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A Taxonomy of Methodological Approaches in Recent Canadian Legal History

SINCE THE EMERGENCE OF LEGAL HISTORY as a sub-field of Canadian history in the late 1970s, a number of scholars have published reviews and historiographical essays discussing the state of legal-historical scholarship in Canada. Early review articles were calls to arms. They argued that legal history was a potentially valuable area of historical inquiry and warned of the dangers of "internal" legal history – the study of legal doctrines and institutions isolated from social context.[1] More recently, with a growing body of work that frequently draws heavily from social and cultural history (and thus avoids the internal legal history critique), scholars writing review essays have evaluated the steady stream of publications rolling out of the Osgoode Society for Canadian Legal History and the University of Toronto Press as well as the occasional volume published by other academic presses. These authors identify remaining gaps in the historiography, but are generally pleased by the continued growth of the field.[2] Thus, while as late as 1992 Greg Marquis declared in *Acadiensis* that legal history was "one of the most neglected branches of social history in Canada" that was "[i]gnored by mainstream journals and conferences",[3] John McLaren recently asserted that Canadian legal history has "come of age"[4] – a point substantiated by the Canadian Historical Association's decision to award Jerry Bannister's study of law and government in Newfoundland with the Sir

1 See, for example, R.C.B. Risk, "A Prospectus for Canadian Legal History", *Dalhousie Law Journal*, 1 (1973), pp. 227-45; Graham Parker, "The Masochism of the Legal Historian", *University of Toronto Law Journal*, 24 (1974), pp. 279-317; David H. Flaherty, "Writing Canadian Legal History: An Introduction", in David H. Flaherty, ed., *Essays in the History of Canadian Law, Volume I* (Toronto, 1981), pp. 3-42; André Morel, "Canadian Legal History – Retrospect and Prospect", *Osgoode Hall Law Journal*, 21, 2 (1983), pp. 159-64; Barry Wright, "Towards a New Canadian Legal History", *Osgoode Hall Law Journal*, 22, 2 (1984), pp. 349-74; D.G. Bell, "The Birth of Canadian Legal History", *University of New Brunswick Law Journal*, 33 (1984), pp. 312-8; and Brian Young, "Law 'in the Round'", *Acadiensis*, XVI, 1 (1986), pp. 155-65.

2 See, for example, M.H. Ogilvie, "Recent Developments in Canadian Law: Legal History", *Ottawa Law Review*, 19, 1 (1987), pp. 225-54; John P.S. McLaren, "The Legal Historian, Masochist or Missionary? A Canadian's Reflections", *Legal Education Review*, 5 (1994), pp. 67-104; John P.S. McLaren,"Meeting the Challenges of Canadian Legal History: the Albertan Contribution", *Alberta Law Review*, 32 (1994), pp. 423-35; Jim Phillips, "Crime and Punishment in the Dominion of the North: Canada from New France to the Present", in Clive Emsley and Louis A. Knafla, eds., *Crime History and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice* (Westport, Connecticut, 1996), pp. 163-99; Jamie Benidickson, "Survey of Canadian Legal History in the '90s", *Ottawa Law Review*, 28, 2 (1996-1997), pp. 433-65; Jim Phillips, "Recent Publications in Canadian Legal History", *Canadian Historical Review*, 78, 2 (1997), pp. 236-57; Margaret McCallum, "Canadian Legal History in the late 1990s: A Field in Search of Fences?", *Acadiensis*, XXVII, 2 (1998), pp. 151-66; W. Wesley Pue, "'Where History Actually Happened': The Pursuit of Canadian Legal History", in DeLloyd Guth and W. Wesley Pue, eds., *Canada's Legal Inheritances* (Winnipeg, 2001), pp. xv-xxvi.

3 Greg Marquis, "Law, Society and History: Whose Frontier?", *Acadiensis*, XXI, 2 (1992), p.162.

4 John McLaren, "In the Northern Archives Something Stirred: The Discovery of Canadian Legal History", *Australian Journal of Legal History*, 7, 1 (2003), p. 86.

R. Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History", *Acadiensis,* XXXIV, 1 (Autumn 2004), pp. 145-55.

John A. Macdonald Prize as the best book published on Canadian history in 2003.[5]

The time thus seems appropriate to take stock of the approaches Canadian legal historians have employed in their work. While the authors of previous review essays tended to structure their analyses around topics in legal history, in this essay I undertake a slightly different approach in examining five recently published books on Canadian legal history: David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849* (Toronto, University of Toronto and Osgoode Society, 2002); Patrick Brode, *Courted and Abandoned: Seduction in Canadian Law* (Toronto, University of Toronto Press and Osgoode Society, 2002); Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Toronto, Oxford University Press and Osgoode Society, 2001); Constance Backhouse and Nancy Backhouse. *The Heiress vs the Establishment: Mrs. Campbell's Campaign for Legal Justice* (Vancouver, University of British Columbia Press and Osgoode Society, 2004); and Carolyn Strange and Tina Loo, *True Crime, True North: The Golden Age of Canadian Pulp Magazines* (Vancouver, Raincoast Books, 2004). This essay will consider these books by classifying their methodological approach, introducing the basic aspects of each approach and considering how each publication embodies their particular methodology.

What taxonomy for this analysis, however, is most appropriate? I will draw upon a very useful classification of legal history scholarship employed by Harvard Law School professor William ("Terry") Fisher III.[6] Fisher divides legal history into six categories (some with several subcategories): 1) descriptive economic analysis, 2) styles of legal thought, 3) progressive evolutionary functionalism, 4) narrative, 5) dialectical materialism and 6) intellectual legal history. My intentional use of an American scholar's taxonomy invites comparisons between Canadian and American legal history. A full comparison is too large an issue to be addressed in this review, but I will note a few obvious differences.

For some parts of Fisher's taxonomy there is little or no equivalent Canadian scholarship. This is especially true for the descriptive economic analysis approach which, at its basic level, argues that legal rules, such as those in contract and tort law, have developed toward pre-ordained and allocatively-efficient ends. This is different than a normative analysis of law, which suggests that judges and legislators need to change the law to encourage economic efficiency; instead, it says that the law *does* change to become efficient by ensuring that consumers are satisfied. "Mistakes" in legal developments occur when legislatures get involved, meddling with the invisible hand of the market. This approach emphasizes private property and freedom of contract. Its most well-known American proponent is Richard Posner, formerly a University of Chicago law professor and currently a member of the United States

5 Jerry Bannister, *The Rule of the Admirals: Law, Custom, and Naval Government in Newfoundland, 1699-1832* (Toronto, 2003).

6 Fisher has not published the entirety of this taxonomy, though part of it may be found in William W. Fisher III, "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History", *Stanford Law Review*, 49, 5 (1997), pp.1065-110. My description of Fisher's entire classification also draws from his Harvard Law School course "American Legal History, 1760-1900", which I had the pleasure of auditing in 2000.

Court of Appeals for the Seventh Circuit (appointed by Ronald Reagan).[7] The dearth of Canadian scholarship representing this approach likely stems from the fact that few law faculties in Canada have adopted the law and economics form of legal analysis popular in several politically conservative American law schools such as the University of Chicago and the University of Virginia.

The second approach to legal history is "styles of legal thought". This is essentially a form of internal legal history that explains the development of the law by linking legal change to broad shifts in the ways in which lawyers think about the law. This approach is often used in the context of American constitutional law scholarship. It has fewer adherents in Canada, probably because this type of historical inquiry was already on the wane in the United States when Canadian legal history began to take root. Nevertheless, some examples of this approach exist in Canada including R.C.B. Risk's essays on the effect of Canadian legal thought on the interpretation of the *British North America Act*.[8]

"Progressive evolutionary functionalism" has been a very common approach to legal history in both the United States and Canada. In the American context, it was marked traditionally by teleology (i.e., the natural movement of society in the direction of welfare capitalism and representative democracy), a functional theory of law, and analogies to Darwinian evolution. The basic idea is that law develops with society. For example, an historian employing a progressive evolutionary functionalist approach in examining injuries among 19th-century industrial workers would assert that 18th-century legal doctrines proved to be ineffective protections for people employed in the dangerous factories of 19th-century England and the United States. Lawyers and judges thus responded by developing legal principles that helped society progress by protecting workers. Scholars keen to avoid the dangers of internal legal history often turn towards functional explanations. The relative strength of this approach lies in its ability to connect legal developments to social, cultural and economic contexts. At their worst, however, functionalist interpretations provide generalized explanations to address historical causation while leaving unexplored the specific details of why and how change occurred in a particular way in a particular place.

Although some Canadian scholars also employ functionalist explanations for legal-historical developments, the "progressive" aspect is usually absent. David Murray avoids falling back on grand social and economic factors in his fine book on the pre-Confederation justice system in Upper Canada, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849*. Murray examines the local

7 See, for example, Richard A. Posner, *Economic Analysis of Law*, 4th ed. (Boston, 1992). See also Jenny Bourne Wahl's book, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (New York, 1998), in which she argues that the law of slavery developed by Southern judges in the antebellum period was efficient from the standpoint of slave masters in that it served to maximize the wealth of slave owners by developing rules that served their welfare. More subtle and nuanced versions of economic analysis explore the ways in which small communities created local and informal legal systems that ensured the protection of limited resources. See, for example, Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA, 1991).

8 See, for example, R.C.B. Risk, "Canadian Courts Under the Influence", *University of Toronto Law Journal*, 40 (1990), pp. 687-737.

administration of the criminal law in the Niagara district of Upper Canada from the establishment of the colony in 1791 to the elimination of districts as the primary administrative units of local government in 1849. Murray provides a detailed overview of the Niagara district's economy, geography and demographics and then describes the institutional framework of the justice system, explores the connection between Christian morality and the legal system, investigates the challenges posed to law enforcement by the close proximity of the American border for certain crimes and reviews the social and legal attitudes toward fugitive slaves.

Murray often explains changes in the colonial justice system by pointing to larger historical forces affecting the Niagara District such as immigration. He stresses that the Upper Canadian criminal justice system gradually drifted away from the English-inspired model desired by the colony's first governor, John Graves Simcoe, in response to local concerns about race, gender, Christian morality, personal safety and economic developments. Murray makes explicit the functionalist aspects of his study in his introduction when he suggests that "[l]ocal conditions in the Niagara district moulded the environment in which the transplanted English system of law emerged in the new colony and they certainly influenced how it was administered".[9] In commenting upon the gradually declining roles of magistrates and grand juries in local government, he notes later in the book "the issues faced by the local magistrates became more complex", and "as a steady stream of immigrants arrived in the colony, the strains in the system became increasingly evident, even to those in charge".[10] The strength of Murray's functionalist explanations lie in his detailed study of one relatively small jurisdiction in Upper Canada, which allows him to examine closely the effects of broader social forces on the legal system; he does not simply invoke "social context" in a general way to explain developments.

Patrick Brode also relies on functionalist arguments in *Courted and Abandoned: Seduction in Canadian Law*, though the explication of historical causation is less persuasive. Brode examines how the courts dealt with "seduction" in 19th- and 20th-century Canada. He includes discussions of several causes of action, including criminal conversation, breach of promise of marriage and the tort of seduction, the last of which a father could use to recover damages for the loss of his daughter's "services". This tort, Brode claims, was especially important in colonial Upper Canada, where the lack of poor laws resulted in efforts to secure financial assistance from delinquent lovers through seduction claims. Brode argues that to understand the application of the tort of seduction it is necessary to appreciate rural society in Upper Canada, as the dispersed communities meant that young people "had limited opportunities to meet a potential mate and were probably tempted to make the most of infrequent opportunities".[11] Actions for seduction, he argues, only began to decline in Canada with greater urbanization, increased government involvement in child welfare and changing attitudes towards men and women as equal partners in marriage. He points out that by the 1960s seduction and its related actions "seemed inconsistent with reality".[12] In comparison to Murray's detailed attempt to demonstrate how local

9 Murray, *Colonial Justice*, p. 5.
10 Murray, *Colonial Justice*, p. 219.
11 Brode, *Courted and Abandoned*, p. 13.
12 Brode, *Courted and Abandoned*, p. 188.

social and economic changes affected the colonial justice system, Brode's efforts to address historical causation are overdrawn, in part because he attempts to explain legal changes throughout Canada yet draws his research materials predominantly from Ontario. In addition, he is reluctant to explore the role of gender inequality in his consideration of the interactions between men and women.

In tackling issues of historical causation, some legal historians have employed the insights of the "dialectical materialism" approach, Fisher's fourth methodology. This approach includes several sub-categories, but all involve the relationship between class and legal change. One version of this approach, for example, portrays the law simply as a vehicle of domination and exploitation. In this sub-category, law is perceived as a weapon in class struggles.[13] A second variation of the dialectical materialism approach is "law as vehicle of legitimation/class hegemony". This is a more subtle argument that explores the use of law as rhetoric to validate legal systems that benefit the capitalist classes. Here, emphasis is placed on the role of law in making the lower classes, despite their resistance, internalize values that lead them to accept their economic positions. It inquires as to why the majority of citizens accepted an economic and social system that encouraged inequality and, in answering, concludes that law helped obscure the oppressive social and economic order.[14]

The more nuanced version of the dialectical materialism approach is applied in Judy Fudge and Eric Tucker's *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948*. Fudge and Tucker are interested primarily in "industrial legality" in the first half of the 20th century – that is, in the interaction between the law, workers, employers and the state that defined acceptable collective action in industrial relations. Fudge and Tucker suggest that labour law changed to assist the growth of industrial capitalism, but they draw from intellectual history (which I will discuss later) in saying that they focus on the role of discourse "in setting up categories that delimit the realm of legitimate claims, organize those claims in particular ways, and privilege some claims over others".[15] They also emphasize the importance of the resistance of workers, pointing out that "discourse and the construction of identities are contested and their production is not the exclusive domain of privileged speakers and state institutions". Thus, just as workers "resist their commodification, their consciousness cannot be moulded and shaped conveniently so that they automatically accept their own subordination".[16]

Fudge and Tucker set out three stages to industrial legality in Canada.[17] They suggest that "liberal voluntarism" prevailed before 1907. The common law

13 An example of this is Morton Horwitz's argument that courts adopted a new tort rule, the so-called fellow servant rule, which limited the responsibility of 19th-century industrialists for injuries to employees caused in part by another employee. See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA, 1977), pp. 207-10.

14 See, for example, R.W. Kostal, "Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario, 1860-86", *Law and History Review*, 6,1 (1988), pp. 1-22.

15 Fudge and Tucker, *Labour Before the Law*, p. 6.

16 Fudge and Tucker, *Labour Before the Law*, p. 9.

17 They define a regime of industrial legality as "a set of institutions that define and enforce a constellation of rights, which in turn govern and mediate relations between workers and employers. Rights in this sense are always political and social in that they are claims recognized by the state that define relations between people". See Fudge and Tucker, *Labour Before the Law*, p. 10.

established a legal regime based upon contract and property, but employers rarely used legal institutions to deal with workers' collective action and governments infrequently attempted to conciliate labour disputes. Fudge and Tucker's second period, "industrial voluntarism", began when the Canadian government passed the *Industrial Disputes Investigation Act, 1907*. It was marked by increased labour activity, a greater amount of government involvement in the labour market and an increased willingness by employers to use the legal system against organized labour. The third period distinguished by Fudge and Tucker, "industrial pluralism", began during the Second World War when increased trade union activity encouraged the recognition of organized labour as an important player in the war effort. In exchange for labour peace during the war, freedom of association for the purpose of collective bargaining became an enforceable right. In gaining these rights, however, the labour movement gave up its ability to call wildcat strikes and "accepted the legitimacy of private property and free enterprise" while undertaking a "commitment to constitutionalism and electoral change".[18]

Labour Before the Law is an impressive volume. It draws together the immense legal and historical scholarship on law, labour and the state in Canada, offering a truly national analysis. Unlike some other histories that use "Canada" in their title but offer a narrative focusing heavily on one jurisdiction (usually Ontario), Fudge and Tucker discuss the development of industrial legality in every province of the country – even Newfoundland before it entered Confederation in 1949. One weakness of *Labour Before the Law* is shared by many works writing within the dialectical materialism approach. In describing how law serves as a vehicle to legitimate the existing economic order, Fudge and Tucker are careful to point out in their introduction that they do not see the history of labour relations in the first half of the 20th century as progressing from bad to good (as in the "progressive" evolutionary functionalist model) – it is not "a tale of linear progress from dark beginnings to the triumph of industrial democracy and freedom of association".[19] Their narrative, however, seems predetermined in the opposite way as a story of failed resistance to changing forms of state and corporate control over labour. The theoretical framework offered by the authors leaves little room for an alterative ending. That they will see the transition from industrial voluntarism to industrial pluralism as one with dark overtones is clear from the outset of the study.

Another quibble is that, despite the book's title, one might be surprised by the lack of law in *Labour and the Law*. Fudge and Tucker spend little time breaking down judicial decisions or carefully analyzing the social and economic backgrounds of the judges and lawyer-politicians who shaped legislation and litigation. Judges are usually faceless, and their views are imputed more than proved; Fudge and Tucker simply offer comments such as "[o]n the whole, judges remained hostile to the collective action of workers".[20] Another example is when they suggest that the role and importance of juries declined because it was easier for judges to issue injunctions or to convict labour leaders by deciding legal issues summarily: "Eliminating trial by

18 Fudge and Tucker, *Labour Before the Law*, p. 305.
19 Fudge and Tucker, *Labour Before the Law*, p. 4.
20 Fudge and Tucker, *Labour Before the Law*, p. 198.

jury not only allowed employers to get criminal sanctions imposed quickly, but it also increased the chances of securing a conviction".[21] The authors, though, provide little direct evidence that individual judges espoused this rationale in limiting the availability of jury trials.

Fisher's fifth approach to legal history – "narrative" – takes several forms, but is at its most effective in the study of gender and race histories using court records. Among the formats employed in this approach are stories told by people in the past about their own lives and/or about their experiences with the law (such as stories told in courts); stories told by people in the past about other people's lives and/or about others' experiences with the law (i.e., early-20th-century progressive reformers' discussions of how legal reforms benefited the working class); fictional stories written by people in the past (such as reformers telling stories of "fallen" women); synopses put together by historians of the experiences of individual people in the past; and composite stories of people in the past (i.e., experiences of women with divorce law).[22]

The narrative approach has several strengths: it provides insights into cultural forces affecting law; it offers a sense of the law in action (i.e., how individuals manipulated legal forms to achieve their own ends); it clarifies the relationship between legal and non-legal systems of norms (i.e., how religion and law intertwine to shape people's self-image and actions); it presents a source of emphatic understanding and of political illumination and inspiration; and, finally, it is a source of complexity and nuance. Constance Backhouse and Nancy L. Backhouse provide an excellent example of the narrative approach in *The Heiress vs the Establishment: Mrs. Campbell's Campaign for Legal Justice*.[23] This fascinating volume is anchored in the middle by a complete reprinting of Elizabeth Bethune Campbell's book, *Where Angels Fear to Tread*, which she self-published in 1940. Campbell relates first-hand her attempts to enforce what she believed to be her late mother's will and to demonstrate that the trustee of her mother's estate had misappropriated trust funds for his own personal use. The daughter of a noted Ontario lawyer, Campbell pursued her claims despite persistent resistance from many members of the bench and bar of the province. After failing to receive any substantial award from several Ontario courts, she appealed her case to the Judicial Council of the Privy Council in London. Although she was not herself a lawyer, Campbell became the first women to argue before the Privy Council. Even more amazing, she won, though continued litigation ultimately sapped the victory of any substantial financial gain. To help keep track of the complex web of individuals and legal proceedings that stretched over ten years, Backhouse and Backhouse include a useful description of people mentioned by

21 Fudge and Tucker, *Labour Before the Law*, p. 27.

22 For an American example, see Carol Weisbrod, "Divorce Stories: Readings, Comments, and Questions on Law and Narrative", *Brigham Young University Law Review* (1991), pp. 143-96.

23 The narrative approach is also employed to good use in Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto, 1999) and James W. St. G. Walker, *"Race", Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, 1997). Both Backhouse and Walker employ a series of detailed case studies of how individuals faced legal oppression. They use their narratives to examine Canadians' attitudes towards race and how those attitudes affected the legal system.

Campbell and an appendix detailing the sequence of legal cases.

Backhouse and Backhouse add a lengthy introduction and epilogue in which they evaluate Campbell's story. The result is a work that draws upon all the strengths of a narrative approach to legal history. Campbell's story certainly serves as a source of political inspiration. Backhouse and Backhouse point out that, despite the roadblocks placed in her way, Campbell succeeded because she was a woman "of formidable intellect, wit, and sarcasm, with the determination of steel".[24] The *Heiress vs the Establishment* also provides insights into cultural forces affecting law. Backhouse and Backhouse suggest, for instance, that assumptions about gender shaped the reactions of several Ontario lawyers towards Campbell, for the lawyers seemed "astonished at the ways in which she breached customary gender boundaries".[25] The study also helps clarify the relationship between legal and non-legal systems of norms. Campbell felt motivated by an intense "Britishness", for example, a characteristic that "may have struck the London legal officials as quaintly endearing and very probably enhanced her prospects for success".[26]

A common critique of the narrative approach is that most stories are drawn from the "victims" of the legal system, a fact that suggests that historians do not choose representative stories. Backhouse and Backhouse acknowledge this potential pitfall as they turn a critical eye to some of Campbell's claims and recognize the unusual aspects of the case and Campbell's social position. In introducing *Where Angels Fear to Tread*, they ask, to choose two examples, "Was Mrs. Campbell an unreasonable, even querulous client, dangerously obsessed by the case?" and "Did Mrs. Campbell's status as a woman from a white, upper-middle-class, prominent legal family affect her treatment?"[27] In answer to these questions they argue that she was sometimes a "stereotypical querulous law client", who had become "psychologically enveloped" in her case.[28] They also argue that her "upper-class stature was central to her success" and that only gender made her an outsider in the eyes of the Ontario legal elite.[29] Backhouse and Backhouse, furthermore, offer a nuanced and complex portrait of Campbell and her protagonists in examining Campbell's assertions that most of the legal profession refused to assist her because they formed a tightly-knit "family compact", the members of which were unwilling to criticize one another despite ample proof of inappropriate and perhaps illegal actions. Backhouse and Backhouse note the gross instances of unfairness meted out to Campbell, but suggest that lawyers and judges probably "acted separately, unreflectively, even instinctively, to protect one of their own against what they perceived to be an unfair attack".[30]

The final approach in Fisher's classification is "intellectual legal history". Informed by the "linguistic turn", legal historians using an intellectual history approach sometimes have more trouble talking to law professors and lawyers (who are interested in legal doctrine and policy considerations) than to other historians. The

24 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 3.
25 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 199.
26 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 180.
27 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 23.
28 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 214, 223.
29 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 179.
30 Backhouse and Backhouse, *The Heiress vs the Establishment*, p. 199.

intellectual history banner flies above at least four sub-categories. While the length of this review prevents a detailed examination of these sub-fields, a few words can be said about each. "Structuralist" legal history has the work of Michel Foucalt as its intellectual foundation; it aims to map the deep structures of language that provide the vocabulary and thus shape the beliefs of citizens. "Contextualist" legal history suggests that the meaning of a document is radically dependant on the context and thus "the central job of the intellectual historian is to reconstruct that context and then to interpret the text in light of it".[31] Usually examining canonical texts, contextualists look to shed new meaning on the beliefs and world-view of the historical authors. The third sub-category of intellectual history is "postmodern" or "textualist". Legal historians using this approach believe that every historical document produces not one, but multiple possible (and valid) interpretations. It differs from the contextualist approach in that postmodern analysis does not necessarily believe that examining the context of a historical document will lead the historian closer to the "real" meaning or best interpretation.[32] Fourth, the "law in cultural context" or "new historicism" sub-category is also aware that texts are ambiguous, but it is more interested in the cultural and ideological contexts of the texts. Unlike the contextualist approach, however, new historicism is not drawn toward the analysis of canonical texts, but examines small events that are suggestive of larger social codes and logics.[33] Each of these approaches to intellectual history has subtle strengths and weaknesses. Contextualism is useful, for example, in explaining historical causation, re-enacting past experiences and seeking the original meaning of events. Textualism, meanwhile, helps liberate the political imagination and adds an element of "play" to the study of legal history.[34]

Some Canadian scholars of the law and society have adopted these intellectual history approaches. As mentioned, Fudge and Tucker are interested in discourse in their study of labour and law.[35] A very different book, though one which also accepts the linguistic turn, is Carolyn Strange and Tina Loo's *True Crime, True North: The*

31 Fisher, "Texts and Contexts", p. 1068.

32 This sub-category is most at odds with Patrick Brode's *Courted and Abandoned*, in which Brode suggests that historians can, and must, objectively view the actions and motivations of historical actors. He thus argues that an 1837 seduction law should not be deconstructed such that it is deemed to be "a paternal attempt to control women", for he says this conclusion "is to impose modern concepts on the past". Rather, he argues that the statute "should be accepted for what it was – a well-intentioned but futile attempt to extend relief to the unwed mother". He further suggests that historians should not impose "modern political judgments on an earlier period", and it is "far more relevant to evaluate the seduction cases by objectively viewing the lives of men and women caught up in the vagaries of the law". Unfortunately, Brode's appeal for objectivity leads to unrealistic accounts of "designing women", who launched malicious suits on false claims and of good-hearted male politicians whose legislation accidentally disadvantaged women. See Brode, *Courted and Abandoned*, p. 207.

33 See, for example, Hendrik Hartog, "Pigs and Positivism", *Wisconsin Law Review* (1985), pp. 899-935.

34 For a further discussion of the strengths and weaknesses of these approaches in intellectual legal history see Fisher, "Texts and Contexts".

35 Another example is Mariana Valverde, who draws heavily from Foucalt in her challenging and illuminating book on moral reform in English Canada in the late-19th and early-20th centuries. See Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto, 1991).

Golden Age of Canadian Pulp Magazines which examines the heyday of true crime magazines published in Canada during the 1940s before their ultimate decline in the 1950s. The magazines offered stories of Canadian crimes and how authorities caught and punished perpetrators. Canadian magazines such as *Feature Detective Cases* and *True Police Cases* carved a niche for themselves when the government in Ottawa banned the importation of similar pulp magazines from the United States in 1940. Accompanied by melodramatic drawings and staged photographs, the magazines used images to create a sense of sexual innuendo, although the narratives themselves were moralistic and sexual violence was only inferred.

Strange and Loo make several brief allusions to the broader social and economic contexts of these "crime pulps". They suggest, for example, that the popularity of crime stories derived from the fact that they were cheap diversions from domestic economic troubles and foreign wars. Strange and Loo's interest, however, is really in the text (and images) of the magazines and their implicit meanings and not in the context of the magazines and their stories. Strange and Loo thus demonstrate little interest in the stated intentions of the pulp writers; they concern themselves, instead, with the ways in which authors used language to emphasize particular social and cultural ideas concerning gender, race, class and ethnicity. *True Crime, True North* reflects the influence of intellectual history in several ways. Strange and Loo read against the grain of the record to look for unstated but implicit meaning, examining not only the text of crime stories but the messages implicit in the advertisements scattered in the magazines. These messages embody a series of unambiguous moral and social lessons: justice should always be an eye for an eye, the deadly sins motivated criminal activity and people of certain races and ethnicities were prone to particular types of criminal behaviour. Strange and Loo also conclude that the stories taught that sex killers were simply motivated by their "healthy male lust" and that, when police killed, it was not "revenge" but "vengeance" – "a word that had religious connotations and linked the lawmen's actions to that of a wrathful God".[36] *True Crime, True North* sheds light on fascinating and often humorous topics, is filled with colourful images and is aimed at a readership broader than the academic community. Nevertheless, the book would have been strengthened if Strange and Loo had been explicit about their methodological approach and had explored alternative possible interpretations of these texts.

There is no "right" way to study legal history and, as this essay suggests, legal historians currently employ various methodologies, each with their own tendencies, strengths and weaknesses. Three of these methodologies are teleological, evolutionary theories (progressive evolutionary functionalism, dialectical materialism and descriptive economic analysis of law) while styles of legal thought, narrative and intellectual legal history do not share this tendency. These methodologies also differ in their relative concern with ideology: styles of legal thought, dialectical materialism and intellectual history all reflect a strong interest in ideology whereas progressive evolutionary functionalism, descriptive economic analysis of law and narrative approaches are normally less interested in it. Many scholars, of course, employ more than one approach in their work, either by intentionally melding interpretative

36 Strange and Loo, *True Crime, True North*, pp. 90, 24.

frameworks or by unintentionally combining them in process of "doing history". In addition to his use of functionalist explanations, for example, David Murray employs a narrative approach in devoting a chapter to the experiences of women and African Canadian victims of crime on the grounds that integrating "the stories of ordinary individuals and their experiences with the legal administration" can "better illuminate how the justice system actually worked".[37]

As the field has grown it seems less and less necessary to implore young scholars to undertake work in legal history. The study of legal history in Canada is obviously alive and well. The spectrum of topics and approaches examined in this review reflect the richness of current work – a richness that probably results from the multi-disciplinary tendencies of legal history, which attracts scholars whose academic backgrounds includes law, sociology, political science, criminology and, of course, history. The diversity of topics and approaches also suggests that we should spend little time attempting to define what is, and what is not, legal history as scholars will continue to investigate topics related to the law and the legal system using whichever methodological approach they find most useful. It is more important that young scholars entering the discipline appreciate that "doing" legal history necessitates choices in methodology that affect every scholar's ability to answer some questions while leaving others unexplored.

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37 Murray, *Colonial Justice*, p. 6.