in *Acadiensis*, Brian Young rebuked Canadian legal historians for ignoring the central question of class relations and the need of placing law in its social and economic context. Young's criticisms were aimed mainly at law school scholars who seemed to be offering elitist, self-absorbed or even antiquarian history based on liberal or pluralist social theory.<sup>8</sup>

Criminal justice history, with its emphasis on conflict, social class and ideology, owes much to the institutionalization of social history in the 1970s and 1980s. Reflecting a larger problem in Canadian historiography, criminal justice history, which exists almost entirely in article form, lacks coherence. There is a solution, and that is to relate criminal justice to state formation. As R.C. Macleod notes, the emergence of a criminal justice system, consisting of police, courts and penal institutions, is "one of the essential defining characteristics of the modern industrial state".<sup>9</sup> The study of criminality and criminals, police, the courts, the operation of criminal law, corrections and prisoner rehabilitation, in contrast to legal history, does not require specialized legal knowledge. In many cases a legal history approach, with a focus on statutes, case law and the formal aspects of criminal justice, obscures more than it uncovers. According to Macleod, whose collection of essays included one study on the Maritimes,<sup>10</sup> the scope for new

8 Brian Young, "Law 'in the round'", *Acadiensis*, XVI, 1 (Autumn 1988), pp. 155-65.

9 Macleod, *Lawful Authority*, p. 1.

10 Judith Fingard, "Jailbirds in Mid-Victorian Halifax", in Macleod, *Lawful Authority*, pp. 64-81.

research on Canadian criminal justice history by 1988 was "almost without limit".<sup>11</sup>

In Canada, police historiography has emerged from three sources: popular writing on the North-West Mounted Police/Royal Canadian Mounted Police, urban history and official or "in-house" histories of various police forces. There are also a number of memoirs by former police officers. Most of this literature is uncritical.<sup>12</sup> The Maritimes seem a fruitful area for police research. Its urban centres organized some of the first police departments in British North America during the mid-18th century. Both British and American influences were important. Legislators in both New Brunswick and Prince Edward Island, in the middle of the last century, contemplated following Newfoundland's later route in creating a provincial constabulary modelled in part on the Royal Irish Constabulary. Instead the Central and Eastern Canadian norm developed: municipal police under local control and part-time constables, or no peace officers at all, in the rural districts.<sup>13</sup> Virtually nothing is known about 19th-century rural law enforcement outside of the West. New Brunswick, Nova Scotia and Prince Edward Island organized provincial rural constabularies prior to the 1930s, but these were absorbed by the Royal Canadian Mounted Police as part of its first major expansion.

In the academic sphere, the Saint John and Charlottetown police of the 19th century have been examined in articles or chapters in larger studies. The Halifax police are mentioned, in passing, in other works.<sup>14</sup> No historian has produced a monograph on police history in the Maritimes, or, with one exception, on any province or region of Canada.<sup>15</sup> The neglect of Canadian policing by academic historians, given the richness of police records as social indicators, is curious to say the least. Labour and working-class historians, who in other countries have examined policing's role in class relations and the rise of the state, have either ignored the topic completely or resorted to generalizations unsubstantiated by

11 Macleod, *Lawful Authority*, p. 4.

12 Maritime examples include E.M. Slader, *From the Victorian Age to the Space Age*, Collections of the New Brunswick Historical Society (Saint John, 1973), Hugh Corkum, *On Both Sides of the Law* (Hantsport, 1989), George Megeny, *The Stellarton Police 1891-1991* (Stellarton Centennial Committee, 1991) and Leonard Harkness, *History of the Amherst Police* (Sackville, 1989).

13 For Newfoundland, whose distinct legal, political and administrative development produced a police system unique in British North America, see Arthur Fox, *The Newfoundland Constabulary* (St. John's, 1971).

14 See T.W. Acheson, *Saint John: The Making of a Colonial Urban Community* (Toronto, 1984), ch. 11, Greg Marquis, "A Machine of Oppression Under the Guise of the Law: The Saint John Police Establishment", *Acadiensis*, XVI, 1 (Autumn 1986), pp. 58-77 and "Enforcing the Law: The Charlottetown Police Force", in Douglas Baldwin and Thomas Spira, eds., *Gaslights, Epidemics and Vagabond Cows: Charlottetown in the Victorian Era* (Charlottetown, 1988), pp. 86-102, and Judith Fingard, *Jack in Port: Sailortowns of Eastern Canada* (Toronto, 1984). The Moncton police are mentioned in Jacques Paul Couturier, "Prohiber ou contrôler?: L'application de l'Acte de Tempérance du Canada à Moncton, N.-B., 1881-1891", *Acadiensis*, XVII, 2 (Spring 1988), pp. 3-26.

15 The exception is R.C. Macleod, *The North-West Mounted Police and Law Enforcement, 1873-1905* (Toronto, 1979). For an overview, see Greg Marquis, "The History of Policing in the Maritimes: Themes and Prospects", *Urban History Review*, XIX, 2 (October 1990), pp. 84-99.

research.<sup>16</sup>

Criminologists are drawn to police history as part of their interest in the historical development of social control. The only full-length history of Canadian policing, for instance, is the product of three Ottawa criminologists.<sup>17</sup> The major practitioner of Maritime police history is sociologist Peter McGahan of the University of New Brunswick at Saint John. His *Crime and Policing in Maritime Canada: Chapters from the Urban Records* (Fredericton, Goose Lane Editions, 1989) is largely a documentary collection. Based on research conducted for the solicitor general of Canada and the Atlantic Institute of Criminology, *Crime and Policing in Maritime Canada* is of mixed quality but it is a pioneering work nonetheless. The book mainly comprises documentary evidence taken from newspapers, court records and police patrols, criminal investigations and administrative records. The author argues that Maritime "police circles" offer valuable insights into urban and social history, areas characterized by "drama, humour and ambiguity" (p. 9). One of the better chapters consists of excerpts from the 1967 log book of a Saint John policewoman. Most of her cases dealt with domestic disputes, juveniles (particularly girls) and those living on the margins of society. McGahan points out that the extent of routine calls to the police station indicates the "welfare mediator role" of the police after the rise of the welfare state (p. 195). The chapter entitled "The Police Beats of Saint John", based on interviews with veteran officers, shows that foot patrols remained important in the port city into the 1950s and that basic police work did not change dramatically over a period of one hundred years. *Crime and Policing in Maritime Canada* (as with *The Saint John Police Story*, below), although not a refereed work, is sensitive to the secondary literature.

McGahan is co-author with William Higgins of the Saint John Police Department and Gerald Wallace, a former police chief, of *The Saint John Police Story: The Clark Years, 1890-1915* (Fredericton, New Ireland Press, 1991), which is described as part of a larger project. The Saint John police department circa 1890 was one of the oldest and most important in the country. The authors, by focusing on the administration of Chief W. Walker Clark, conclude that the road to police professionalization and efficiency in the port city was a rocky one. Clark, a Liberal whose background was in the lumber business, instituted more systematic record keeping. Yet policing in Saint John by 1915 does not appear to be any more professional than it had been in 1860, although levels of street violence had subsided.<sup>18</sup> The civic authorities, who resented the fact that mid-century police

16 William M. Baker, "The Miners and the Mounties: The Royal North-West Mounted Police and the 1906 Lethbridge Strike", *Labour/Le Travail*, 27 (Spring 1991), pp. 55-65.

17 C.K. Talbot, C.H.S. Jayewardene and T. Juliani, *Canada's Constables: The Historical Development of Policing in Canada* (Ottawa, 1985). This study, based almost totally on secondary sources, most of them generated by fans of the police, can be criticized for a variety of faults, but it is not uncritical. See John Weaver, "Introduction: Trends and Questions in New Historical Accounts of Policing", *Urban History Review*, XIX, 2 (October 1990), p. 82, fn. 1; Baker, "The Miners and the Mounties", p. 56, fn. 5.

18 See Greg Marquis, "The Police Force in Saint John, New Brunswick, 1860-1890", M.A. thesis, University of New Brunswick, 1982.

reform had placed control over the appointment of police chief in the hands of the provincial government, attempted to control the department through informal means and frugality. The Saint John force, for example, did not obtain a patrol wagon until 1910. The study, aiming for the popular market, intersperses the controversies in police administration with anecdotes on specific crimes. Among the topics discussed are liquor regulation and public drunkenness, prostitution, youth gangs, police working conditions and departmental discipline. By 1912, the year Saint John adopted a commission form of government, Clark had made too many enemies. The assertion of municipal autonomy, press criticism of police behaviour, the fatal wounding of a police officer and controversy surrounding the street railway strike of 1914 spelled Clark's demise. *The Saint John Police Story* is a useful contribution to the sparse literature on Canadian municipal policing. Two weaknesses are its neglect of sectarianism, a major force Saint John's politics and social relations, and the police rank and file.

The Royal Canadian Mounted Police has maintained an important but little-studied federal presence in the Maritimes for over 50 years. The three provincial governments abolished their short-lived rural constabularies in the early 1930s and have depended upon RCMP contract policing ever since. Formally, RCMP contract detachments are under the authority of the provincial attorneys general. R.A. Maclean's *Bill Fraser, Mountie* (Hantsport, Lancelot Press, 1991) is an entertaining biography aimed at the general reader. Fraser, a native of Loggieville, New Brunswick, served in the Arctic before being posted to Cape Breton during the 1930s and New Glasgow from 1940 to 1947. Following a brief stint in Ontario, Fraser helped engineer the RCMP's move into Newfoundland in 1949-52. Rising from the ranks he eventually headed G Division (the Arctic) and retired after serving as acting director of criminal investigation in Ottawa. Maclean's sense of humour and knowledge of Nova Scotia in general and Cape Breton in particular are employed to underline the degree to which the Mountie was an alien creature in the Maritimes of the 1930s. Rural Cape Breton during the Depression is depicted as a legal frontier where the natives were friendly, but unwilling to impart information to the RCMP. The protagonist, in dogged pursuit of bootleggers and moonshiners, seems to have attempted, almost singlehandedly, to impose an alien culture on Highlanders, Newfoundlanders and Acadians in communities such as Cheticamp, Inverness, Ingonish and St. Peters. Members of the RCMP were expected to be on duty 24 hours a day; this and the constant round of transfers placed considerable strains on family life. Fraser's story also suggests that despite the force's reputation, the RCMP was not free from political and religious influences which affected postings and promotion. Maclean's account, based on Fraser's diaries and taped interviews, points the way for more work on rural policing and the role of the RCMP in Nova Scotia, Prince Edward Island and New Brunswick.

A major contribution to both regional and national historiography is Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law, Volume III, Nova Scotia* (Toronto, University of Toronto Press, 1990). The project defies



discrete categorization as either legal or criminal justice history.<sup>19</sup> The editors and authors, sensitive to the criticisms of social historians, have adopted the "law and society" approach, which attempts to make legal history more palatable and relevant to the non-specialist. Most of the volume's 12 essays, ranging from administrative to criminal law, are situated in the 19th century. The introduction suggests that the Nova Scotia legal system prior to 1900 was "a subtle and complex mixture of English, American and indigenous influences" (p. 7). American influences were strongest in the economic and commercial spheres; criminal law owed more to the English tradition. The essays reveal that Nova Scotia law, in a number of areas, was more progressive than other jurisdictions in British North America. At the same time, there was abundant evidence of legal conservatism, a trend identified by Ontario and Quebec legal historians. Legal conservatism countered individual rights and privileges with notions of stability, order and the public good.

The volume's first essay, Thomas Garden Barnes' "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749", examines the "juridical failure" of the Annapolis Royal regime in terms of acculturating the Nova Scotia Acadians after 1713. The author, in stressing civil and criminal law administration in England's early-18th-century ramshackle colony, attempts to connect the informality and flexibility of British justice amongst the Acadians with the ultimate political failure that leads to the 1755 expulsion. Law, according to Barnes, was central to imperial control. The failure, therefore, of Annapolis Royal officials to develop more formal procedures, their reliance on Acadian legal practice in civil actions involving real property, and the use of Acadian deputies in local administrative and quasi-magisterial capacities all encouraged Acadian independence or neutrality.

Another study rooted in the 18th century is Clara Greco's "The Superior Court Judiciary of Nova Scotia, 1754-1900: A Collective Biography", a collective biography of Nova Scotia's Supreme Court judiciary. This effort, inspired by American legal history methodology, quantifies the demographic, professional and political characteristics of 43 Supreme Court judges from 1754 to 1900. Until 1848 these officials were appointed on imperial authority; responsible government and the passing of the Loyalist generation produced an indigenous judiciary. Most appointees had political experience, as attorneys general or solicitors general, MLAs or MPs. Many had important family connections. Twenty-eight were members of the Church of England; the first Catholic was appointed in 1873. Less than half attended university, and three-quarters acquired their legal training in the traditional apprenticeship fashion. This, according to Greco, explains why the court was "uneven in intellectual quality" (p. 53). Most members of the judicial elite had served as justices of the peace or probate court judges prior to their elevation to the Supreme Court.

19 The volume also contains two useful "law and economy" studies: Margaret McCallum's "The Mines Arbitration Act, 1888: Compulsory Arbitration in Context" and Jennifer Nedelsky's "From Private Property to Public Resources: The Emergence of Administrative Control of Water in Nova Scotia".

Jim Phillips' "Poverty, Unemployment and the Administration of the Criminal Law: Vagrancy Laws in Halifax, 1864-1890" examines vagrancy enforcement as part of the city's "broader process of social control" (p. 129). Marxist scholars have argued that American vagrancy laws were attempts to control the surplus pool of labour so necessary to capitalist development. According to Phillips, vagrants arrested in Halifax were victims of a middle-class-dominated legal system which punished the lower classes. Vagrancy, part of the Criminal Code until 1972, was a status offence, which gave the police considerable leverage over individuals offensive to middle-class mores. Phillips' social control thesis, although compelling, is open to attack. First of all, the differences among persons arrested for drunkenness, vagrancy or prostitution often were administrative conveniences; criminal categories, for police and magistrates, were of secondary importance. Second, vagrancy committals in the period under study average one per week, hardly suggesting a concerted drive against the homeless and the "loose, idle and disorderly". Persons convicted of vagrancy accounted for almost one quarter of all incarcerations from 1864 to 1890; when drunks are added, the figure falls to 12 per cent. Third, there is no exploration of "voluntary vagrancy", the use of the police, courts and jails by lower-class individuals as part of a survival strategy. In late-19th century rural and small-town Ontario, for example, "vagrants" literally checked themselves into county jails for the winter. Ontario, it is true, lacked the Poor Law, but the use of its jails as shelters is suggestive. Ontario mayors, constables and jailers did not consider all vagrants to be criminals.<sup>20</sup> And last, Phillips ignores a less coercive response to the unemployed and transients: the use of police stations as overnight shelters.<sup>21</sup>

Rainer Baehre's "From Bridewell to Federal Penitentiary: Prisons and Punishment in Nova Scotia Before 1880" focuses on institutional development against a political and ideological backdrop. Nova Scotia's jail and prison policy did not reflect any sense of social crisis. In 1820s and 1830s Nova Scotia, important decades for the international penitentiary movement, "the issue of crime and punishment probably was not of great importance in peoples' minds" (p. 173). The colony lagged behind Upper Canada in terms of penal reform. Halifax's 18th-century bridewell, a colony-wide, multiple-purpose detention facility, housed offenders ranging from vagrants to debtors. A new bridewell constructed after the War of 1812 indicated official interest in imprisonment as punishment as opposed to fines, the stocks, corporal punishment, mutilation and transportation. A penitentiary, founded in 1844, reflected the humanitarian concerns of the penal reform movement, although the institution in practice was not always a "terror to evil doers" or an agency of reform. The Halifax Penitentiary followed the Auburn or "silent" system, which included convict labour but no corporal punishment. Segregation was minimal. The majority of its inmates were sentenced for larceny and other property offenses. Their numbers were relatively small, in part because of

20 Ontario, *Commission Appointed to Enquire into the Prison and Reformatory System of Ontario* (Toronto, 1891), pp. 125, 132-3.

21 Greg Marquis, "A Machine of Oppression"; see also Marquis, "The Police as a Social Service in Early Twentieth Century Toronto", *Histoire sociale/Social History* (forthcoming).

the opening of the Rockhead municipal prison, a new county jail and a new Poor House between 1860 and 1867. By this period penitentiary discipline appears to have been lax, although shackles were evident. In 1880 its last inmates were transferred to the new federal facility at Dorchester, New Brunswick. Baehre's study accentuates the importance of differentiating between the ideology and goals of penal reform on the one hand and its accomplishments on the other. Official reports, newspaper articles and political speeches promised that the penitentiary, through its combination of strictness, labour, religious instruction and humanitarianism, would be a place of reform. The political authorities kept a tight hand on penitentiary budgets, a tradition that lingered on in the province's underfunded county jails, whose primitive conditions were investigated by a royal commission in 1933. The results were poor diet, inferior sanitation and heating, relaxed discipline and punitive incarceration, not rehabilitation.

Women and the law, an organizing issue for feminists, is attracting corresponding historical attention. Constance Backhouse's groundbreaking *Petticoats and Prejudice: Women and the Law in Nineteenth Century Canada* (Toronto, Women's Press, 1991) examines not only female criminality but also the ideological and structural role of law in ordering gender relations. This is part work of history and part manifesto. The author of an impressive list of legal history articles (only one of them published by a major Canadian history journal), Backhouse draws on a mass of material to detail gender issues in historical perspective. Her methodological technique is to explore the cases of individual women "selected because their experience was representative of many" (p. 1). Although some may quibble with the representativeness of these women, it is abundantly clear that this study opens a number of doors. Backhouse, through a series of "heroines", tackles the legal regulation of marriage, courtship and sexual violence, infanticide and abortion, divorce and separation, prostitution, and labour legislation aimed at protecting (and controlling the sexuality of) working-class women. Her final chapter examines the career of Clara Brett Martin, Canada's first female lawyer, and "a woman of vision, talent and guts" (p. 334). *Petticoats and Prejudice* concludes that the law, and the legal profession, of 19th-century Canada was inherently patriarchal. Legal incapacity, and until the early 20th century the absence of political rights, was common to women of all classes (although class in this study takes a back seat to gender). The work attempts to be regionally representative, but cannot escape the fact that more research has been conducted on Ontario and Quebec than the other provinces. Thus Backhouse devotes about eight per cent of her study to the Maritimes, a region containing 20 per cent of Canada's population in 1881.

In *Essays in the History of Canadian Law, III*, six of the 11 authors are women and four of the essays deal with women and the law. Philip Girard's "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867" includes not only chancery abolition and insolvency law but also married women's property law. He shows that Nova Scotia was influenced by both English and American reform currents in the case of the rights of married women. Law reform, in the words of Girard, served the needs of the "literate, propertied middle classes" (p. 81). Advocates of property rights for

married women argued not on behalf of individual rights, but on the need to protect the family from spendthrift and intemperate husbands. An attempt in 1850s Nova Scotia to enact married women's property reform was inspired by New York legislation. The less-radical legislation of 1866, applicable only in cases of desertion or divorce, reflected English practice.

Outside of a number of articles on prostitution, the history of women and criminal law in Canada has received cursory attention. *Essays in the History of Canadian Law* attempts to redress this imbalance. Jane Price's quantitative study of female criminality in Halifax, "'Raised in Rockhead. Died in the Poor House': Female Petty Criminals in Halifax, 1864-1900" is based not on arrests but imprisonment. Women, although far less likely to break the law, represented almost one third of those convicted to the city prison in the period 1864-90. Almost half were locked up for drunkenness and a third for vagrancy or prostitution. Liquor abuse was a common factor for all offenders, most of whom were Canadian-born. Blacks, constituting three per cent of the Halifax population, were over-represented amongst petty offenders. Every fifth woman sent to Rockhead came from this minority. The study implies a life-cycle effect, in that most female petty offenders were young. There are problems in relying too much on official statistics, particularly when an attempt is made to compare one jurisdiction with another. This type of study is nonetheless useful. Price's article overlaps very much with the work of Judith Fingard. Both, for example, make use of "Raised in Rockhead. Died in the Poor House", the epitaph of many a petty offender in 19th-century Halifax.

Judith Fingard's *The Dark Side of Life in Victorian Halifax* (Porter's Lake, N.S., Pottersfield Press, 1989) is an important social history contribution that develops a number of law and society themes: class, gender, social control, reform and welfare. Fingard's earlier study on Halifax "jailbirds" previewed her larger examination of a hard core of petty offenders, many of them women and blacks, who were habitual frequenters of the lock-up, police court, jail and poorhouse. This criminal cadre, arrested for drunkenness, vagrancy and prostitution, significantly inflated arrest, conviction and incarceration statistics. The book offers a vivid, if somewhat skewed, portrait of lower-class life in a Canadian seaport and naval town. Recidivists such as Margaret Howard and Bridget McNamara, shady entrepreneurs such as Isaac Sallis and underclass clans such as the Fords and Kellums all give a human face to a subject that can all too easily become theoretical or statistical.

What is refreshing about Fingard's work is her sophisticated appreciation of the role of legal institutions at their basic level. She does not reject totally the social control model and points to the legal system's obvious racism, yet the moral reform and social control efforts dismissed by other historians as coercive are reappraised. Fingard sees the criminal justice apparatus and the poorhouse as important in the life cycle or family survival strategies of the underclass. The mid-19th-century prison, for example, is described as "an essential institution of social welfare without which the levels of alcoholism, family violence and assaults against women would have been worse and the fragile lives of society's helpless outcasts even more desperate and uncertain" (p. 57). This would have been

considered heresy among many social historians a few years ago and in some quarters may still be.

The second half of the book examines the poor relief, anti-cruelty, evangelical and rescue movements that gradually increased middle-class supervision over the city's underclass. The intrusions of these forces, although piecemeal, were significant portents. Moral reform efforts, according to Fingard, both "helped and hindered" the underclass. Spurred on by the overriding issue of temperance, reformers turned to specific problems: infanticide, cruelty against women and children, and juvenile delinquency. Social work was conducted by evangelical Protestants, the Salvation Army and Catholic organizations. Although Halifax's several homes for "fallen women" enjoyed little success in reclaiming prostitutes, the effort signalled the gender-sensitive legal programme of first-wave feminism. Similarly, the Society for the Prevention of Cruelty, like its Massachusetts counterpart studied by Linda Gordon, did ameliorate working-class suffering. Fingard, in a tribute to women's historiography, concludes on the subject of social reform that "class-based explanations do not provide all the answers" (pp. 118, 189).

An aspect of women's legal rights, or lack thereof, was divorce, a subject tackled in the Osgoode volume and by Wendy Owen and J.M. Bumsted in a recent *Acadiensis* article.<sup>22</sup> In terms of divorce law and practice, each province has been a "distinct society". Nova Scotia's legal provisions for divorce date from 1758. Based on 60 surviving petitions for the years 1750-1890, Kimberly Smith Maynard's "Divorce in Nova Scotia, 1750-1890" shows that petitioners were mostly Protestant and middle class, and that men and women applied for divorce relief in almost equal numbers. Their success rate, moreover, was similar, suggesting that the notorious double standard of gender relations was somewhat tempered in Nova Scotia. The presence of children outweighed the personal and moral arguments for sundering marriages. The author speculates that societal attitudes, not legal structures and procedures, were responsible for a low divorce rate. Rebecca Veinott's "Child Custody and Divorce: A Nova Scotia Study, 1866-1910" describes the "remarkable gains" in legal status made by women and children in late-19th-century Nova Scotia. The common-law doctrine of marital unity, based on paternal control over children, was gradually eroded by social reformist and maternal feminist pressures. Legislation in 1866 allowed for judicial discretion in child custody, although few Nova Scotia women made formal applications prior to 1893. Legislation of that year, reflecting child protection ideology, altered the legal status of women and children. The bottom line was now child welfare, based more on moral considerations than the economic status of the mother.

Prince Edward Island followed the Maritime pattern in that its 19th-century divorce court consisted of the governor-in-council or provincial cabinet. A lone divorce petition in 1833 had led to legislation establishing a divorce court modelled on that of New Brunswick. Nevertheless, there were no recorded divorces on the

22 Wendy Owen and J.M. Bumsted, "Divorce in a Small Province: A History of Divorce on Prince Edward Island from 1833", *Acadiensis*, XX, 2 (Spring 1991), pp. 86-104. See also James G. Snell, *In the Shadow of the Law: Divorce in Canada, 1900-1939* (Toronto, 1991).

Island from 1873 until 1913, a situation little altered by the world wars, when social pressures and marital problems produced limited support for divorce reform. The results were separations but no formal dissolutions. The dormant court of marriage and divorce revived after the Second World War was "a political rather than a judicial court" (p. 100). Owen and Bumsted speculate that divorce was an especially contentious issue in a rural society where questions of land inheritance were paramount.<sup>23</sup>

The body of literature surveyed above may give the impression that Maritime legal and criminal justice history is flourishing. This, sadly, is not the case. It is flourishing on the fringes. On the national level, the status of legal and criminal justice history as poor cousins is reinforced by the claims of competing prophets who promise that class, ethnicity, gender or region hold the key to historical enlightenment. The one exception to the relative marginalization of legal research is women's history; works such as *Petticoats and Prejudice* should help propel legal topics into the historical mainstream. The subject's problems extend beyond mere visibility. At present the field of legal and criminal justice history suffers from the fragmentation characteristic of post-1960s Canadian historiography and the social sciences in general. Canadian legal history is one of the last frontiers. That it is being explored mainly by law professors and social scientists can only perpetuate neglect and fragmentation on the part of historians.

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23 Owen and Bumsted, "Divorce in a Small Province".