

Canadian Legal History in the Late 1990s: A Field in Search of Fences?

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IN MAY 1998 A CONGENIAL GROUP gathered at the University of Toronto Faculty of Law to examine the general theme “Exploring Canada’s Legal Past”. The conference title was sufficiently broad to encompass the variety of papers presented, from detailed accounts of particular cases to studies of constitutional and political thought, the reception of English law in the colonies and the development of the legal profession’s identity and image. But the broad title did not convey the theme and purpose of the conference: to honour R. C. B. Risk, widely-acknowledged founder of “new” legal history in Canada.¹

The baker’s dozen of monographs and essay collections considered in this review are evidence of the vigour and extent of legal history scholarship in Canada today.² No longer limited to decontextualized histories of courts and common law doctrines, collections of “famous cases” or portraits of judges and practitioners, the range of subjects and sources suggests that the field stretches forever. Indeed, given the

1 Risk earned this accolade with his four essays published in the *University of Toronto Law Journal*, “The Nineteenth-Century Foundations of the Business Corporation in Ontario”, *University of Toronto Law Journal*, 23 (1973), pp. 270-306; “The Golden Age: The Law About the Market in Nineteenth-Century Ontario”, *UTLJ*, 26 (1977), pp. 307-46; “The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century”, *UTLJ*, 27 (1977), pp. 199-239; “The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective”, *UTLJ*, 27 (1977), pp. 403-38. For a survey of Risk’s contributions to the development of Canadian legal history in the past quarter century, both in published work and in the inspiration and encouragement offered to colleagues and students, see Blaine Baker’s essay in a forthcoming Risk festschrift to be published in 1999 by the Osgoode Society. Well-known for his modesty, Risk would be the first to give credit to other founding figures. In 1979 creation of the Osgoode Society for Canadian Legal History provided those interested in legal history, new and old, with an organizational focus, funding and a forum for publication. Supported by the Law Foundation of Ontario, individual law firms and 800 members, the Osgoode Society has published 35 volumes and provides ongoing support for archival research and oral history. Others have helped to establish legal history as a field of research by organizing seminars and conferences, including at least two on the legal history of Atlantic Canada, one in Fredericton in 1989, organized by David Bell and Philip Girard, and another in Halifax in 1995, organized by Philip Girard. David Bell, “The Birth of Canadian Legal History”, *University of New Brunswick Law Journal*, 33 (1984), pp. 312-18, cites 1981, when the Osgoode Society published its first volume, as the natal date of “modern Canadian legal historiography”.

2 *Acadiensis* has published three previous reviews covering work in this area. See Rainer Baehre, “The State in Canadian History”, *Acadiensis*, XXIV, 1 (Autumn 1994), pp. 119-33; Greg Marquis, “Law, Society and History: Whose Frontier?”, *Acadiensis*, XXI, 2 (Spring 1992), pp. 162-74; and Brian Young, “Law ‘in the round’”, *Acadiensis*, XVI, 1 (Autumn 1986), pp. 155-65. Barry Wright, “Towards a New Canadian Legal History”, *Osgoode Hall Law Journal*, 22, 2 (1984), pp. 349-74, offers a prescriptive definition of the new legal history that emphasizes its interdisciplinary and radical aspects. For recent surveys of the field, see Jamie Benidickson, “Survey of Canadian Legal History in the ‘90s”, *Ottawa Law Review*, 28, 2 (1997), pp. 433-65 and Jim Phillips, “Recent Publications in Canadian Legal History”, *Canadian Historical Review*, 78, 2 (June 1997), pp. 236-57.

Margaret McCallum, “Canadian Legal History in the Late 1990s: A Field in Search of Fences?”, *Acadiensis*, XXVII, 2 (Spring 1998), pp. 151-166.

importance of law in constituting economic and social relations, one can plausibly assert that all history is legal history. How, then, do the practitioners of legal history — the people who identify themselves as legal historians, as well as those who preface their presentations at legal history conferences by proclaiming that they are not legal historians, lawyers or even historians — recognize each other? How is this sub-field related to Canadian history? to social history? to political history? to legal history in other jurisdictions? And is the cultivation of yet another sub-field within Canadian history a cause for jubilation or the more fashionable jeremiads?³

Susan W. S. Binnie and Louis A. Knafla, editors of *Law, Society, and the State: Essays in Modern Legal History* (Toronto, University of Toronto Press, 1995) variously describe their authors' enterprise as legal-historical or socio-legal studies, the new "historiography on the interface of law, history and the state in modern times" or "law in societal context" (pp. 3-4). The volume's 20 essays are grouped in four sections: colonial legal experience; disorder, dissent and the state; gender and the law; and archival sources in legal history. Only one deals with Atlantic Canada — Christopher English's account of the evolution of judicial authority, courts and law in Newfoundland prior to the establishment of representative government.⁴

The essays on archival sources include two on the problems of writing the history of police work, and both decry the traditional approach to the subject as Whiggish. Greg Marquis, observing that most of the historical writing about police in Canada focuses on the Mounties, describes it as "anecdotal and ethnocentric" (p. 478). In his suggestions for other areas of inquiry, Marquis emphasizes the significant police role in informal law enforcement, as for example in recommending cancellation of a commercial licence issued by municipal authorities rather than laying a criminal charge. Police history is thus part of urban history as well as legal history.⁵

Binnie's contribution, "The Blake Act of 1878: A Legislative Solution to Urban Violence in Post-Confederation Canada" (pp. 215-42), shows the overlap between political history and legal history. Using traditional political history sources, she documents the passage of a short-lived amendment to the Criminal Code that permitted the federal government to designate specified communities in which it would be illegal to carry a weapon. Offered as a response to sectarian violence in Montreal, the Act was little-used, but served as a "symbolic parliamentary solution" (p. 233).

Family courts are highlighted in the title of Dorothy Chunn's essay, "'Just Plain Everyday Housekeeping on a Grand Scale': Feminists, Family Courts, and the Welfare State in British Columbia, 1928-1945" (pp. 379-404). But to learn about the

3 For a recent jeremiad on the fragmentation and loss of focus of the historical enterprise in Canada, see Doug Oram, "Narrow Circles: The Historiography of Recent Canadian Historiography", *National History: A Canadian Journal of Enquiry and Opinion*, 1, 1 (Winter 1997), pp. 5-21. For further references to, and comments on, the current debate about the merits of "national" political history rather than social history, see Janet Guildford and Michael Earle, "On Choosing a Textbook: Recent Canadian History Surveys and Readers", *Acadiensis*, XXVII, 1 (Autumn 1997), pp. 133-44.

4 "From Fishing Schooner to Colony: The Legal Development of Newfoundland, 1791-1832", pp. 73-98.

5 Marquis, "Towards a Canadian Police Historiography", pp. 477-96 and Clive Emsley, "The Archives of the English and Welsh Police Forces: A Survey", pp. 465-76.

creation of the B.C. family court, consult Chunn's contribution to the Osgoode Society volume on British Columbia and the Yukon.⁶ This essay focuses on three women in public life who advocated creation of a family court to aid in rehabilitating dysfunctional families. Chunn does not clarify whether these women thought of themselves as feminists or whether that label is her choice, though Conservative MPP Tillie Rolston's description of the role of the legislature, as quoted in Chunn's title, certainly invokes a "maternal feminist" ideology.

Wendy Ruemper, in "Locking Them Up: Incarcerating Women in Ontario, 1857-1931" (pp. 351-78), shows how the discourse of rehabilitation resulted in much longer sentences for women who were incarcerated at Toronto's Andrew Mercer Reformatory than at two rural Ontario jails. She uses these findings to illustrate a broader social reform agenda that emerged during the "transformation of Ontario from a laissez-faire state to a liberal welfare state" (p. 353). Readers may question Ruemper's assumption that Ontario was at one time a laissez-faire state, or that it ever completed the transformation to liberal welfare state, but at least she attempts to explain why we should be interested in her carefully-collected empirical data.

The narrow focus of much new legal history seems to discourage the authors from considering basic historical questions such as causation, continuity or change. Jennifer Stephen's essay, "The 'Incorrigible', the 'Bad', and the 'Immoral': 'Factory Girls' and the Work of the Toronto Psychiatric Clinic" (pp. 405-39), looks at the five years from 1918 to 1923. As the proliferation of quotation marks in her title indicates, her subject is labelling — specifically, how "the category of feeble-mindedness was constructed and applied to young working-class women" (p. 405) who did not conform to mental hygienists' standards of occupational stability and/or sexual purity. Being labelled as "feeble-minded" led to incarceration or deportation for some women, but Stephen does not comment on the power relations that made the labelling exercise significant, nor does she address explicitly how her data contributes to our understanding of the state, quasi-statal agencies, or gender and the law.

Annalee Golz's essay in the Binnie and Knafla volume, "'If a Man's Wife Does Not Obey Him, What Can He Do?': Marital Breakdown and Wife Abuse in Late Nineteenth-Century and Early Twentieth-Century Ontario" (pp. 323-50), is based on a sample of cases in which women attempted, usually with little success, to use both criminal and civil law to obtain financial support and physical security from their abusive husbands. Along with a description of changes in the governing legal regime, the essay summarizes or quotes verbatim several descriptions of the abuse women suffered. This approach, used frequently in the new legal history, shows the value of legal records in revealing some aspects of the lives of ordinary people. Detailed studies of particular cases can illustrate patterns, continuities and changes in law and law enforcement, as does Constance Backhouse with one of her descriptions of an abortion case from London, Ontario in 1901 and another from Halifax, Nova Scotia in 1943, in one of the Osgoode Society volumes.⁷ The mere compilation of example

6 "For God, Country and the Public Purse: 'Liberal' Politics and the Campaign for Family Courts in British Columbia, 1939-45", in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law, Volume VI: British Columbia and the Yukon*, (Toronto, 1995), pp. 423-56.

7 "Prosecution of Abortions Under Canadian Law, 1900-1950", in Jim Phillips, Tina Loo and Susan Lewthwaite, eds., *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice*, (Toronto, 1994), pp. 252-92.

after example, however, is closer to voyeurism or journalism than historical inquiry.

An excess of examples obscures Lori Chambers' originality and industry in her monograph, *Married Women and Property Law in Victorian Ontario* (Toronto, University of Toronto Press for the Osgoode Society for Canadian Legal History, 1997). In order that the reader may hear the voices of long-suffering and often-silenced women, Chambers reproduces passages from legal documents that would be better summarized and provides in narrative form information on case results that would be more effectively presented in tables. In her introduction, Chambers acknowledges that she is interested in history because she is concerned "with the present state of the law" (p. 13). That presentist orientation may explain her insistence that marriage is an equal economic partnership and that the law should mandate joint ownership of all of the assets of a married couple.

The general outlines of the history Chambers recounts are fairly well known. At common law, "marriage, for women, represented civil death" (p. 3). Throughout the 19th century, women gradually regained, through legislative reform, some of the civil rights that they lost on marriage, including the right to own and manage their separate property.⁸ Chambers analyzes the legal and legislative debate about the reform process in Ontario, and, through an examination of court cases concerning married women's property, what the reforms meant for women. Not surprisingly, she concludes that judges were most likely to enforce women's control over their separate property if they needed protection from abusive husbands. But Chambers states that this result would not have been apparent without looking at unpublished cases, because the published law reports contained a disproportionate number of cases in which the wife's matrimonial offences denied her the sympathy of the court. Nor would reported cases have yielded as much evidence of women who used the new laws to the disadvantage of legitimate creditors. Chambers' careful and comprehensive research thus provides a nuanced account of married women's property law in the largest Canadian common-law jurisdiction.

Traditional legal history sources — cases, statutes and treaties — are a significant part of the historical background to the events described by Anthony Hall in the Binnie and Knafla collection in "Treaties, Trains, and Troubled National Dreams: Reflections on the Indian Summer in Northern Ontario, 1990" (pp. 290-320), an expanded version of an essay published previously in a collection on contemporary Indian country.⁹ From his perspective as participant-observer, Hall describes some of

8 See, for example, Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto, 1983); Constance Backhouse, "Married Women's Property Law in Nineteenth Century Canada", *Law and History Review*, 6 (Fall 1988), pp. 211-57; Philip Girard, "Married Women's Property, Chancery Abolition and Insolvency Law: Law Reform in Nova Scotia, 1820-1867", in Philip Girard and Jim Phillips, eds., *Essays in the History of Canadian Law: Volume III — Nova Scotia* (Toronto, 1990); Rebecca Veinott and Philip Girard, "Married Women's Property Law in Nova Scotia, 1850-1900", in Janet Guildford and Suzanne Morton, eds., *Separate Spheres: Women's Worlds in the 19th-Century Maritimes* (Fredericton, 1995), pp. 67-91; Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill, 1985); Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York* (Ithaca, 1982).

9 A.-M. Mawhiney, ed., *Rebirth: Political, Economic and Social Development in First Nations* (Toronto, 1993).

the events of the seven-day long blockade of the CNR track running through Long Lake Reserve 58 north of Lake Superior. The “Indian Summer” of the title is the summer of Indian activism, when Elijah Harper’s “no” in the Manitoba legislature blocked the Meech Lake Accord, and the Mohawk nation at Oka stood their ground against the Surêté du Québec. Hall relates the Long Lake blockade to these struggles, and to the largely unsuccessful attempts of the Teme-Augama Anishnabai and the Lubicon Crees to obtain recognition of their land claims. These First Nations, like the Ojibway of Long Lake, claim as traditional territories land subject to treaties that were negotiated without their participation. If one determines whether a work is legal history by the sources used, Hall’s account may be political theory or journalism rather than legal history, but it is one of the more compelling essays in the collection.

Dianne Newell’s title, *Tangled Webs of History: Indians and the Law in Canada’s Pacific Coast Fisheries* (Toronto, University of Toronto Press, 1993), identifies her book as history, and its subject as law. Focusing on policy as much as formal law, Newell provides a detailed description of how provincial and federal fisheries regulations excluded First Nations peoples from participating in the fishery, either for traditional purposes or for profit. Newell uses the term “industrial” (p. 24) rather than commercial for the fishery that developed after Confederation because trade was always part of the aboriginal fishery in the highly-specialized coastal societies. Through examining both law on the books and law as it was administered, Newell demonstrates that in the post-colonial regime, the Indian fishery was characterized as irresponsible and destructive, and the resources of the state were used to harass Indians who continued to fish. Newell’s meticulously detailed account of changing federal policy provides historical background to restrictions on native food fisheries and the harsh enforcement of fisheries regulations in the 1970s and 1980s that sparked native activism in British Columbia. Written before the December 1997 decision of the Supreme Court of Canada in *R. v Delgamuukw*¹⁰ that recognized significant and unresolved native claims to land and fishing rights, the book documents inadequate legal and political responses to First Nations’ resource claims. It should serve, as Newell hoped, to inform public opinion, not just the judges who heard Newell testify as an expert witness in native claims cases.

If catalogued according to the publisher’s suggested call numbers, Newell’s book will be shelved in the law section of the library; it could also be shelved with histories of British Columbia, because its subject matter is a region-specific resource, with “region” meaning, as it so often does in Canadian historiography, somewhere other than Ontario. Perhaps to compensate for the preponderance of articles about Central Canada in the first two volumes of the Osgoode Society’s *Essays in the History of Canadian Law*, two later volumes deal specifically with the margins — Nova Scotia (already reviewed in *Acadiensis*),¹¹ and the Pacific coast.

Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law, Volume VI — British Columbia and the Yukon* (Toronto, University of Toronto Press for the Osgoode Society for Canadian Legal History, 1995) make no claim that British

10 [1998] 1 *Canadian Native Law Reporter* 14.

11 Girard and Phillips, eds., *Essays in the History of Canadian Law: Volume III — Nova Scotia*, see also Marquis, “Law, Society, and History: Whose Frontier?”

Columbia and the Yukon constitute a unified region, or that the essays taken together offer a comprehensive or consistent account of the legal history of these two jurisdictions. The introductory historiographic essay nonetheless identifies some themes common to both. These include anxiety about law and order and “the dangers of American acquisitiveness in the new mining frontier” (p. 16) and “the contested nature of law” (p. 4), specifically resistance to the European legal heritage brought by the colonizers by those with different values and assumptions. In a presentist conclusion, Foster and McLaren assert that law is one of the institutions that mediates the tension between periphery and centre, between formal equality and accommodation of diversity, and between authority and individual autonomy. They do not expect legal history to show how to effect this mediation, but hope that it will raise doubts about some of the standard accounts of how diversity, equality and order have been understood and managed.

Diversity abounds in this volume, in subject matter, sources and a list of contributors that includes lawyers, law professors, criminologists and historians. Some of the essays, such as Burt Harris’s profiles of lawyers who practised in the Yukon prior to the First World War,¹² describe the regional version of institutions or developments that exist in other Canadian jurisdictions. Others, such as John McLaren’s account of the state’s efforts to impose conformity on Doukhobor communities through compulsory public schooling,¹³ use events rooted in British Columbia’s particular history to reflect on larger questions of law, power and resistance.

Given the many unresolved questions concerning the place of First Nations people in B.C. society, it is appropriate that three of 14 essays deal with aboriginal people and the law. Alan Grove focuses on the circumstances of the murder trial of four Tagish hunters during Yukon gold rush days which resulted in the hanging of two of them, even though the court that convicted them lacked jurisdiction to do so.¹⁴ Tina Loo also focuses on cases in which aboriginal peoples are accused of murder, in order to show that effective law enforcement in British Columbia well into the 20th century required the active and independent engagement of aboriginal peoples with the legal process, as guides, trackers, constables and — for their own purposes — collaborators, not just as victims of oppression.¹⁵

In “Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927” (pp. 28-86), Hamar Foster describes how law was used to limit the rights of First Nations’ people in what he terms the first phase of the British Columbia Indian Land Question. This phase, marked by commissions of various sorts, attempts to litigate the issue and petitions to the monarch, ended with a joint parliamentary committee’s conclusion that there was no basis for a claim to Indian title in B.C. To ensure that this conclusion remained unchallenged, an amendment to the Indian Act made it an offence to raise money for prosecuting land claims without the permission of the

12 Burt Harris, “Fighting Spirits: The Yukon Legal Profession, 1898-1912”, pp. 457-507.

13 “Creating ‘Slaves of Satan’ or ‘New Canadians’? The Law, Education, and the Socialization of Doukhobor Children, 1911-1935”, pp. 352-85.

14 “Where is the Justice, Mr. Mills?: A Case Study of *R. v Nantuck*”, pp. 87-127.

15 “Tonto’s Due: Law, Culture, and Colonization in British Columbia”, pp. 128-70.

federal government. Foster's thoughtful and provocative essay recaptures this lost history and concludes with reflections on the relationship between law and social change. Quoting E. P. Thompson's observation that we "waste our labour" in studying the history of law if law merely executes class power,¹⁶ Foster defends the labour spent because, like Thompson, he believes that law can limit as well as facilitate the actions of the ruling elite.

James W. St. G. Walker is also concerned with law's role in the construction of race relations and the deployment of power. In *"Race", Rights and the Law in the Supreme Court of Canada* (Waterloo, Wilfrid Laurier University Press for the Osgoode Society for Canadian Legal History, 1997), which received Honourable Mention in the 1998 competition for the Canadian Historical Association's Sir John A. Macdonald Prize, Walker presents a superb study of four cases in which the Supreme Court of Canada grappled with the meaning of race. Each case involved a different legal issue: *Quong Wing v The King* (1914) was a challenge to Saskatchewan legislation declaring it illegal for "Chinamen" to employ white females; in *Christie v York Corporation* (1939), a black man brought a civil action for damages against a public tavern in Montreal which had refused to serve him; *Noble and Wolf v Alley* (1950) started as an application for a court order declaring invalid a covenant pertaining to a summer cottage that prohibited sale or lease of the land to persons "of the Jewish . . . or coloured race or blood"; *Narine Singh v Attorney General of Canada* (1955) challenged a deportation order issued against a Trinidadian of East Indian ancestry because he was a member of "the Asian race". In each case, courts at all levels participated in "generating and applying common sense" (p. 11) about the meaning and consequences of race that affirmed and facilitated racial discrimination.

Walker writes with several audiences in mind, and his engaging prose and careful analysis should appeal to that mythical "well-educated general reader" as well as those who read books for a living. There are even sections that Walker suggests can be skipped by those who do not need background on law and legal process, race theory, the historiography of race or the methodology of history — all excellent readings for introducing students to legal history. The case studies describe the social and legal origins, outcome and consequences of each case, providing historical evidence that racism is neither new in Canada nor necessarily a by-product of the search for a scapegoat in economic hard times. The chapter on the Quong Wing case includes an excellent synthesis of anti-Oriental legislation and policy, and of the way that race concerns shaped the reform agenda of maternal feminists, the moral reformers and organized labour. The chapters on the *Christie* case and *Noble and Wolf* demonstrate the public nature of private law, and the *Narine-Singh* chapter shows the complexities of the relationship between the legislative and administrative process.

In *Historical Perspectives on Law and Society in Canada* (Toronto, Copp Clark Longman, 1994), Tina Loo and Lorna McLean respond to the need for readily-accessible readings in Canadian legal history with a collection of 15 articles previously published in academic journals. In their introductory essay, the editors state the articles were selected to illuminate the relationship between law and order.

16 E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, 1975), p. 264.

The only discernible unifying theme, however, is resistance to the legally constituted order, whether through the use of the charivari to punish government supporters during the Patriot uprising in Lower Canada in 1837-38,¹⁷ a woman's resort to murder to protect herself from an abusive husband,¹⁸ or the desire for vengeance rather than justice among European fur traders in the American North West.¹⁹ The only article on Atlantic Canada is Greg Marquis's on the Saint John police in the latter half of the 19th century,²⁰ but the collection avoids the Central Canadian bias of several of the Osgoode Society volumes. Organizing a course around this collection of readings would be challenging, but rewarding for instructor and students.

Another textbook possibility is Carolyn Strange and Tina Loo, *Making Good: Law and Moral Regulation in Canada, 1867-1939* (Toronto, University of Toronto Press, 1997). In 151 pages plus ten pages of references, the authors attempt to delineate the connection between law and morality in "the early-national period" in Canadian history. Strange and Loo choose as their organizing theme the idea of law as the product of struggle, particularly between those who want to use the state to enforce their moral vision and those who want the state to leave them alone, rather than among those who argue for differing versions of state-enforced morality. In describing law as "a site of struggle" (p. 4), Strange and Loo declare their adherence to the "regulation" rather than the "social control" school of thought, emphasizing the limits of law's coercive power.

These authors navigate adequately between the Scylla of unsupported generalization and the Charybdis of obscure detail, although, as with any such text, different authors might have emphasized different things from the uneven secondary literature. The significance of "extra-legal" regulatory agents such as religious institutions, employers, schools and communities is acknowledged but not explored, and, despite the focus on the state, the state is never adequately defined. For example, Children's Aid Society workers are described as non-state actors, presumably because the Children's Aid Societies are incorporated as private charitable organizations. Yet the substantial delegation of state powers to the C.A.S., both to apprehend children and to serve as probation officers, suggests the need to problematize the state/non-state or public/private distinction. Class is another analytical concept that the authors rob of explanatory power by too mechanical an application. The insistence that much moral regulation was an attempt of middle class reformers and the emerging social service profession to impose order on an unruly working class leaves the unfortunate impression that most working-class men were degenerate drunks and ignores workers' efforts to promote the image of the respectable working man.

17 Alan Greer, "From Folklore to Revolution: Charivaris and the Lower Canadian Rebellion of 1837", pp. 35-55, originally published in *Social History*, 15, 1 (January 1990), pp. 24-43.

18 Karen Dubinsky and Franca Iacovetta, "Murder, Womanly Virtue, and Motherhood: The Case of Angelina Napolitano, 1911-1922", pp. 161-183, originally published in *Canadian Historical Review*, 72, 4 (December 1991), pp. 505-31.

19 "Principles of Vengeance: Fur Trappers, Indians and Retaliation for Homicide in the Transboundary North American West", pp. 14-34, originally published in *Western Historical Quarterly*, 24, 1 (February 1993), pp. 21-43.

20 "'A Machine of Oppression Under the Guise of Law': The Saint John Police Establishment, 1860-1890", pp. 200-218, originally published in *Acadiensis*, XVI, 1 (Autumn 1986), pp. 58-77.

The use of law to construct and constrain workers' ability to secure a living wage and safe workplaces receives attention in only three essays in the thousands of pages reviewed here. Tina Loo and Lorna R. McLean's collection, referred to above, includes an examination of the regulation of child labour in Quebec following passage of the Compulsory School Attendance Act in 1943.²¹ Ross Lambertson in the Foster and McLaren volume²² looks at the long struggle by white workers and politicians in British Columbia to eliminate competition from lower-paid Asians in underground work in the province's coal mines. Margaret McCallum analyzes legislation mandating some minimum standards for the employment contract and creating a framework for industrial relations that placed legal restrictions on workers' ability to strike while placing little pressure on employers to engage in collective bargaining.²³

The McCallum essay is one of 22 commissioned for a Canadian legal history text, sponsored by the Canadian Legal History Project at the University of Manitoba, with funding from the Manitoba Law Foundation.²⁴ Dick Risk's contribution to this volume, "The Scholars and the Constitution: P.O.G.G. and the Privy Council", dealing with the Privy Council decisions on the interpretation of the Peace, Order and Good Government clause of the Constitution Act, 1867, (pp. 496-523), concludes with the hope that the current constitutional ferment will encourage thinking that is distinctively Canadian rather than English or American. That hope was shared by the volume's editors, who wanted to produce a text suitable for Canadian legal history courses in law faculties and history departments. To provide a descriptive chronology of the development of Canadian legal institutions and to expose readers to socio-legal history, the essays are divided into two types: essays with a thematic focus and essays with a regional focus that chronicle the changing structure of legal institutions.

Among the thematic essays, McCallum's on the employment contract is one of the few attempts at an overview of federal and provincial legal regimes; her reliance on published work means that developments in Ontario receive the most attention, with references to other jurisdictions relegated to the lengthy footnotes. None of the thematic essays offers a comprehensive account of social welfare, family or criminal law; but aspects of these subjects are dealt with in John McLaren's article on prostitution,²⁵ Connie Backhouse's discussion of an infanticide prosecution in British Columbia,²⁶ Russell Smandych's account of mechanisms for dealing with Upper

21 Dominique Marshall, "The Decline of Child Labour in Quebec, 1940-1960: Conflict Between Poor Families and the Welfare State", in Loo and McLean, eds., *Historical Perspectives on Law and Society in Canada*, pp. 254-288, originally published in French in *Labour/Le Travail*, 24 (Fall 1989), pp. 91-129.

22 "After *Union Colliery*: Law, Race, and Class in the Coalmines of British Columbia", pp. 386-422.

23 *Manitoba Law Journal*, 23 (January 1996), pp. 574-93.

24 Publication of the text has been postponed several times, but the essays are available in a special volume of the *Manitoba Law Journal*, 23, 1, 2 and 3 (January 1996). The text will be published as *Canada's Legal Inheritances*, edited by Wes Pue and DeLloyd Guth. Many of the essays were initially circulated as working papers published by the Legal Research Institute, University of Manitoba.

25 "Recalculating the Wages of Sin: The Social and Legal Construction of Prostitution, 1850-1920", pp. 524-55.

26 "The Shining Sixpence: Women's Worth in Canadian Law at the End of the Victorian Era", pp. 556-73.

Canada's indigent,²⁷ and Jean-Maurice Brisson and Nicholas Kasirer's elucidation of the correspondence between Quebec's growing independence from French legal models and legislative reform to increase women's legal autonomy within the family unit.²⁸ The latter essay smoothly integrates two separate tasks: providing the detailed chronology of a particular law reform and using that chronology to make some larger observations about the relationship between legal and political ideology and between law and culture.

Like the thematic essays, the institutional essays leave gaps. No one wrote on Saskatchewan or Alberta, and coverage of Quebec, Manitoba and British Columbia stops at Confederation. Christopher English contributed the only essay on Newfoundland's legal institutions, covering the years up to passage of the Judicature Act of 1792, the point of beginning for his contribution to the Binnie and Knafla volume. The pair of essays on the Maritimes are among the best of the institutional histories, providing excellent accounts of law in its social and cultural setting.²⁹ David Bell draws on extensive primary and secondary research to describe the transformation of Acadie from a contested military frontier into three "self-consciously loyal British colonies" (p. 103), with governments dominated by elected representatives of the people. Composed of many demographically and politically distinct communities, the three colonies nonetheless shared similar legal institutions, designed to maintain the imperial connection and the relations of deference and dependence that were the best guarantee of civil peace in the absence of police, an established church or a common education. Philip Girard takes up the narrative with the grant of responsible government, offering, through an examination of changes in legislation, court structure, and the organization of government and the legal profession, an account of the populist revolution of the mid-19th century. Covering the period through to the end of the Second World War, Girard touches on several themes for further research: the new professionalism; lawyers as agents of national integration; and the growing hegemony of the formal legal process as "community" and "religion" lost their cohesive power.

Law as creator and enforcer of social cohesion is a central theme in Tina Loo's *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto, University of Toronto Press, 1994). In 1821 both Vancouver Island and the area that is now mainland British Columbia were part of the territory administered by the Hudson's Bay Company. Between then and 1871, when British Columbia joined Confederation, the Island and the mainland enjoyed a bewildering variety of constitutional arrangements, as McLaren and Foster explain in the introduction to the Osgoode Society volume of essays on British Columbia and the Yukon.³⁰ The details of the changes need not detain us here, for Loo is concerned with charting broader transformations, as the autocratic paternalism of Hudson's Bay Company governance

27 "Colonial Welfare Laws and Practices: Coping Without an English Poor Law in Upper Canada, 1792-1837", pp. 214-46.

28 "The Married Woman in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866-1991", pp. 406-49.

29 David Bell, "Maritime Legal Institutions under the *Ancien Regime*, 1710-1850", pp. 103-31; Philip Girard, "The Maritime Provinces, 1850-1939: Lawyers and Legal Institutions", pp. 379-405.

30 "Hard Choices and Sharp Edges: The Legal History of British Columbia and the Yukon", pp. 8-9.

was re-made into a liberal legal order that would facilitate the colonies' economic development and provide some common social values.

More than most Canadian historical writing, Loo's book is self-consciously, sometimes pretentiously, theoretical; she hopes "to build a bridge — or, in true British Columbian fashion, a road — between two scholarly traditions: the empirical and the theoretical" (p. 10). She identifies her approach as post-structuralist, meaning that she views "the legal order that came to characterize British Columbia as something that was constructed through a particular discourse (the discourse of liberalism), rather than something that was natural, inevitable, or self-evident" (p. 11). In making explicit and thereby problematizing "the categories and assumptions we use to see the world", she hopes to free us from viewing the present as inevitable so that we can imagine alternatives that offer greater possibilities for social justice and liberation (p. 12).

This laudable project is not fully realized in Loo's book.³¹ Despite her espousal of post-structuralism, she falls back on evolutionary functionalism as the explanation for a particular legal outcome, asserting that the legal regime developed in response to the needs of the economy. Loo does remind her readers that "Canada's legal system as a whole was and continues to be implicated in the production and reproduction of a racist, classist and sexist system of domination" (p. 5), and that law is also shaped by those who resist its domination. However, her narrative reveals a much more conservative view of law. Loo acknowledges that the courts were "a necessary instrument of coercion" (p. 90) but ignores the fact that all law is coercive: coercion is the very heart of law.³² Instead, Loo emphasizes that law provided "a community of shared meaning and experience" (p. 65) in which going to court to settle disputes was 'a natural thing' for British Columbians to do" (p. 89, also 68, 74-75, 92). Exactly who are these people for whom resort to litigation is natural? Occasional references to European British Columbians (p. 94) or white British Columbians (p. 108) remind the reader that British Columbia was home to indigenous peoples and non-European immigrants; more often, they disappear in the general term British Columbians, an identification some people resist to this day. Despite these problems, *Making Law, Order and Authority* is a well-researched and analytically ambitious account of the use of law to impose order among the inhabitants of a resource frontier, and it will likely inspire similar studies in other jurisdictions.

The use of law to enforce social conformity is explored from other vantage points in *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice*, edited by Jim Phillips, Tina Loo and Susan Lewthwaite (Toronto, University of Toronto Press for the Osgoode Society, 1994). But, as the editors observe in their introduction, "the assertion of authority through the criminal law" was "neither simple nor straightforward" (p. 12). Given this recognition, it is surprising that the editors use the term "criminal justice" rather than "criminal law" in the title of the

31 For three reviews of the "new legal history" that explicate and celebrate the liberating message of contingency, see Barry Wright, "Towards a New Canadian Legal History" and Robert W. Gordon, "Critical Legal Histories", *Stanford Law Review*, 36 (1984), pp. 57-125, and "Historicism in Legal Scholarship", *Yale Law Journal*, 90 (1981), pp. 1017-62.

32 For this view of law, see Richard Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence", *Osgoode Hall Law Journal*, 27 (1989), pp. 219-93.

volume and two of its parts. Law — the coercive power of the state — is the reality: justice, the ideal, is not the necessary or only product of resort to the criminal law. To speak of justice when one means law denies the injustice that the law permits and perpetuates.

The title of this volume suggests a relatively narrow focus in contrast to, for example, Knafla and Binnie's *Law, Society and the State*, but the essays cover much of the same ground: encounters between native peoples and European law;³³ the use of criminal law to regulate family relations and women's sexuality;³⁴ and the detention, punishment and rehabilitation of those labelled as criminal, including another article on the Mercer Reformatory.³⁵ Nineteenth-century Upper Canada/Ontario provides the subject matter for about half of the essays, probably because modern Ontario possesses an abundance of archival collections, law schools and graduate programmes in history, although the editors obviously sought contributions from other jurisdictions. Jean-Marie Fecteau's "Between the Old Order and Modern Times: Poverty, Criminality, and Power in Quebec, 1791-1840" (pp. 293-323) makes accessible to anglophones his revisionist work on poverty and crime control in Lower Canada.³⁶ Fecteau challenges the idea that the transition to capitalist production was a gradual, evolutionary process characterized by increases in trade, industrial activity and employment opportunities. Instead, he sees the process as "brutal and sudden" (p. 293): it involved dislocation for workers and the hegemonic classes both, as the social order derived from "a tightly regulated network of social hierarchies" (p. 295) gave way to the liberal ideal of individual responsibility in which lack of responsibility would be disciplined in the market as well as the penitentiary.

The challenge of imposing discipline of any kind in rural Upper Canada is explored by Susan Lewthwaite through her reconstruction of a related series of disputes in Burford Township, southwest of Brantford, in 1839-40.³⁷ The ability of local residents to obtain redress for their treatment by a local magistrate leads her to conclude that "formal state law and formal legal institutions could be manipulated according to the vagaries of community power" (p. 373-74). But the redress comes in a civil trial presided over by Chief Justice John Beverley Robinson, whose own account of his charge to the jury indicates his unwillingness to countenance abuses of authority, even by officials who share his political views and formal authority. Thus,

33 John Dickinson, "Native Sovereignty and French Justice in Early Canada", pp. 17-40; Hamar Foster, "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia", pp. 41-111; Tina Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia", pp. 112-42.

34 André Lachance and Sylvie Savoie, "Violence, Marriage, and Family Honour: Aspects of the Legal Regulation of Marriage in New France", pp. 143-73; Constance Backhouse, "Prosecution of Abortions under Canadian Law, 1900-1950", pp. 252-92.

35 Rainer Baehre, "Prison as Factory, Convict as Worker: A Study of the Mid-Victorian St. John Penitentiary, 1841-1880", p. 439-77; Joseph Gondor Berkovits, "Prisoners for Profit: Convict Labour in the Ontario Central Prison, 1874-1915", pp. 478-515; Peter Oliver, "'To Govern By Kindness': The First Two Decades of the Mercer Reformatory for Women", pp. 516-71.

36 See J.-M. Fecteau, *Régulation sociale et transition au capitalisme: Jalons théoriques et méthodologiques pour une analyse du 19^e siècle canadien* (Québec, 1986); *Un nouvel ordre des choses: La pauvreté, le crime, L'Etat au Québec, de la fin du 18^e siècle à 1840* (Montreal, 1989).

37 "Violence, Law, and Community in Rural Upper Canada", pp. 353-86.

just as accounts of law that assume compliance are too simplistic, so too are accounts of resistance that assume the unity of formal legal authority.

In their introduction to *Crime and Criminal Justice*, the editors comment on the limited attention given to their subject in the Osgoode Society *Essays in the History of Canadian Law* — only seven of 30 essays in the preceding four volumes. The balance has since shifted: in the Foster and McLaren volume, half of the essays deal with criminal law or policing, and the Osgoode Society's newest series of essays, on Canadian state trials, deals primarily with criminal law, albeit of a highly-specialized kind. Begun in 1988, the Canadian State Trials project is an ambitious effort to document the state's response to perceived threats to internal or external security from European settlement through to the imposition of the War Measures Act in October 1970. The first volume, *Canadian State Trials: Law, Politics and Security Measures, 1608-1837*, edited by F. Murray Greenwood and Barry Wright (Toronto, University of Toronto Press for the Osgoode Society for Canadian Legal History, 1996), contains 17 essays dealing with British North America prior to the uprisings of 1837-38. Also included are three appendices, introducing scholars to the available archival sources and reproducing some of the significant documents referred to in the essays. The editors' introduction provides a lucid discussion of the indeterminacy of the date of reception of English law in each of the colonies, a review of English precedents for state trials projects and a brief discussion of the existing literature on political trials and the rule of law in Canada.

Some of the essays in this collection deal with well-known incidents of official repression, such as Scottish radical Robert Gourlay's banishment from Upper Canada in 1819,³⁸ or Joseph Howe's sedition trial,³⁹ but most describe less well-known resistance to state authority. Six, besides the Howe essay, deal with Atlantic Canada. Thomas Barnes provides some observations on the merits of the Acadian commitment to survivance compared to the Québécois *souvenance*, along with an approving review of the tactics adopted by Major Paul Mascarene to ensure that the Acadian population did not support the enemy during France's four unsuccessful forays into Nova Scotia from 1744 to 1747.⁴⁰ Barry Cahill offers a critical assessment of the indictment, trial and conviction of Johannes Wilhelm Hoffman for his role in a militant challenge to the authorities in Lunenburg, Nova Scotia in December 1753.⁴¹ J. M. Bumsted describes two civil cases involving James Douglass Haszard, editor of the *Prince Edward Island Register*; in both cases, the presiding judges refused to recognize a right to publish petitions to the Crown or speeches given in the legislature, but popular support for the defendant made it impossible to impose any real penalty.⁴² Ernest A. Clarke and Jim Phillips look at legal and administrative responses to the Cumberland Rebellion in Nova Scotia in 1776.⁴³ Christopher English discusses

38 Barry Wright, "The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-9", pp. 487-504.

39 Barry Cahill, "*R. v Howe* (1835) for Seditious Libel: A Tale of Twelve Magistrates", pp. 547-75.

40 "'Twelve Apostles' or a Dozen Traitors? Acadian Collaborators during King George's War, 1744-8", pp. 98-113.

41 "The 'Hoffman Rebellion' (1753) and Hoffman's Trial (1754): Constructive High Treason and Seditious Conspiracy in Nova Scotia under the Stratocracy", pp. 72-97.

42 "Liberty of the Press in Early Prince Edward Island, 1923-9", pp. 522-46.

43 "Rebellion and Repression in Nova Scotia in the Era of the American Revolution", pp. 172-220.

faction fights, popular protest and mutiny in Newfoundland from 1789 to 1819, years in which the absence of the institutions of the state apparently made it difficult to demonstrate against the state.⁴⁴ David Bell reviews the Loyalist experience and the Loyalist myth, focusing on Governor Thomas Carleton's successful use of the loyalty cry, sedition charges and legislation prohibiting petitioning, in order to silence dissent and "render eighteenth-century New Brunswickers passive and obedient". His understated concluding sentence is vintage Bell: "the transition from Whig Loyalist to New Brunswicker had begun".⁴⁵

High treason, sedition, riots and banishment are the stuff of the "true crime" genre of popular legal history, along with what Jim Phillips refers to as "grisly tales of the gallows".⁴⁶ Jim Hornby's *In the Shadow of the Gallows: Criminal Law and Capital Punishment in Prince Edward Island, 1769-1941* (Charlottetown, Institute of Island Studies, 1998) tells the grisly tales of the 11 persons hanged on the Island, but the research and writing are better than one expects from the "true crime" genre. So is Hornby's main message — that resort to the death penalty "tends to brutalize the society and the justice system that permit it" (p. 123). Hornby, a practising lawyer, places his Prince Edward Island stories in the context of Canadian and English criminal law and practice, but he pays insufficient attention to recent work in legal history that could be cited in support of some of his conclusions. For example, his description of the pardon process as "a kind of moral popularity contest" (p. 124) accords with Carolyn Strange's account of the federal cabinet's decisions on whether to commute individual's death sentences and with Jonathan Swainger's analysis of capital cases from British Columbia in the first decade after Confederation.⁴⁷

Lawyers, historians, legal and other academics all contribute to *Essays in the History of Canadian Law, Volume VII, Inside the Law: Canadian Law Firms in Historical Perspective* edited by Carol Wilton (Toronto, University of Toronto Press for the Osgoode Society, 1996). Despite the contrast in their titles, this volume is a sequel to *Beyond the Law*, Wilton's edited essays on lawyers and business.⁴⁸ As in the earlier volume, most of the authors write about lawyers or law firms in Ontario, including genealogies of some of Toronto's most prestigious "bank tower" firms — Faskens,⁴⁹ Blakes⁵⁰ and Oslers.⁵¹ The essays on Atlantic Canada are two of the

44 "The Official Mind and Popular Protest in a Revolutionary Era: The Case of Newfoundland, 1789-1819", pp. 296-322.

45 "Sedition Among the Loyalists: The Case of Saint John, 1784-6", pp. 223-40.

46 Phillips, "Recent Publications in Canadian Legal History", p. 248.

47 Carolyn Strange, "The Lottery of Death: Capital Punishment, 1867-1976", *Manitoba Law Journal*, 23 (1996), pp. 594-619; Jonathan Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880", Foster and McLaren, eds., *Essays in the History of Canadian Law, Volume VI: British Columbia and the Yukon*, pp. 203-41.

48 *Essays in the History of Canadian Law, Volume IV, Beyond the Law: Lawyers and Business in Canada, 1830-1930* (Toronto, 1990). I reviewed this volume in *McGill Law Journal*, 37, 1 (1992), pp. 352-63.

49 C. Ian Kyer, "The Transformation of an Establishment Firm: From Beatty Blackstock to Faskens, 1902-1915", pp. 161-206.

50 T. D. Regehr, "Elite Relationships, Partnership Arrangements, and Nepotism at Blakes, a Toronto Law Firm, 1858-1942", pp. 207-47.

51 Curtis Cole, "A Family Firm in Transition: Osler, Hoskin and Harcourt in the 1950s and 1960s", pp. 357-393.

strongest. Philip Girard recounts the trials, triumphs and tribulations of a sole practitioner in 19th-century Halifax,⁵² while Gregory P. Marchildon and Barry Cahill look at a law firm at the other end of the professional hierarchy, the predecessor to what is currently Atlantic Canada's "largest and most conspicuously 'entrepreneurial' law firm" (p. 280).⁵³

Most of the essays in this volume explicitly acknowledge the barriers to entering and succeeding in the legal profession that confront women, visible minorities and even white males without elite family connections or the appropriate religious affiliation. John Fagan and Fiona Kay, "Hierarchy in Practice: The Significance of Gender in Ontario Law Firms" (pp. 530-72), presents a survey of existing literature on entry to the legal profession. Relying on their own survey data, the authors also draw a portrait of law practice today that is likely to discourage men or women who hope that a career in law will pay the bills and allow them to pursue other interests.

With billable hours a significant criterion for making partner, it is no wonder that most lawyers leave legal history to the academics. The resulting array of subjects, methods and presentist agendas (from the present author, the word "presentist" is not to be considered pejorative) may not be quite what first springs to mind when lawyers, or the general public, think about law. Indeed, much of the work reviewed here would fit readily into other categories of what is often labelled as "new" historical scholarship — urban, business, labour, women's, welfare, ethnic, aboriginal, political or regional history — to list but a few of the extant sub-fields that have occasioned such concern about the fragmentation of Canadian history and Canadian identity. Were it not for the existence of the Osgoode Society, organized to promote legal history, and the — now diminishing — aloofness of law from other academic disciplines,⁵⁴ much of the work here might have appeared in journals or essay collections organized under some other category or no category at all except Canadian history. Indeed, both the journals and the legal history might be better served if that happened. The journals would have a new source of contributors, and legal history would gain a wider audience, and a review process that would help establish its significance in a broader historiography.

It may be that legal historians, being a generally gregarious and generous lot, define themselves not by their work but by the company they keep. Many of them also define their work in similar ways — not by methodology, time period, jurisdiction or sources, but by the purpose and problematic of their enterprise. Legal history exposes the contingent nature of law and legal processes and asserts that law is the product of human choice among various alternatives. Who makes those choices, how and why they are made, and who wins and loses from the consequences of the choices is thus the focus of legal history, as it is of any history that concerns itself with the creation, maintenance and distribution of power. Law, as McLaren and Foster observe, "has tended to present one face to the ambitious entrepreneur, the well-connected rancher,

52 "The Making of a Colonial Lawyer: Beamish Murdoch of Halifax, 1822-1842", pp. 57-99.

53 "Corporate Entrepreneurship in Atlantic Canada: The Stewart Law Firm, 1915-1955", pp. 280-319.

54 See H. W. Arthurs et al., *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (1983), for a bleak assessment of the place of legal academics in the scholarly community.

and the Anglican bishop; and quite another to the wage-dependent labourer, the Indian hunter, and the religious zealot (be he dissident priest or Doukhobor separatist)".⁵⁵ Legal history reveals the many faces of law and the many faces of those who resist its coercive force. It seems unlikely, then, that practitioners of legal history "are all in search of a single national experience", the purpose that John Schultz ascribes, with more angst than accuracy, to almost everyone writing history in Canada. But legal history, in common with other "new" histories, meets Schultz's request for work to "deepen our understanding of the processes that have shaped modern Canada".⁵⁶

MARGARET McCALLUM

55 John McLaren and Hamar Foster, "Hard Choices and Sharp Edges: The Legal History of British Columbia and the Yukon" in Foster and McLaren, eds., *Essays in the History of Canadian Law, Volume VI: British Columbia and the Yukon*, p. 20.

56 John Schultz, ed., *Writing About Canada: A Handbook for Modern Canadian History* (Scarborough, 1990), p. ix.