

SURVEY OF CANADIAN LEGAL HISTORY IN THE '90S

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Cette étude des écrits récents dans la domaine de l'histoire juridique canadienne examine les articles dans les journaux, les collections de dissertations et les monographies sous cinq têtes de chapitre générales: les études biographiques, idées et idéologies, les institutions juridiques et la profession, la loi criminelle et le châtiment, et la présence autochtone.

This survey of recent writing in Canadian legal history reviews journal articles, essay collections and monographs under five general headings: Biographical Studies, Ideas and Ideologies, Legal Institutions and the Profession, Criminal Law and Punishment, and the Aboriginal Legal Presence.

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I. INTRODUCTION

The good news for Canadian legal historians is that their subject has never been more popular. Across the country, and indeed elsewhere, a very extensive readership has been identified. Large audiences regularly appear to learn of the nineteenth century trials of housemaids and their associates. This is hardly a cause for self-congratulation, however, for it must be acknowledged that the central character in this particular drama is Grace Marks. Her story does not appear in the learned journals, but rather in the novel *Alias Grace* by Margaret Atwood whose apprenticeship in the realm of Canadian legal history, although quite extensive, is unorthodox in the extreme.¹ For the sake of anyone unfamiliar with the novel, the *New York Times Book Review* blurb will suffice: "Grisly but playfully devious, spiced with spooky plot twists, this high Gothic novel is based on an actual murder (did the scullery maid *really* do it?) in 1840's Toronto."²

What has actually been appearing on the Canadian legal history shelves far removed from the best-sellers, is the subject of this survey. Though less popular and visible than *Alias Grace*, the results constitute an impressive acceleration of scholarly activity in a field whose shape has changed in several respects since the last survey in this journal.³ Some of these developments may be briefly noted at the outset. Much legal historical writing is being done outside law schools in departments of history, sociology, criminology and anthropology, in particular. Feminist approaches are more prevalent than ever, and statistical analyses are also more common. One consequence of the influences of these varied perspectives is that the predominance of 'internal' legal history has been greatly reduced. The interplay between law, on the one hand, and social, economic and political themes, on the other, is more pronounced than only a few years ago. Among the major publications are more monographs, taking their place alongside the essay collections which still generally serve to bring Canadian legal history to its readership.

This review is loosely organized under five general headings: Biographical Studies, Ideas and Ideologies, Legal Institutions and the Profession, Criminal Law and Punishment, and the Aboriginal Legal Presence. Any aspirations I might once have entertained towards comprehensiveness were overwhelmed long ago by the richness and scope of current scholarly activity.

II. BIOGRAPHICAL STUDIES

As demonstrated in several major biographies and a number of other studies of lawyers, judges, and administrators who participated in some way in the evolution of Canadian legal traditions, individual careers continue to provide a useful perspective on law and legal developments.

William Johnstone Ritchie, ultimately Chief Justice of the Supreme Court of Canada, is the subject of a full-length biography by Gordon Bale.⁴ Ritchie, in his

¹ M. Atwood, *Alias Grace* (Toronto: McClelland & Stewart, 1996).

² "And Bear in Mind" *The New York Times Book Review* (5 January 1997) 26.

³ M.H. Ogilvie, "Recent Developments in Canadian Law: Legal History" (1987) 19 *Ottawa L. Rev.* 225.

⁴ G. Bale, *Chief Justice William Johnstone Ritchie* (Ottawa: Carleton University Press 1991) 41.

biographer's view, "repeatedly, courageously, grounded personal and political choices in moral and legal principles." Bale, for his part, carefully situates Ritchie's career and influence in the context of unfolding nineteenth century developments such as the struggle for responsible government and the evolution of Canadian judicial institutions. The emergence in Canada of judicial review is the centrepiece of the narrative and arguably of Ritchie's career on the New Brunswick bench. Bale pulls together the limited fragments of contemporary commentary on the relationship of courts to legislatures as a backdrop to Ritchie's decision in *Chandler*⁵ which he describes as the first time any Canadian superior court enunciated its responsibility for ensuring legislative adherence to the constitutional distribution of power.⁶ Bale's evaluation of his subject's role is a balanced and careful one, acknowledging the limitations alongside the accomplishments of an individual he sums up as a "pragmatic incrementalist" in politics and in law.⁷

Patrick Boyer tells the story of James Chalmers McRuer's emergence from a rural Ontario background to an influential position in the provincial legal hierarchy.⁸ Following military service and a struggle with tuberculosis in 1920, McRuer succeeded in obtaining an appointment from W.E. Raney as an assistant Crown Attorney. Most of his responsibilities revolved around prosecutions under the *Ontario Temperance Act*, and he produced a guide on the legislation for the benefit of enforcement officials.⁹ Stock fraud prosecutions then absorbed his energies leading him eventually to recommend legislative reform to facilitate search and seizure of corporate records. Legislation embodying some of McRuer's suggestions was passed in 1923, but not proclaimed. Subsequent chapters of the book discuss McRuer's involvement in the reform of penitentiaries, the Gouzenko proceedings, judicial decisions in a variety of fields, the inquiry into civil rights in Ontario and the Ontario Law Reform Commission.

Boyer is generous, perhaps overly so, in crediting his subject with influence on the law of Ontario. If some of his decisions have become landmarks along the pathway towards environmental protection or the recognition of native rights, for example, he was not alone on the path and he was certainly not leading the way. Again, in connection with administrative law reform and civil liberties, his important contribution is that of a prominent and respected spokesperson for broader currents of development rather than the solitary champion he sometimes appears in *A Passion for Justice*.

Bad Judgment,¹⁰ William Kaplan's study of Leo Landreville's encounter with government and the legal establishment, is not the story of a man who rose to the summit of the profession, enriching it through the force of intelligence or determination to advance the general welfare of fellow citizens. Landreville, to put the matter in the most generous light, was an indifferent student of the law whose most important legal battle was waged on his own behalf. On the basis of a regionally-successful legal career, prominence as a Sudbury politician, partisan associations and a Franco-Ontarian

⁵ *R. v. Chandler* (1869), 12 N.B.R. 556.

⁶ *Ibid.* at 129.

⁷ *Ibid.* at 293.

⁸ J.P. Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: The Osgoode Society, 1994).

⁹ *Ibid.* at 59.

¹⁰ W. Kaplan, *Bad Judgment: The Case of Mr Justice Leo A. Landreville* (Toronto: University of Toronto Press, 1996)

vacancy on the bench, Landreville was appointed in 1956 to the Supreme Court of Ontario where he served eleven years as "an all-round good judge who quickly grasped the facts".¹¹ Prior to his appointment, however, he had acquired and profited from shares in a venture known as Northern Ontario Natural Gas Limited through a process which, if not unlawful, was highly questionable. The transaction gave rise to a series of investigations and inquiries, one conducted by Mr Justice Ivan Rand, and led eventually to an impeachment resolution which compelled Mr Justice Landreville, citing impaired health as a consequence of the prolonged proceedings against him, to resign in June 1967.

Landreville believed for the rest of his life that he had done nothing wrong. He struggled for years after the resignation to vindicate his reputation, to obtain the pension to which he believed himself entitled and to demonstrate that he had been poorly treated by his persecutors. Kaplan's narrative does not rehabilitate Landreville but it effectively establishes deficiencies in the various inquiries and confirms some of the procedural shortcomings in the decision-making processes which so greatly affected his reputation and circumstances. After years of litigation, Landreville accepted a settlement payment of a quarter of a million dollars in 1981. "In the end," Kaplan observes, "Landreville got some money, but he never restored his good name. All that he established was that he had been treated unfairly."¹² The experience, as Kaplan's account makes clear, involved important questions of general interest.

The Landreville litigation, conducted by a team under the direction of Gordon Henderson and closely supervised by the principal protagonist, may be due for an upgrade in status. It was underway at precisely the time that *Nicholson*¹³ was working its way through the system to signal the official launch of the fairness revolution in Canadian administrative law. It is noteworthy that by the time *Nicholson* was decided the Landreville litigation team had already taken on preliminary inquiries, cabinet decision-making and a number of other skirmishes along the fairness frontier. And, as Martin Friedland noted in a report for the Canadian Judicial Council, "[t]he Landreville case in 1966 was as close as Canada has come to removing a superior court judge."¹⁴ In the aftermath of the book's publication, as the Judicial Council of Quebec embarked on an investigation of Judge Richard Therrien based on his pre-appointment conviction for harbouring members of the Front de Liberation du Quebec who abducted and murdered Pierre Laporte, several of the judicial independence issues raised in Kaplan's account of Landreville's 'bad judgment' appeared remarkably timely.¹⁵

Several biographical essays record aspects of practitioners' lives, with David Ricardo Williams' *Just Lawyers* constituting a fair proportion of the list.¹⁶ As his subjects, Williams sought out lawyers thought to be "distinguished above all others" and his reflection on the challenges of selection should interest other researchers. Eugene Lafleur, W.N. Tilley, Aimé Geoffrion, Isaac Pitblado, J. W. de B. Farris, F. M. Covert

¹¹ *Ibid.* at 41.

¹² *Ibid.* at 197.

¹³ *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979], 1 S.C.R. 311, D.L.R. (3d) 671.

¹⁴ M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, May 1995).

¹⁵ Therrien was pardoned in 1987.

¹⁶ D. R. Williams, *Just Lawyers: Seven Portraits* (Toronto: The Osgoode Society, 1995)

and Gordon Henderson survived the final cuts. Litigators won out over lawyers whose careers were less visible, and generalists won out over specialists or those who are sometimes said to be technicians. Competitive masters of verbal combat take centre stage, whatever their particular style or motivation. Of Frank Covert, Williams remarks: "In all his pursuits he was driven by a fear of failure. He had to achieve mastery over every problem presented to him, he had to know everything there was to be known about it, he had to be in control, and, accordingly, he went to extraordinary lengths to prepare himself so that he would never be caught out; he had to be right and almost invariably was."¹⁷ In contrast with the laudatory conclusions almost inevitably embodied in Williams' approach to selection, Thomas Stinson concluded his study of Roland Ritchie, a member of the Supreme Court of Canada for a quarter of a century from 1959 to 1984, a few notches down the enthusiasm scale: "He was a political appointment and a black letter judge in an era when neither of those things was unusual. He was only unusual in his longevity."¹⁸

A number of additional studies of the careers of other Supreme Court judges have also been recently published. Some are in the nature of remembrances or homages, although more critical and analytical essays are included among commentaries on Justices Rand, Kerwin, Martland, and Beetz.¹⁹ Although retirement from the Supreme Court of Canada hardly brought Bertha Wilson's career to an end, several commemorative reviews of her legal accomplishments have appeared.²⁰

In addition to the legal entries in volumes XII and XIII of the *Dictionary of Canadian Biography*,²¹ the consolidation and republication of 70 earlier contributions made legal biographies accessible in a new way. Edited by Robert L. Fraser who wrote or co-authored several of the essays, *Provincial Justice: Upper Canadian Legal Portraits* represents more than the sum of its parts.²² As Ramsay Cook remarks in the general introduction, "the context of family, society, politics, profession and place turns biography into the history of society.... Taken together the biographies also reveal an evolving legal system, and its workings, in these formative years of Canadian legal history."²³

The subjects of the essays were members of the judiciary and the legal

¹⁷ *Ibid.* at 201.

¹⁸ T. Stinson, "Mr Justice Roland Ritchie: A Biography" (1994) 17 Dalhousie L.J. 509 at 532.

¹⁹ R.P.H. Balcome, E. J. McBride and D. A. Russell, *Supreme Court of Canada Decision-Making: The Benchmarks of Rand, Kerwin and Martland* (Toronto: Carswell, 1990); J. Betz, *Melanges* (Montreal: Themis, 1995).

²⁰ The Right Honourable Brian Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1; C. Cole, "A Family Firm in Transition: Osler, Hoskin & Harcourt in the 1950's and 1960's" in C. Wilton ed., *Essays in the History of Canadian Law*, vol. 7, *Inside the Law: Canadian Law Firms in Historical Perspective*, (Toronto: The Osgoode Society, 1990) 357 at 366-370 [hereinafter *Inside the Law*]. For a more critical analysis of Justice Wilson's approach as essentially anti-democratic, see R. E. Hawkins and R. Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill L.J. 1.

²¹ These two volumes contain well over two hundred biographical entries on legal professionals including judges, lawyers, magistrates, justices of the peace and notaries.

²² R. L. Fraser, ed., *Provincial Justice: Upper Canadian Legal Portraits* (Toronto: The Osgoode Society, 1992)

²³ *Ibid.* at xiii.

profession, or individuals accused of various notorious crimes or otherwise involved in *cause célèbres*. Thus, in addition to extended essays on Robert Baldwin, William Dummer Powell, John Beverley Robinson and William Warren Baldwin, among the most familiar figures, shorter items in the collection illuminate Upper Canadian reaction to such questions as slavery, infanticide, and the status of aboriginal customs. The trial of Shawanakiskie in 1822, for example, raised the issue of aboriginal immunity from criminal prosecution for the killing of an Indian woman on the grounds that the accused's act was carried out to avenge the murder of a parent, a custom sanctioned by native law. After diligent inquiry no treaty could be located to support the contention that an Indian was not amenable to the law for offences against another Indian.²⁴ This particular incident, as I note later in connection with the aboriginal presence in Canadian legal history, has provoked renewed interest.

Other legal professionals, if not the subject of dedicated biographies, cross the stage with sufficient frequency that some notice is appropriate here. Zebulon Lash, still crying out for a comprehensive study, turned up in the recent literature in connection with his early career at the Department of Justice, his important partnership with Edward Blake and his role in the 1911 version of the Canada-U.S. free trade debate. Lash, in Carol Wilton's words, "effectively spearheaded the resistance of the Toronto business community to reciprocity, exercising an important if short-lived influence at a decisive moment in Canadian history."²⁵

John Langmuir is another vital, but still not fully appreciated participant in the evolution of Canadian law and legal institutions. He was, in Hodgetts' words, "a dedicated administrator and ... a policy innovator with firm convictions of where he wanted to go and the boundless energy to pursue his goals and induce the powers that be to accept them."²⁶ He is even credited with the status of "the true founder of Ontario's social welfare system" in an account which attributes the essential impulses of institutional change to a small bureaucracy which assumed "a pro-active stance by educating politicians and their constituents to the need for supporting policy innovations inspired by the officials' reading of the environment in which they operate and which they wish to alter."²⁷ Peter Oliver, in a somewhat more critical discussion of Langmuir recognizes the force of his influence, but forthrightly identifies the shortcomings.²⁸

The career of Clara Brett Martin, celebrated as Canada's first woman lawyer, continues to attract attention. Some observations make clear just how significant her accomplishment was: "In law the struggle was of a different order since not only the worksites but the entire culture of work left few niches where women's claims could be lodged except for the blunt and radical one of equal rights, something that directly

²⁴ Fraser, *supra* note 22 at 344.

²⁵ C. Wilton, ed., *Essays in the History of Canadian Law*, vol. 4, *Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: University of Toronto Press, 1990) at 26 [hereinafter *Beyond the Law*].

²⁶ J.E. Hodgetts, *From Arm's Length to Hands-On: The Formative Years of Ontario's Public*, (Toronto: University of Toronto Press, 1995) at 36.

²⁷ *Ibid.*

²⁸ T. Oliver, "To Govern by Kindness: The First Two Decades of the Mercer Reformatory for Women" in J. Phillips, T. Loo eds. *Essays in the History of Canadian Law Vol 5 Crime and Criminal Justice* (Toronto: The Osgode Society, 1994) [hereinafter, *Crime and Criminal Justice*] p. 516 at 522-7 and 566.

challenged the doctrine of separate spheres itself."²⁹ In contrast, however, her claim to heroine status was called into question in a series of critical essays oriented around charges of anti-Semitism.³⁰

Several biographies of individuals whose ultimate stature will be independent of their careers in law, if any, are notable nonetheless. In *Rogue Tory*, Denis Smith describes a number of John Diefenbaker's murder trials in a series of accounts drawn largely from contemporary newspaper reports.³¹ While the account shows Diefenbaker's tenacity and capacity for legal creativity, there is little in this exemplary political biography to help us make the connections, if any, between Diefenbaker's legal and political careers.

Roger Graham's biography of Leslie Frost, *Leslie Frost: Old Man Ontario* presents the Premier's early career in legal practice in Lindsay as a prelude to politics, but in so doing contributes something to a trend.³² Quite a few of the case studies noted later in this essay in connection with criminal law and aboriginal legal issues also explore Canadian legal history from the non-metropolitan perspective: thus it is worthwhile to recall that the economic dominance of a small number of large urban centres was much less pronounced in an earlier era.

Leslie Frost's Lindsay was not Toronto, but well into the twentieth century it was not without varied economic activity. As Graham explains, some 30 locally owned manufacturing industries existed alongside lumber milling, giving employment to nearly 500 people. Moreover, with eight lines of CP and CN track radiating out from the town, Lindsay was a railway hub which saw nearly 30 passenger trains and even more freight trains on a daily basis. The surrounding agricultural area depended upon Lindsay for marketing its products and for supplying its needs. In addition to branch offices for five chartered banks Lindsay boasted its own Victoria Trust and Savings Company, an organization with assets in the early 1920's of four million dollars.³³ Interestingly, Frost's experience in a series of murder trials, led him to reflect on the impossibility of operating under the *M'Naghten* rules although the issue does not seem to have returned to his agenda during the period of his political authority.³⁴

In contrast with the Diefenbaker and Frost biographies, Louis Knafla is much

²⁹ R. D. Gidney & P. J. Millar, *Professional Gentlemen: The Professions in Nineteenth Century Ontario* (Toronto: University of Toronto Press, 1994) at 325.

³⁰ C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: University of Toronto Press, 1991) at 293; L.-R. Betcherman, "Clara Brett Martin's Anti-Semitism" (1992) 5 C. J. W. L. 280; C. Backhouse, "Clara Brett Martin: Canadian Heroine or Not?" (1992) 5 C.J.W.L., 263-79; B. Cossman & M. Kline, "And if not now, when?: Feminism and Anti-Semitism Beyond Clara Brett Martin" (1992) 5 C. J. W. L. 298; L. Pearlman, "Through Jewish Lesbian Eyes: Rethinking Clara Brett Martin" (1992) 5 C. J. W. L. 317; C. Backhouse, "Response to Cossman, Kline, and Perlman" (1992) 5 C. J. W. L. ; Brenda Cossman and Marlee Kline, "And If Not Now, When?: Feminism and Anti-Semitism Beyond Clara Brett Martin" (1992) 5 Canadian Journal of Women and the Law, 298; Lynne Pearlman" (1992) 5 C.J. W. L. 351; L.-R. Betcherman, "Response to Cossman, Kline and Pearlman" (1992) 5 C. J. W. L. 355.

³¹ D. Smith, *Rogue Tory: The Life and Legend of John G. Diefenbaker* (Toronto: Macfarlane, Walter & Ross, 1995).

³² R. Graham, *Old Man Ontario: Leslie M. Frost* (Toronto: University of Toronto Press, 1990).

³³ *Ibid.* at 29.

³⁴ *Ibid.* at 39.

more forthcoming on the significance of interrelationships between the professional concerns and political inclinations of his subject, R. B. Bennett.³⁵ Knafla remarks, for example, on Bennett's effort to incorporate local Calgary businesses into the client base of the Loughheed firm he had joined after moving west from the Maritimes. These businesses:

would not only provide the firm with additional revenue, but would also support his economic philosophy of developing the markets and wealth of the region. They would become, Bennett envisioned, the driving force in Confederation and fulfil his own personal political ambition to play a major role in the further development of the British Empire.³⁶

Exploring the relationship from the other perspective, Knafla speculates that "[t]he nature of Bennett's clients' businesses predetermined many of the claims and defences that ... came to dominate his work as a litigation lawyer, and perhaps helped to reinforce his political ideology."³⁷ His attacks on government regulation constitute a prime example.

Chief: The Fearless Vision of Billy Diamond is at first impression an unlikely candidate for consideration in a review of materials on Canadian legal history.³⁸ Roy MacGregor's biography of the Cree leader from northern Quebec covers a lot of territory that is quite unrelated to the legal universe. Nonetheless, with the status of aboriginal people in the Canadian community as the continuing theme of Billy Diamond's creative leadership through litigation, negotiation and economic development strategies, this might well be treated as a central text in the study of the rule of law and legal pluralism in Canada. And with F.R. Scott, the distinguished constitutionalist, serving secretly as the legal strategist of the Cree challenge to Premier Robert Bourassa's vision for hydro-electric power development in the James Bay watershed, this well-told story is not without mystery and revelation.³⁹

III. IDEAS AND IDEOLOGIES

A. Reception

Reception, an area of legal historical research that is often thought to have passed its prime, has become the focus of some thoughtful re-interpretations. The consequence of these analyses is an image of reception emphasizing the informality and variability of a process of transfer and adoption that was far more tentative and uncertain than we have customarily assumed even though the practical implications remain very much

³⁵ L. A. Knafla, "Richard 'Bonfire' Bennett: The Legal Practice of a Prairie Corporate Lawyer, 1898 to 1913" in *Beyond the Law*, *supra* note 25 at 321.

³⁶ *Ibid.* at 28.

³⁷ *Ibid.* at 338.

³⁸ R. MacGregor, *Chief: The Fearless Vision of Billy Diamond* (Toronto: Penguin Books, 1990).

³⁹ *Kanatewat et al v. The James Bay Development Corporation.*, [1975] 1 S. C. R. 48, 41 D. L. R. (3d) 1.

alive.⁴⁰

While the work of Jacques Vanderlinden has helped to reconfigure the theoretical perspective,⁴¹ Barry Cahill has documented an example which shows that constitutional authorities on the question of reception in Nova Scotia may have effectively reversed the implications of historical experience.⁴² With detailed reference to a series of early cases on reception, he argues that 1758, the date when the legislature first met, was not the effective date which terminated a period of automatic reception of English statute law. Rather, he contends that 1758 "was really a *terminus post quem*, a date *after which* no existing Acts of Parliament were deemed to be in force unless and until they had been enacted by the provincial legislature."⁴³ Regardless of their date of passage, English statutes were subject to retrospective re-enactment by the Nova Scotia legislature.

Many of the studies of reception and transformation have the effect of supplementing the study of external sources of Canadian law with consideration of domestic influences. Issues surrounding the status of aboriginal customary practices provide one example, as do studies of the mutual influence and interaction of the civil and common law traditions.

Several papers make notable contributions to our understanding of this latter theme. Brian Young describes the transition of Georges Etienne Cartier's legal career from a general practice in Montreal at the time of his admission to the bar in 1835 to that of a lawyer in a national legal system which Cartier himself had done much to bring about.⁴⁴ Cartier's career, Young contends "reflects one side of a complex social dialectic played out in an environment that mixed the Custom of Paris and seigneurialism with international capital, industrial production, and elements of common law."⁴⁵ Features of the transition included various measures to rationalize and bring uniformity to highly localized institutions and civil law practice, including a *Judicature Act* in 1857 and other measures relating to land registry, juries, the enforcement of debts, financial institutions and bankruptcy matters. Young's assessment is that Cartier, "while insisting on the uniformization of the legal system within the province used the reforms to insist on Quebec's particularity in civil law."⁴⁶

In a companion piece in the same collection,⁴⁷ Blaine Baker explores the role of the anglophone Torrance-Morris firm which was also actively engaged in the mid-nineteenth century in the process of facilitating Montreal's commercial expansion. With a combination of Scottish legal education, knowledge of civil law and some period of apprenticeship with John A. Macdonald in Kingston, members of the firm provided to their business clients a variety of devices and techniques intended to minimize possible

⁴⁰ Law Reform Commission of Saskatchewan, *The Status of English Statute Law in Saskatchewan* (Saskatoon, 1990).

⁴¹ J. Vanderlinden, "La réception des systèmes juridiques européens au Canada" (1996) 1 *Revue de la common law* 1.

⁴² B. Cahill, "'How Far English Laws are in Force Here': Nova Scotia's First Century of Reception Law Jurisprudence" (1993) 42 *U. N. B. L. J.* 113

⁴³ Cahill, 140.

⁴⁴ Brian Young, "Dimensions of a Law Practice: Brokerage and Ideology in the Career of George-Etienne Cartier" in *Beyond the Law*, *supra* note 25 at 92.

⁴⁵ *Ibid.* at 92.

⁴⁶ *Ibid.* at 106.

⁴⁷ G. Blaine Baker, "Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848-1868" in *Beyond the Law*, *supra* note 25 at 45

entanglements with French customary law or the particularities of local legislation. Many of their practices and innovations found official acceptance in the 1866 *Civil Code* of Lower Canada, a text whose preparation they had influenced through research support and consultations with the codifiers. At the conclusion of *Legacies of Fear*, Murray Greenwood illustrates a corresponding process of non-adoption as the creators of the *Civil Code* of 1866 are seen reaching back to an era preceding the French Revolution for provisions more in keeping with the values of elements of the church and the Quebec elite than Napoleonic and revolutionary innovations would have been.⁴⁸

In a paper on "The National Law Programme at McGill: Origins, Establishment, Prospects" Rod Macdonald reviews and analyzes defining characteristics of the National Programme. It represented, he argues, "a view of legal education as more than a strictly professional endeavour tied to the study of local legislation and judicial decisions." Thus, the core subjects of the curriculum included courses that might today fall within the realm of legal theory: Roman law, international law, philosophy of law, legal history, legal bibliography, and principles of government. Moreover, Macdonald situates the bilingual and bijuridical character of McGill's National Programme in the context of a broader commitment:

the goal of teaching some concept of non-jurisdictional and non-temporal juridicity comprising both western legal traditions, as a model of a complete legal education; the desire through the publication of English-language scholarship, to proselytize across common law North America the virtues of the civil law tradition, and through the publication of French language scholarship, to keep the Quebec legal community informed of developments elsewhere on the continent; and the ambition to design a teaching programme which would inculcate in students a strong commitment to public service.⁴⁹

B. *Constitutionalism*

In one of a series of essays on how nineteenth century Canadian lawyers thought about federalism and the constitution, R.C.B. Risk describes a transformation which for many commentators might constitute impoverishment.⁵⁰ He notes that as late as 1896 in the *Local Prohibition Reference*, Justices Gwynne, Sedgewick and King interpreted relevant sections of the *British North America Act* "in the light of the understandings and context of Confederation, and all wrote with passion and intensity about Canada."⁵¹ Such approaches were threatened with extinction, however. A survey of constitutional texts from Dennis A. O'Sullivan through Jeremiah Travis and W.H.P. Clement to A.H.F.

⁴⁸ F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: The Osgoode Society, 1993) at 247-49

⁴⁹ R. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13 Dal 210 at 123-24.

⁵⁰ "A.H.F. Lefroy: Common Law Thought in Late Nineteenth-Century Canada" (1991) 41 U.T.L.J. 307; "Constitutional Thought in the Late Nineteenth Century" in *Glimpses of Canadian Legal History*, (Manitoba: Legal Research Institute, 1991) 205 [hereinafter *Glimpses*]; "Constitutional Thought in the Late Nineteenth Century: Making Federalism Work" (1996), 46 U.T.L.J. 427 [hereinafter, "Making Federalism Work"]; "The Puzzle of Jurisdiction" (1995) 46 South Carolina L.R. 703; "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 Manitoba LJ 496

⁵¹ *Glimpses*, *ibid.* at 207.

Lefroy leads to the conclusion that "sense of context and history virtually disappeared" as early interest in principles and institutions of government was gradually displaced by a preoccupation with doctrine on the division of powers.⁵²

Risk's underlying objectives are to explain intellectual trends and particularly their Canadian manifestations. He does so in relation to early Canadian constitutional writers by identifying certain features of their federalist thinking that differ from the US experience. In particular, the Canadian model incorporated a greater emphasis on the autonomy and equality of the federal and provincial governments and a more insistent vision of the exclusivity of their spheres of authority. However, the course of Canadian constitutional analysis is simultaneously presented as part of, and profoundly influenced by, general intellectual developments in common law thought.⁵³ Thus, the discourse of the rule of law and the claims of the provincial rights movement are seen to coincide, especially in the minds of the eminent and influential Ontario lawyer/politicians Edward Blake, Oliver Mowat and David Mills. "The language of mutually exclusive spheres of power was united with the language of coordinate legislatures in the rule of law understanding of the constitution, and it was used in the political arena as well as in the courts. It was used to express the claims of the provinces to sovereignty and autonomy..."⁵⁴

Venturing onto similar intellectual terrain, William Lahey examined a pair of nineteenth century New Brunswick decisions on the constitutionality of the *Canada Temperance Act*.⁵⁵ Lahey pays particular attention to the thinking of Andrew Fisher, contrasting his principled and purposeful approach to constitutional interpretation with the circumspect judgments of William Johnstone Ritchie which were ostensibly more closely linked to the text of the *British North America Act*. Lahey joins others who have speculated on the interrelatedness of individual and provincial rights in this era,⁵⁶ arguing for the importance of legal, as distinct from political, dimensions to the federal-provincial struggle and emphasizing similarities between Fisher and David Mills as indications of pan-Canadian rather than exclusively Ontario-based claims about provincial autonomy.

In yet another close analysis of liquor regulation, David Schneiderman considers the fundamental reasoning of the *Local Prohibition Reference* to explore the possibility that the particular idea of freedom manifested in the decision was linked to economic liberalism, and particularly the principle of productivity.⁵⁷ Schneiderman explains the chain of thought leading to a denial of the federal trade and commerce power encompassing the authority to abolish the drink trade as follows:

The regulation of trade nationally, concerns belonging to the federal government under section 91(2), should be limited to ensuring, by regulation, that property is being used productively. Limitations on the use of private property would still be

⁵² "Making Federalism Work," *supra* note 50 at 452.

⁵³ "Making Federalism Work," *supra* note 50 at 451.

⁵⁴ *Glimpses*, *supra* note 50 at 212.

⁵⁵ William Lahey, "Constitutional Adjudication, Provincial Rights and the Structure of Legal Thought in Late Nineteenth-Century New Brunswick" (1990) 39 U.N.B.L.J. 185

⁵⁶ R. C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991).

⁵⁷ D. Schneiderman, "Constitutional Interpretation in an Age of Anxiety: A Reconsideration of the Local Prohibition Case" (1996) 41 McGill L. J. 411.

available to either level of government under other heads of power, but the idea of 'prohibiting', in effect abolishing, property nationally is to be discouraged. Consequently, the federal government should be deprived of the power generally to prohibit certain trades or forms of commerce.⁵⁸

The linkage of constitutional interpretation with productivity will undoubtedly stimulate further inquiry into the scope of possible application of the hypothesis. Even within the narrow confines of the drink debate itself, such an interpretation resonates with the diversion of prohibitionist efforts away from reclaiming lost souls from their autonomous choices and towards demonstrating the economic costs associated with alcohol in the period after *Local Prohibition Reference* and continuing through World War I.

C. *The Moral Reform Impulse*

The prohibition legislation which was so prominent in relation to constitutional inquiry also represents one form of activity clustered around the ideas of moral reform and social purity.⁵⁹ The writing in this overall area is particularly wide-ranging and diverse as it incorporates theoretical, institutional and empirical studies of drink regulation, controls on prostitution, responses to immigration and social welfare, among other subjects.

In *The Age of Light, Soap and Water*, Mariana Valverde analyzes the social purity movement in English Canada between 1885 and 1925.⁶⁰ The ambitious range of her project is illustrated by an explanation of the scope of the social purity campaign and by the author's conclusions about how best to situate moral reform in the broader context of regulation. Sexual morality, she suggests, was social purity's primary focus, but the initiative "has to be understood in the context of a larger project to solve the problems of poverty, crime and vice."⁶¹ Ultimately she provocatively concludes that "moral regulation does not occupy a social space distinct from that occupied by 'the economic' or 'the social': it is a mode of regulating social and individual life generally, not pretagged moral issues."⁶² The book usefully explores connections between philanthropic organizations, influential professionals — especially in medicine, emerging state institutions and, to a significantly greater extent than much of the primarily legal writing on moral reform, links Canadian experience to British and American literature.

John McLaren describes the transformation of social and legal responses to prostitution in the years between 1850 and 1920.⁶³ "Those who had made and

⁵⁸ *Ibid* at 449-50.

⁵⁹ J.P. Couturier, "Prohibition or Regulation? The Enforcement of the Canada Temperance Act in Moncton, 1881-1896" and R. A. Campbell, "Profit was just a circumstance": The Evolution of Government Liquor Control in British Columbia, 1920-1988" in C. Warsh, ed., *Drink in Canada: Historical Essays* (McGill-Queen's University Press, 1993) 144 and 172.

⁶⁰ M. Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart, 1991).

⁶¹ *Ibid.* at 19.

⁶² *Ibid.* at 167.

⁶³ J. McLaren, "Recalculating the Wages of Sin: the Social and Legal Construction of Prostitution, 185-1920" (1995) 23 *Manitoba L. J.* 524

administered Canada's criminal law in its pioneer phase," he argues, "tended to be men who entertained a determinist view of class relations, believing that the immorality of the poor was endemic."⁶⁴ Influenced by international developments and what might be seen as orchestrated anxiety, reformist approaches emphasizing the importance of remedial initiatives, including legal strategies, eventually led to legislative intervention around the criminal law codification process. The enthusiasm of local enforcement officials for the new control mechanisms never matched that of their advocates and magistrates seemed equally disinclined to attach harsh sanctions to conviction.

McLaren links his analysis of changing attitudes to prostitution to intellectual trends generally but especially to developments in religious thinking, while he accounts for the failure of the reform initiative with reference to the limitations of reformers themselves. Most of these people, he concludes, misunderstood the sex trade and what propelled women to enter it:

[F]or the most part these analyses ignored the extent to which prostitution was associated with the privation caused by economic policies and social structures that marginalised poor women and maintained patriarchy. The inequities of the class system and their conjunction with gender discrimination were not factors in the reform calculus. Instead it tended to focus on the moral shortcomings and irresponsibility of those caught in a web of vice.⁶⁵

Another study oriented around the perspective of the police traces the ebb and flow of enforcement activity in relation to gambling, prostitution and illegal liquor in Vancouver during the early decades of the twentieth century. The dynamic within which a succession of senior police officials sought — with varying degrees of success — to operate was created by simultaneous pressure for an all out war on vice and for a policy of limited tolerance based on the contribution of the industry to the economic and social well-being of the city.⁶⁶

In an impressive monograph on Toronto's 'girl problem', Carolyn Strange presents another perspective on policing 'vice'. Her examination of various aspects of social regulation affecting young women places the processes of the formulation and enforcement of controls in the context of a wide range of social and intellectual influences extending from changing employment patterns through attitudes towards abortion and contraception.⁶⁷

⁶⁴ *Ibid.* at 526.

⁶⁵ *Ibid.* at 554. See also J. P. McLaren and J. Lowman, "Enforcing Canada's Prostitution Laws, 1892-1920: Rhetoric and Practice" in M.L. Friedland ed. *Securing Compliance: Seven Case Studies* (Toronto: University of Toronto Press, 1990) 21 at 38-54.

⁶⁶ G. Marquis "Vancouver Vice: The Police and the Negotiation of Morality, 1904-1935" in H. Foster and J. McLaren eds. *Essays in the History of Canadian Law Vol. 6 British Columbia and the Yukon* (Toronto: The Osgoode Society, 1995) at 242 [hereinafter *British Columbia and the Yukon*].

⁶⁷ C. Strange, *Toronto's Girl Problem: "The Perils and Pleasures of the City, 1880-1930"* (Toronto: University of Toronto Press, 1995).

IV. LEGAL INSTITUTIONS AND THE PROFESSION

A. Courts

Several major works on the history of the Supreme Court of Canada provide alternative approaches to territory surveyed from an institutional perspective a few years ago by James G. Snell and Frederick Vaughan.⁶⁸ In *The Captive Court: A Study of the Supreme Court of Canada*, Ian Bushnell discusses "the intellectual life of the law as it revolved around the Supreme Court of Canada, through a critical analysis of cases and other writings, coupled with a study of the judges who sat on the court, and the issue of the abolition of the appeal to the Privy Council."⁶⁹ Following an introductory review of the circumstances surrounding the creation of the Supreme Court, Bushnell describes the judicial function as a prelude to a more or less chronological presentation of individual decisions supported by background commentary on their social context and judicial method as illustrated by the approaches of various members of the bench. In so doing, Bushnell resurrects and draws attention to a number of once-prominent decisions that have fallen by the wayside through the intergenerational filtering process of legal education. This is an impressive accomplishment, but legal historians will be inclined to view the dependence on appellate cases to provide their own context as something of a limitation.

Katherine Swinton has focussed on a narrower time frame and a more clearly-defined set of cases for her study of *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*.⁷⁰ This more selective approach to the Supreme Court permits an extended deliberation on themes such as the role of economics in the context of constitutional decision-making and on the perspectives of individual judges. Thus, Laskin, Beetz and Dickson judgments are considered in some detail as representative of a centralist vision, classical federalism and interest balancing respectively.⁷¹ Legal historians should find Swinton's discussion of methodological and conceptual issues surrounding the use of history in constitutional interpretation of particular interest.⁷²

Dale Gibson's very readable account of the development of legal and judicial institutions at the federal level includes a brief discussion of the Department of Justice from its statutory creation in 1868 through expansion from five lawyers in 1872 to 800 lawyers in 1990, and provides an account of the incremental disentanglement of the office of the Solicitor General.⁷³

⁶⁸ J. G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985).

⁶⁹ I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at xiii.

⁷⁰ K. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).

⁷¹ *Ibid.* c. 8-10

⁷² *Ibid.* c. 4.

⁷³ D. Gibson, "Development of Federal Legal and Judicial Institutions in Canada" (1995) 23 *Manitoba L. J.* 450 at 455-58. See also D. Brown, "Ottawa and the Department of Justice in 1892" in D. Brown ed., *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995) at 3. See also J. Swainger, "Governing the Law: The Canadian Department of Justice in the Early Confederation Era" (Ph.D. thesis, University of Western Ontario, 1992).

At the provincial level, numerous court histories continue to appear. For example, several Nova Scotia courts came under scrutiny in a series of essays. One paper, hardly flattering to the Court of Chancery, nonetheless explores its operations, providing, among other insights, a statistical summary of cases chronologically and by subject matter.⁷⁴ Another paper describes the work of the Nova Scotia Court of Vice-Admiralty from its origins until its jurisdiction was assumed in 1891 by the Exchequer Court. The Admiralty Court contributed to a more reliable application of Imperial trade laws among Britain's North American colonies, and simultaneously offered specialized maritime law remedies for seamen, those involved in salvage and in the aftermath of collisions at sea.⁷⁵ A third essay does not fall into the development of the institution genre at all. It is rather a critical analysis of the re-legitimation of the Nova Scotia Supreme Court following responsible government in 1848. The court, discredited by patronage, sought rehabilitation through professionalization, institutional history projects and ceremonial involvements with a decidedly Imperial flavour.⁷⁶ One study of institutional transformation echoing certain themes from the moral and social reform literature is Dorothy Chunn's examination of Ontario family courts.⁷⁷ In a manner that is reminiscent of earlier literature on the evolution of the juvenile justice system, she identifies a shift in the conceptual framework:

Thus, a mode of regulating the deviant and dependent grounded in legal concepts of liberty, equality, responsibility, and retribution was transformed into a hybrid one as non-legal categories of determinism, inequality, non-culpability and rehabilitation were incorporated within existing welfare structures.⁷⁸

Paralleling the conceptual transformation, Chunn sees an increase in positive intervention on the part of a range of officials extending far beyond the realm of traditional enforcement agencies and the judiciary. Like Valverde's work, Chunn's analysis suggests connections between initiatives in the public and private realms as church and family-based functions are assumed by state agencies and legal developments appear as aspects of a wider range of professional intervention in social welfare matters.

Although James Struthers' study on the evolution of Ontario's social welfare regime is only intermittently concerned with courts and legal matters, it is highly relevant to the legal historian's interest in social reform and institutional change. In *The Limits of Affluence*, Struthers examines the evolution of Ontario's welfare arrangements in the half-century between 1920 and 1970. The volume seeks to describe and, more ambitiously, to explain the design and implementation of the old age pension regime,

⁷⁴ J. Cruickshank, "The Chancery Court of Nova Scotia: Jurisdiction and Procedure, 1751-1855" (1992) 1 Dal. J. Leg. Stud. 27.

⁷⁵ A.J. Stone, "The Admiralty Court in Colonial Nova Scotia" (1994) 17 Dalhousie L. J. 363.

⁷⁶ P. Girard, "The Supreme Court of Nova Scotia, Responsible Government, and the Quest for Legitimacy, 1850-1920" (1994) 17 Dalhousie L. J. 430. See also B. Cahill, "The Origin and Evolution of the Attorney and Solicitor in the Legal Profession of Nova Scotia" (1991) 14 Dalhousie L. J. 277.

⁷⁷ D. Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992).

⁷⁸ *Ibid.* at 7.

mothers' allowances and general welfare assistance programs with reference to a series of interpretive models and theories including Marxist, state-centred and gender-based approaches. The author is judicious in assessing the particular strengths and limitations of each of these and persuasive in his ultimate assertion that "nor will any single theory suffice for unravelling the complexity of what has come to be known as the modern welfare state."⁷⁹

Struthers' work, like that of Chunn, tends to focus on the emergence and growth of the institutional framework with somewhat less emphasis on operational questions linking the intentions of institutional builders with the behaviour of those whose lives became entangled in the official model. Accordingly, a major work on divorce in Canada appeals for its deliberate attempt to incorporate the experience of people who were often more inclined to circumvent, than to celebrate, modern governmental structures.

James G. Snell provides an analysis of divorce in Canada in the first four decades of the twentieth century, showing how the family, the local community and the individuals involved exerted varying degrees of influence over the state-sanctioned legal process.⁸⁰ As a consequence, marriage, divorce and remarriage were "matters of negotiation and compromise and accommodation"⁸¹ or, as the author explains: "The customary rules of marriage and divorce coexisted with the formal divorce regime and interacted with the needs and position of individual couples and spouses to produced a strikingly complex divorce environment."⁸² When required there was also resort to foreign divorce proceedings, particularly American.⁸³

B. *Administrative Tribunals and Regulation*

The significance of railway law and regulation in the general evolution of the Canadian legal system has begun to emerge more clearly in studies of the origins of regulation,⁸⁴ the development of the Board of Railway Commissioners⁸⁵ and early judicial reaction to this prominent federal tribunal.⁸⁶ Several individual practitioners whose clients included railways or those concerned with the operation of these enterprises also received attention. Paul Romney links the enthusiasm of John Wellington Gwynne for Canadian railway development with his anti-Americanism and nationalist feelings remarking on Gwynne's tendency to identify railways "not just with progress but with what one might call *national progress* and self-sufficiency."⁸⁷

⁷⁹ J. Struthers, *The Limits of Affluence: Welfare in Ontario, 1920-1970* (Toronto: University of Toronto Press, 1992) at 17.

⁸⁰ J. G. Snell, *In the Shadow of the Law: Divorce in Canada, 1900-1939* (Toronto: University of Toronto Press, 1991).

⁸¹ *Ibid.* at 6.

⁸² *Ibid.* at 191.

⁸³ *Ibid.* at 83.

⁸⁴ P. Baskerville, "Transportation, Social Change and State Formation, Upper Canada, 1841-1864" in A. Greer and I. Radforth, ed.'s, *Colonial Leviathan: State Formation in Mid-Nineteenth Century Canada* (Toronto: University of Toronto Press, 1992) 230.

⁸⁵ J. Benidickson, "The Canadian Board of Railway Commissioners: Regulation, Policy and Legal Process at the Turn-of-the-Century" (1991) 36 McGill L.J. 1222.

⁸⁶ B.J. Hibbitts "A Change of Mind: the Supreme Court and the Board of Railway Commissioners, 1903-1929" (1991) 41 U.T.L.J. 60.

⁸⁷ P. Romney, "From Railway Construction to Constitutional Construction: John Wellington Gwynne's National Dream" in *Glimpses supra* note 50 at 104.

Gwynne's passion for railways emerges as consistent with, if not causally connected to, a federalist disposition which made him an attractive Supreme Court appointee in the mind of John A. Macdonald. But the career of another nineteenth century railway lawyer, Amelius Irving, who succeeded Gwynne as solicitor for the Great Western Railway, cautions us about the difference between consistency and coincidence, for while Gwynne's expansionist railway promoter's approach to constitutional interpretation may have been intended to support Macdonald's federalist aspirations, Irving left the GTR to become a close associate of Oliver Mowat in the latter's campaign for the recognition of provincial rights.⁸⁸

Isaac Pitblado, the Winnipeg lawyer whose career is chronicled by David Ricardo Williams, was actively involved in railway matters for much of his lengthy career. Pitblado successfully represented western interests including the City of Winnipeg, its Board of Trade and the Winnipeg Grain Exchange, as well as grain elevator companies in technical and sometimes extended conflicts over rates and service charges.⁸⁹

Rande Kostal's work on English railways and the law is surely among the most impressive accomplishments and merits mention here even if it is only tangentially Canadian.⁹⁰ In an elaborate analysis of the interaction of the common law, legal practice and the expansion of the railway industry in England, Kostal argues that each affected the evolution of the other. Any number of legal and quasi-legal tribunals became important battlegrounds for railways and their promoters, while the industry, in turn, generated change and innovation within long-established legal institutions:

Steam railway promotion, incorporation and operation led to the creation of new legal practices, products and principles. Only one development in the nineteenth-century world of business and technology, the rise and consolidation of the steam railways, was large, wealthy, invasive and pervasive enough, not only to engage the English legal establishment, but to reshape it.⁹¹

Recent legal studies on the history of economic regulation in Canada deal with a pollution compensation scheme introduced shortly after the First World War in connection with damage to crops from nickel smelting operations⁹² as well as with competition and business combines legislation.⁹³ Case studies of salt production⁹⁴ and the struggle of margarine for legitimacy and market share⁹⁵ help to situate some of the

⁸⁸ J. Benidickson, "Aemilius Irving: Solicitor to the Great Western Railway, 1855-1872" in *Inside the Law*, *supra* note 20 at 100.

⁸⁹ D. R. Williams, *Just Lawyers: Seven Portraits*, (Toronto: Osgoode Society, 1995) 124. In fact, quite a number of Williams subjects had experience in proceedings of the BRC.

⁹⁰ R. W. Kostal, *Law and English Railway Capitalism, 1825-1875* (Oxford: Clarendon Press, 1994).

⁹¹ *Ibid.* at 3.

⁹² D.N. Dewees and M. Halewood, "The Efficiency of the Common Law: Sulphur Dioxide Emissions in Sudbury" (1992) 42 U.T.L.J. 1.

⁹³ J. Benidickson, "The Combines Problem in Canadian Legal Thought, 1867-1920" (1993) 43 U.T.L.J. 799.

⁹⁴ W.E.B. Code, "The Salt Merchants of Goderich in Ontario's Court of Chancery: *Ontario Salt Co. v. Merchant Salt Co.* and the Judicial Enforcement of Combinations." (1993) 38 McGill L.J. 517.

⁹⁵ W. H. Heick, *A Propensity to Protect: Butter, Margarine and the Rise of Urban Culture in Canada* (Waterloo: Wilfrid Laurier University Press, 1991).

legal and legislative manoeuvring in social and economic context. Corporate finance and securities regulation appear with increasing frequency in the emerging literature on legal practice, even if these complex subjects continue to deter inquiry.⁹⁶ Studies of the legal services required by the Montreal Stock Exchange during an important period of expansion⁹⁷ and by Max Aitken in connection with the promotion of several major enterprises around the turn-of-the-century⁹⁸ offer insights into the contribution of lawyers to business development and into their influence on public regulation of commercial activity. Hodgetts' very readable account of the development of the public service in Ontario from Confederation to 1940 contains accessible short descriptions of the origins of such agencies as the Ontario Railway and Municipal Board and the Workmen's Compensation Board.⁹⁹

C. *Legal Practice, the Profession and Education*

Carol Wilton's introductions to a pair of Osgoode Society volumes synthesize a great deal of writing on the evolution of legal practice and the profession.¹⁰⁰ These essays will provide reference points for further consideration of a variety of intriguing issues. *Beyond the Law: Lawyers and Business in Canada*, opens up aspects of the history of legal entrepreneurship in the Canadian setting. Wilton identifies a number of significant factors contributing to the involvement of nineteenth century Canadian lawyers in activities well beyond the scope of conventional legal practice, and contrasts their situation with British and European patterns.¹⁰¹ Although generally cautious about the limitations of the preliminary findings contained in the collection, she emphasizes that "The practice of law ... was not seen as a lifetime sentence at the hard labour of contracts and property transactions." It was instead "a passport to a world that could include business, finance, and politics, among other options."¹⁰² Even more provocatively, in light of writings that have emphasized a conceptual separation of the intellectual spheres of law and politics, she remarks that "Law and business were not distinct activities, but formed part of a seamless web that also included politics."¹⁰³

The introduction to the second collection, *Inside the Law: Canadian Law Firms in Historical Perspective*, provides a wide-ranging review of the evolution of legal practice set in the context of changing economic conditions. Indeed, Wilton asserts that "Law firms in Canada have altered in size and function largely because of changes in the

⁹⁶ L. Knafla, "Goodall and Cairns: Commercial, Corporate, and Energy Law in Alberta, 1920-1942" in *Inside the Law* *supra* note 20, 320 at 342-45; C. Ian Kyer "The Transformation of an Establishment Firm: From Beatty Blackstock to Faskens," in *Inside the Law* *supra* note 20 161 at 179-83, 194.

⁹⁷ D. B. Hamill, "The Campbell, Meredith Firm of Montreal: A Case-Study of the Role of Canadian Business Lawyers, 1895-1913" in *Inside the Law*, *supra* note 20 at 122.

⁹⁸ G. P. Marchildon, "International Corporate Law from a Maritime Base: The Halifax Firm of Harris, Henry, and Cahan" in *Beyond the Law*, *supra* note 25 at 201.

⁹⁹ Hodgetts, *supra* note 26 at 143-46 and 150-54.

¹⁰⁰ *Beyond the Law* *supra* note 25; *Inside the Law* *supra* note 20. See also C. Wilton, "Canadian Law Firms in Troubled Times: The Interwar Years 1919-39" (1995) 29 L.S.U.C. Gazette 232-51.

¹⁰¹ *Beyond the Law*, *supra* note 25 at 29-31.

¹⁰² *Ibid.* at 29.

¹⁰³ *Ibid.* at 6.

Canadian economy which developed at its own pace and in ways different from the American economy.”¹⁰⁴ Issues such as client development, the impact of changes in office technology, inter-jurisdictional expansion, specialization, training and recruitment, partnership styles and financing are all addressed in a series of essays focussed on the histories of specific firms operating in nearly all of the provinces. Approximately a dozen essays deal with the changing composition and operational evolution of Canadian law firms during the nineteenth and twentieth centuries.

The extent of transformation in the essential nature of legal practice may be the subject of some debate. Phil Girard concludes a study of the mid-nineteenth century Halifax practice of Beamish Murdoch with the observation that his subject's legal career entirely preceded the formal trappings of modern legal professionalism. University-based law schools, professional self-governance and codes of ethics, the large law firm, and specialization by practice area were unknown in Murdoch's era. Yet Girard identifies basic continuities between Murdoch's career and that of the modern lawyer:

There is the same struggle to acquire a clientele and a reputation in the early years, resulting in the same devotion to voluntary organizations as a means of meeting and understanding one's market and obtaining leadership experience. There is also the same need for many years of hard work while one acquires the necessary skills and experience to attract more clients, with the attainment of a superior level of remuneration achieved fairly late in one's career. The main differences at the level of daily practice are simply technological: the quill pen, the post, and personal attendance versus the typewriter, telephone and computer.¹⁰⁵

Longitudinal studies, particularly in the form of firm histories would appear to place more emphasis on the importance of change, despite the temptation to search for a stabilizing core. In their foreword to Curtis Cole's monograph, *Osler, Hoskin & Harcourt: Portrait of a Partnership*,¹⁰⁶ Osler's chair and managing partner set out some of their expectations at the outset of the project in 1987. They had aspired, seemingly, to document “a pattern of activities, a firm ethos or some deeply held common values which would show the world why we flourished when other firms languished and died.”¹⁰⁷ and were somewhat surprised to discover the elusiveness of the task. Ultimately, they were forced to acknowledge the subtlety of the inquiry with the result that the values of the firm “remain an article of faith, and not a matter of record.”¹⁰⁸

At the heart of the book is the story of individuals who belonged at one stage or another and in one capacity or another to the evolving partnership¹⁰⁹ which Cole describes in relation to a set of models: compact, clan, club, corporation. There are comparatively few general insights, although the volume does offer some discussion of recruiting and partnership issues through the years. Those familiar with the firm may be expected to read on the basis of indexed references to individual characters — notable and notorious. Other readers may benefit from the use of the valuable index

¹⁰⁴ *Inside the Law* *supra* note 20 at 42.

¹⁰⁵ Girard in *Inside the Law* *supra* 20 at 89.

¹⁰⁶ C. Cole, *Osler, Hoskin & Harcourt: Portrait of a Partnership* (Whitby: McGraw-Hill Ryerson, 1995).

¹⁰⁷ *Ibid.* at viii.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at 248-93.

which demonstrates how industrious Cole has been in linking his study of an individual firm to broader developments in the profession and the social and economic context more generally. Indexed sub-headings under "Legal profession," for example, include anonymity of lawyers, anti-Semitism, branch offices, client acquisition, competition within, conflict of interest, contingency fees, demographic composition, division between barristers and solicitors, earnings, ethics, growth, law firm histories, legal education, literary views on, nineteenth century practice, *pro bono* tradition, professionalization, prohibition on advertising, ratio of lawyers to population, solicitor-client privilege, public image of lawyers and women lawyers.

On the last subject, the history of women in the legal profession, several research publications have appeared in addition to those on Clara Brett Martin. Some of these works emphasize individuals,¹¹⁰ although a few have more broadly assessed the collective experience of women in practice.¹¹¹ The work of John Hagan and his associates provides valuable statistical information on the growth in the number of women in the profession in Canada from a total of seven in 1911 to some 15 000 in 1991.¹¹² Other publications draw our attention to such landmarks as McCarthy and McCarthy's hiring of Alice Gordon in 1942, making her the first woman lawyer in a large downtown Toronto firm, or to Laura Legge's 1975 election as the first woman bencher of the Law Society of Upper Canada.

Apart from historical work on the evolution of legal practice there were a number of studies of the profession in broader and more institutional terms. The point of departure for a monograph generally presenting and analysing the evolution of the profession in statistical terms was the rapid expansion in the number of practising lawyers during the 1970s and 1980s to the level of about 50 000 in 1989.¹¹³ Although much of the description and analysis centres on these two decades, most chapters in this volume by David Stager and Harry Arthurs survey longer term trends. Statistical information, sometimes dating back to the nineteenth century, underlies the discussion of firm, corporate and government practice; the composition, distribution and earnings of the profession; the evolution of self-government; and legal education among other issues.

Another notable examination of the profession, also grounded in an impressive assembly of statistical information, is Elizabeth Bloomfield's study of lawyers in the context of southern Ontario business development between 1860 and 1920.¹¹⁴ Bloomfield's research charts the changing distribution of lawyers across her study region in Toronto and the smaller, but often prosperous, manufacturing communities of the

¹¹⁰ L. K. Yorke, "Mabel Penery French (1881-1955): A Life Re-Created" (1993) 42 U.N.B.L.J. 2-49.

¹¹¹ M. Kinnear "'That There Woman Lawyer': Woman Lawyers in Manitoba 1915-1970" (1992) 5 C. J. W. L., 411-41; J. Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia and the Yukon"; M. J. Mossman, "The Past as Prologue: Woman and the Law" in A. Esau and J.R. Penner eds. *Lawyer and Legal Education into the 21st Century* (Winnipeg: Legal Research Institute 1990) 27-33.

¹¹² J. Hagan and F. Kay, "Hierarchy in Practice: The Significance of Gender in Ontario Law Firms" in *Inside the Law*, *supra* note 20 at 536.

¹¹³ D. A. Stager (in collaboration with H. W. Arthurs) *Lawyers in Canada* (Minister of Supply and Services Canada, 1990).

¹¹⁴ Elizabeth Bloomfield, "Lawyers as Members of Urban Business Elites in Southern Ontario, 1860-1920" in *Beyond the Law* *supra* note 20.

province. Her study documents the diffusion of lawyers to smaller communities previously lacking resident legal services from roughly 1870 to the end of the century, so that by 1900, there were lawyers in 217 different centres of population. The first 20 years of the twentieth century witnessed a contraction both in the number of southern Ontario communities served by lawyers and in the total number of lawyers in the province.¹¹⁵ With reference to a sampling of smaller centres, Bloomfield describes the nature and extent of lawyer participation in local economic and business life, with particular reference to the lawyer's specialized role in municipal bonusing schemes.¹¹⁶

On the question of change, Stager and Arthurs observe:

The recent political history of the profession shows that, despite a sometimes unfriendly climate, it has managed to preserve its essential interests; but its ability to continue to preserve its autonomy is threatened by increasing internal dissent and loss of internal cohesion. Public policies do not affect the economic interests of all elements in the profession in the same way, nor can the profession any longer be assured that its members share a common professional ideology or outlook.¹¹⁷

It is helpful to set alongside these reflections on factors influencing the present-day evolution of practice and the legal profession a number of studies which illuminate the long-term transformation of the profession in response to internal and external influences. R.D. Gidney and W.P.J. Millar place lawyers in the broader context of professionalization in nineteenth-century Ontario. Despite "peaceable" and at times "soporific"¹¹⁸ interludes, recurring frictions between various elements of the profession demanded ongoing attention; nor was the status of lawyers within the community as secure as its members might have wished and we have tended to assume.¹¹⁹

Responses to changing dynamics within and outside the profession involved institutional mechanisms associated with self-regulation and the development of a collective identity or self-image. An extensive body of recent writing illuminates and opens up discussion of this process.

Self-regulation was central, in terms of professional status. Several authors deal with codes of conduct and formulation of ethical norms.¹²⁰ In some accounts, the professionalization process has been presented as an exercise in metaphor with the legal profession seemingly modelling itself on images linked to Christian service, military

¹¹⁵ *Ibid.* at 113, 119-20.

¹¹⁶ *Ibid.* at 136-38.

¹¹⁷ Stager and Arthurs, *supra* note 113 at 53.

¹¹⁸ R.D. Gidney and W.P.J. Millar, *Professional Gentlemen: The Professions in Nineteenth-Century Ontario* (Toronto: University of Toronto Press for the Ontario Historical Studies Series, 1994).

¹¹⁹ *Ibid.* at 81.

¹²⁰ W.W. Pue, "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" in *Glimpses*, *supra* note 50 at 237. and; J. F. Backof and C. L. Martin Jr. "Historical Perspectives: Developing Codes of Ethics in Legal, Medical and Accounting Professions" (1991) 10 *Journal of Business Ethics* 99; P. Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia 1850-1910" in *Glimpses* at 155; Robert D. Gidney and W.P.J. Millar, *Professional Gentlemen: The Professions in Nineteenth Century Ontario* (Toronto: UTP, 1994).

engagement or the respectability of the gentility.¹²¹ Other accounts present the process of professional self-definition as an exercise in myth-making oriented around the lawyers' assertion of independence from state supervision and control.¹²²

The most extensive treatment of issues of professional self-government is Christopher Moore's history of the Law Society of Upper Canada, published in connection with the 200th anniversary of the law society in Ontario. In a thoroughly readable and successful piece of scholarship, generously illustrated by the publisher, Moore accomplishes the formidable task of making the LSUC an interesting institution. Alongside concise explanations of recurring conflicts over policy questions such as legal education, legal aid, and professional liability insurance, the volume effectively combines insights into the influence of colourful and sometimes legendary individuals with comparative descriptions of basic approaches to professional self-government in other jurisdictions.¹²³

In terms of the history of Canadian legal education, Wes Pue has discerned three narrative traditions.¹²⁴ The first presents the rise of the law schools as a story of progressive evolution; the second describes heroic struggles between crusaders for academic respectability and practitioners committed to technical utility; and the third portrays the education process as part of a trend towards professional autonomy which reinforces the status and exclusivity of the bar. After critically surveying the limitations of these models, Pue comments on the history of legal education in western Canada with particular reference to Manitoba in an effort to situate the training of lawyers in a broader cultural context. His argument places legal education in the framework of Valverde:

...the notion that individual and national regeneration could be achieved through the university education of aspiring lawyers provided a neat fit with the dominant culture of the English Canadian middle class during this period. The rhetoric, programme, plans and social vision of those intent on reforming legal education nested within a hegemonic culture coloured at all levels by the concerns of 'moral and social reformers.'¹²⁵

Although the linkages between the legal profession and the surrounding intellectual environment are often stimulating, we should not underestimate the extent to which professional governance and legal education were, at some basic level, functions to be fulfilled. David G. Bell's study of legal education New Brunswick documents a fundamental local development, the creation of the law society in 1825 as not much more than crisis management. In speaking of a dispute that originated between two young lawyers in court—culminating in the death of one—Bell writes:

While the rhetoric of the protagonists makes it clear that they fought to vindicate their status as 'gentleman', the spectacle of one junior member of a great legal

¹²¹ J. W. Hamilton, "Metaphors of Lawyers' Professionalism" (1995) 33 Alta L.R. 833.

¹²² W. Pue, "In Pursuit of a Better Myth: Lawyers' Histories and Histories of Lawyers" (1995) 33 Alta L.R. 730 at 748-751.

¹²³ C. Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1897-1997* (Toronto: University of Toronto Press, 1997).

¹²⁴ Pue, *supra* note 122.

¹²⁵ *Ibid.* at 686.

family killing another to settle a court room quarrel, followed by a well-publicized hue and cry, followed by a murder trial, revealed clearly that informal control mechanisms within the bar no longer commanded consent.¹²⁶

Perhaps the flood of New Brunswickers attending Harvard and other U.S. law schools in the second half of the nineteenth century was again not much more than a pragmatic response to a problem that existed before the creation of the School of Law at the University of King's College in 1895.

One way or another, whether in the form of personal recollections or major studies, recent publications have added considerably to the record of development of legal education in common law Canada.¹²⁷

V. CRIMINAL LAW, PUNISHMENT AND CORRECTIONS

Not unexpectedly, the 100th birthday of the Canadian *Criminal Code* was marked by commemorative reflections on its origins and evolution. In a pair of anniversary essays, Martin Friedland and Alan Mewett surveyed elements of the *Code's* first hundred years.¹²⁸ Both studies report strong evidence of an essential continuity, recently perhaps even re-inforced by *Charter* jurisprudence, although the authors diverge somewhat on the desirability of future revisions.¹²⁹ Mewett explains the absence of general principles on criminal liability with reference to the inclination of original drafters to think "in terms of the particular moving toward the general rather than the other way around — the typical common law approach upon which the *Code* was essentially based"¹³⁰ and he notes the remarkable way in which the *Code* was rapidly integrated into a common law framework, a result attributable to the fact that "it was a codification only in the sense of being a reduction of the already existing common law into a more or less comprehensive statute."¹³¹

Questions, such as whether the *Criminal Code* was ever a code at all in the sense that it was comprehensive and established a systematized approach to criminal responsibility, are central preoccupations of a particularly thoughtful paper on the general nature (if any) of codification.¹³² On the basis of a comparison of the *Criminal*

¹²⁶ D.G.Bell, *Legal Education in New Brunswick: A History* (Fredericton: Faculty of Law, University of New Brunswick, 1992) at 13.

¹²⁷ P.M. Sibenik, "Doorkeepers: Legal Education in the Territories and Alberta, 1885-1928" (1990) 13 Dalhousie L.J. 419; R.G.L. Fairweather, "U.N.B. Faculty of Law: A Recollection - Forty Years Onward" (1990) 39 UNBLJ 243; T.D. Anderson, "The Faculty of Law, University of Manitoba, 1964-1989" in (1990) 13 Dal. L.J. 406; J. Bloom, "The Faculty of Law, University of British Columbia" (1991) 14 Dal.L.J., 195.

¹²⁸ A.W. Mewett, "The Canadian Criminal Code, 1892-1992" (1993) 72 Can B Rev 1; M.L. Friedland, "Canadian Criminal Justice, 1892-1992" (1993) 42 UNBLJ 175. See also Desmond H. Brown ed. *Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995). On the period prior to codification, see. Susan W.S. Binnie, "Explorations in the Use of Criminal Law in Canada, 1867-1892" (Carleton University, Ph.D. 1992)

¹²⁹ See Mewett *ibid.* at 26-27 and Friedland *ibid.* at 184-85.

¹³⁰ Mewett, *ibid.* at 25-26

¹³¹ *Ibid.*

¹³² Nicholas Kasirer, "Canada's Criminal Law Codification Viewed and Reviewed," (1990) 35 McGill LJ, 841-879;

Code of 1892 with the Quebec *Civil Code* of 1866, Nicholas Kasirer searches hopefully but inconclusively for generic approaches to codification. "The similarity in the way in which the civil law and the criminal law codifiers framed and frame their objectives," he writes, "encourages the view that there may be some (as yet uncharted) universality in the two enterprises."¹³³

Yet it is increasingly evident that neither the doctrinal evolution nor the conception of the *Criminal Code* represent much more than a fraction of the scope of activity in criminal justice history in Canada. Two surveys by Jim Phillips effectively set out the general historiography, showing the depth and breadth of recent research on rates of crime, enforcement mechanisms, rural-urban and gender-based divergences and so on, all considered in light of a range of perspectives over a time period (somewhat unevenly treated) stretching from New France to the present day.¹³⁴

Depending, of course, upon how one draws the boundaries, many of the items mentioned (especially in connection with moral reform issues and the aboriginal legal presence) elsewhere in this essay, might fall within the scope of criminal law and corrections. The territory is enormous and what follows here is therefore merely a sampling from recent historical studies of crime, policing and punishment in Canada.

Helen Boritch, in an examination of the criminal justice system of Middlesex County over a half-century period around 1900 finds an essential continuity in patterns of conviction and sentencing at the lowest institutional levels of the system. The actual population of offenders was more strongly representative of economically and socially marginal members of the community than it was of the contemporary conceptions linking the four I's — Irishness, intemperance, illiteracy and idleness — with criminality, while at an operational level reformist efforts to stress rehabilitation over punishment had seemingly little impact.¹³⁵

Another study calls in question any presumed dichotomy between the civil and criminal spheres, at least in relation to a range of comparatively minor but recurring matters of dispute in rural nineteenth century Upper Canada. A variegated system of inter-connected dispute resolution mechanisms, both formal and informal, functioned flexibly at the behest of the protagonists:

The ... story revealed a number of factors: the probable integration of civil and criminal law in the minds of ordinary people, at least with regards to less serious offences; attempts to ignore offences or to use arbitration to settle disputes rather than proceed to trial; the use of recognizances to keep the peace; the undercharging of offences; the existence of informal authority structures attempting to enforce local codes of order; and the ignoring, suing, criticizing, or attacking of legal officials. ... Also, trial juries may have been influential in

¹³³ *Ibid.* at 879.

¹³⁴ "The History of Canadian Criminal Justice, 1750-1920," in J. Gladstone, R. Ericson, and C. Shearing eds. *Criminology: A Reader's Guide* (Toronto: 1991); "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 Histories and Histories of Crime* (Westport, Conn.: Greenwood Press, 1996) at 163.

¹³⁵ H. Boritch, "Crime and Punishment in Middlesex County, Ontario, 1871-1920," in *Crime and Criminal Justice* *supra* note 28 at 387-438.

protecting local interests from central authorities."¹³⁶

Another local study, this one well to the west and focussing on the twentieth century offers interesting comparisons. Jonathan Swainger's essay on legal culture and criminal law in Red Deer, Alberta, also identifies parallel streams of legal action in response to misconduct in and around the rural community.¹³⁷ Alongside the formal legal system which was generally effective, unofficial methods of resolving disputes were common. These initiatives seem, however, to have functioned in a supplemental capacity rather than as preferred alternatives to official institutions for the administration of justice when the latter fell short of Albertans' expectations about security and enforcement, especially in relation to important local matters such as the protection of livestock.¹³⁸

In the general context of violent disputes, it is difficult to resist noting Cecilia Morgan's study of duelling, a masculine form of conflict management that, in Upper Canada, not infrequently resulted in death and the trial of the victor for murder.¹³⁹ With reference to the perspectives of gender and class, the author examines the phenomenon in the late 18th and 19th century, contrasting the views of those who supported and those who condemned the vestiges of a very controversial mechanism for alternative dispute resolution.

Both as victims and as perpetrators of criminal activity, women's distinctive situation has been the subject of increasing research. Several of Constance Backhouse's studies in the narrative tradition at which she excels have been joined by other case studies, and by a growing number of statistically-oriented inquiries.¹⁴⁰

A convenient introduction to themes and resources for Canadian police history is also now available. Greg Marquis identifies four organizing principles for future research centred on the relationship of policing to law, to crime, to the community and to professionalism. The framework offers considerable potential to enrich understanding of informal practices and procedures in their social context, although Marquis cautions that the decentralized nature of Canada's police system compels inquiry to proceed on a city-by-city and province-by-province basis.¹⁴¹

While local studies may be essential for a reliable understanding of the historical

¹³⁶ S. Lewthwaite, "Violence, Law and Community in Rural Upper Canada," in *Crime and Criminal Justice*, *supra* note 28 at 353-86.

¹³⁷ J. Swainger, "Dime Novel Toughs: Legal Culture and Criminal Law in Red Deer, Alberta, 1907-1920" (1993) 14 *Criminal Justice History* 109

¹³⁸ For another western case study, see T. Chapman, "Crime and Justice in Medicine Hat, 1883-1905," *Alberta History* 38 (1990) 17.

¹³⁹ C. Morgan, "'In Search of the Phantom Misnamed Honour': Duelling in Upper Canada" *Canadian Historical Review* 76:4 (December 1995) 529.

¹⁴⁰ *Petticoats and Prejudice*, *supra* note 30; K. Dubinsky and F. Iacovetta, "Murder, Womanly Virtue, and Motherhood: The Case of Angelina Napolitano, 1921-1922" *Canadian Historical Review* 72 No.4 (December 1991) 505; J. Phillips, "Poverty, Unemployment and the Criminal Law: The Administration of the Vagrancy Laws in Halifax, 1864-1890," in *Osgoode Society V* 174; J. Sangster, "Pardon Tales from a Magistrate's Court: Women, Crime and the Court in Peterborough County Court, 1920-1950" *Canadian Historical Review* 74 (1993) 161.

¹⁴¹ G. Marquis, "Towards a Canadian Police Historiography" in *Crime and Criminal Justice* *supra* note 28. See also Greg Marquis, "Law, Society and History: Whose Frontier?" *Acadiensis* 21 (1992) 174.

operation of police services in Canada, there is still much to be said for some comparative and systematic work devoted to the formative era or eras in which models of policing may have been adopted from elsewhere. In a paper on the traditional common law constable, DeLloyd Guth formulated the challenge:

Unfortunately for Canadian police history, that era of origins remains a dark age, lacking even shadows of knowledge because no glimmer of research light has been systematically thrown on its constables. There are no answers because to date no one had bothered to ask the question of origins and receptions for policing models into what becomes Canada.¹⁴²

Fortunately, in terms of more recent developments, an extensive account of the Association of Canadian Chiefs of Police (originally, in 1905, the Chief Constables Association of Canada) has been published.¹⁴³ This work traces twentieth century developments, notably in relation to the management of criminal investigations and technology, law reform campaigns and lobbying by the CACP, the process of police professionalization and the interaction between enforcement policy and shifts in public attitudes towards crime and the accused.

While *Policing Canada's Century* treats policing history from the comparatively elevated and general perspective of Chiefs of Police, a remarkable case study traces the transplantation, adaptation and continual evolution of policing and criminal justice institutions in Hamilton over a period of more than a century and a half.¹⁴⁴ John Weaver's analysis of local developments recognizes the contribution of international influences and notes not only shifts in forms of authority — from monarchical to legal to scientific — but also the consequences of such transitions in the operation of criminal justice institutions for life in the community. The volume addresses several broader historical debates, including the utility and significance of statistical records on criminal activity and the social functions of policing. Weaver emphasizes, for example, the contribution of the Hamilton police to public security generally, in so far as these officials were involved in accident response programs, day-to-day preventive monitoring and municipal by-law matters in addition to their more familiar roles in criminal law enforcement.¹⁴⁵ The impact of the automobile on police duties is a refreshing new subject of contemplation to make an appearance in Weaver's Hamilton saga.

The literature on punishment and corrections is also significantly more extensive today than at the outset of the decade. Not only has the work of previous generations undergone extensive re-assessment; new themes have also emerged.¹⁴⁶

¹⁴² D.J. Guth, "The Traditional Common Law Constable, 1235-1829: From Bracton to the Fieldings to Canada" in R.C. Macleod and D. Schneiderman eds. *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994) 3 at 16-17.

¹⁴³ G. Marquis, *Policing Canada's Century: The History of the Canadian Association of the Chiefs of Police* (Toronto: University of Toronto Press, 1993).

¹⁴⁴ J. C. Weaver, *Crimes, Constables and Courts: Order and Transgression in a Canadian City, 1816-1970* (Montreal & Kingston: McGill-Queen's University Press, 1995).

¹⁴⁵ *Ibid.* at 171-78.

¹⁴⁶ R. Smandych, "Beware of the 'Evil American Monster': Upper Canadian Views on the Need for a Penitentiary, 1830-1834" (1991) 33 *Canadian Journal of Criminology* 125; R. Smandych, "Tory Paternalism and the Politics of Penal Reform in Upper Canada, 1830-1834: A 'Neo-Revisionist' Account of the Kingston Penitentiary" (1991) 12 *Criminal Justice History* 57;

Ontario's Mercer reformatory for women, established in 1879, is the subject of a balanced and persuasive account by Peter Oliver who sets out to describe the institution's distinctive operational features and to broaden the framework within which the success or failure of the initiative might be evaluated.¹⁴⁷ Under the firm but sensitive direction of superintendent Mary Jane O'Reilly, women at the Mercer experienced a distinctly reformist and supportive form of treatment, in marked contrast with the harsh and punitive measures that were characteristically applied to late nineteenth century male prisoners. As Oliver sums up the situation, "it applied disciplinary methods which were gender specific and distinctly feminine and it created an environment which distinguished it in many respects from its male counterpart, the Central Prison."¹⁴⁸ Oliver's assertion in terms of evaluation, however, is that the criminal justice historian must assess such institutions as the Mercer on the entire range of issues which shaped the prison experience of this period rather than focussing on gender. He argues:

From that more encompassing point of departure, the contribution made by maternal feminists to the prison enterprise seems fundamentally different, and what becomes most interesting in the reformatory programme is not the alleged spectacle of feminism constrained but the relatively enlightened objectives and, even more significant, the substantial achievements of the women's leadership.¹⁴⁹

Another recent paper on the evolving pattern of treatment and intervention at the Mercer over a longer period cautions, however, that the impact of reform initiatives at smaller centres elsewhere in the province was delayed and limited. Thus, through to the early 1930s the jails in the communities of Owen Sound and Kenora appears to have operated "as a public order holding tank rather than a moral reformatory."¹⁵⁰

Beverley Boissery has recreated a fascinating narrative around transportation, a form of punishment whose Canadian manifestations are frequently ignored. In the aftermath of the rebellion of 1838 in Lower Canada, 58 Canadian patriotes were transported to New South Wales under the authority of Sir John Colborne following their conviction for treason. This is a sympathetic account revolving around the personal experiences of men some of whose actual involvement in the rebellion was modest and for whom the punishment was accordingly sometimes arbitrary and disproportionate.¹⁵¹

R. Baehre, "From Bridewell to Federal Penitentiary: Prisons and Punishment in Nova Scotia Before 1800," in P. Girard and J. Phillips, eds. *Essays in the History of Canadian Law*, vol. 3, *Nova Scotia* (Toronto: University of Toronto Press, 1990) 164; R. Baehre, "Prison as Factory, Convict as Worker: The Saint John Penitentiary, 1841-1880" in *Crime and Criminal Justice supra* note 28, 439-477; J. Berkovits, "Prisoners for Profit: Convict Labour in the Ontario Central Prison, 1875-1915" in *Crime and Criminal Justice supra* note 28 at 478-515.

¹⁴⁷ P. Oliver, "To Govern by Kindness: The First Two Decades of the Mercer Reformatory for Women" in *Crime and Criminal Justice supra* note 28 at 516.

¹⁴⁸ *Ibid.* at 560.

¹⁴⁹ *Ibid.* at 519.

¹⁵⁰ W. Ruemper, "Locking Them Up: Incarcerating Women in Ontario 1857-1931" in L.A. Knafla and S.W. Binnie, eds. *Law, Society and the State* (Toronto: University of Toronto Press, 1995) 351 at 372.

¹⁵¹ *A Deep Sense of Wrong: The Treason, Trials, and Transportation to New South Wales of Lower Canadian Rebels after the 1838 Rebellion*, (Dundurn Press for the Osgoode Society, 1995)

Also raising the spectre of disproportionality is a valuable synthesis of research on the discretionary application of the death penalty in the century or so prior to abolition in 1976. Carolyn Strange suggests that the prerogative of mercy has been much influenced by extra-legal considerations of dubious rationality.¹⁵²

VI. THE ABORIGINAL LEGAL PRESENCE

The antecedents of many issues raised in the contemporary context through Roy McGregor's biography of Billy Diamond were developed in the legal historical writings of the 1990s. The first study in *Petticoats and Prejudice* is, in fact, the marriage of a young Cree woman and a 17 year old fur trader with the North-West Company. Backhouse concludes:

Judicial rulings over marital customs among the First Nations, grudgingly supportive at the outset and antagonistic by the close of the century, provide a microcosm for viewing the changing dynamics between the First Nations and whites in Canada. As white dominance increased, whites increasingly assumed that European-based laws should supersede First Nations' legal systems.¹⁵³

Most interestingly, several new studies in Canadian legal history have gone further to suggest how (in some circumstances) aboriginal communities themselves saw opportunities to use European legal principles in defence to their own interests.¹⁵⁴

Generally, the aboriginal presence in Canadian legal history became much more notable as a consequence of historical studies focussed on land and resource use,¹⁵⁵ treaties and land claims,¹⁵⁶ aboriginal justice systems and a few specific legal proceedings, usually criminal trials involving native and non-native relations.

Several recent papers deal with aboriginal justice systems, treaty making and interpretation, and the process of legal accommodation between colonial and aboriginal legal systems. Primarily with reference to the Mikmaq, James Youngblood Henderson describes aboriginal customary law and an idealized worldview and core values such as

¹⁵² C. Strange, "The Lottery of Death: Capital Punishment, 1867-1976" (1995) 23 Manitoba LJ 594. See also J. Phillips, "The Operation of the Royal Pardon in Nova Scotia, 1749-1815" (1992) 42 U.T.L.J. 401.

¹⁵³ *Petticoats and Prejudice*, *supra* note 30 at 331.

¹⁵⁴ See *infra*.

¹⁵⁵ For papers on trapping, aboriginal fisheries, water rights and other land use experience primarily from western and northern Canada, but including northern Ontario, see K. Abel and J. Friesen eds. *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991). See also, S. L. Haring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law" (1992) 56 Sask L Rev 297, esp. at 312-15 and 326-28.

¹⁵⁶ A. Bear Nicholas, "Mascarene's Treaty of 1725" (1994) 43 UNBLJ 3; W.C. Wicken, "The Mi'kmaq and Wustukwiuk Treaties" (1993) 43 UNBLJ 241; W.C. Wicken, "Heard It From Our Grandfathers": Mi'kmaq Treaty Tradition and the Siliboy case of 1928" (1995) 44 UNBLJ 145; P. Tennant, "Aboriginal Rights and the Canadian Legal System: The West Coast Anomaly" in J. McLaren, H. Foster and C. Orloff, eds. *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina, Sask.: Canadian Plains Research Center Ninth Judicial Historical Society, 1992) 106;

peace, kindness, sharing and trust underlying it.¹⁵⁷ R.C. Macleod, in a study of law and order on the Western-Canadian frontier, takes issue with some of the broader claims made about the operational scope of aboriginal legal systems. In responding to one study in which it was asserted that lands ostensibly under the authority of the Hudson Bay Company were "subject largely to Indian law," Macleod responds that if the author intended to suggest that there was an agreed-upon set of rules and customs applicable to all aboriginal inhabitants, or even to tribes, "this seems to me ... as much a fiction as universal [Hudson Bay Company] sovereignty."¹⁵⁸ If that remark was in its turn intended as an invitation for further consideration of the nature of law under the governance of the Hudson Bay Company, it has already begun to produce responses.¹⁵⁹

Jeremy Webber explores the emergence of normative community between colonists and aboriginal peoples in a theoretical paper which presents aboriginal rights as the result of a cross-cultural process of interaction and experimentation rather than as the product of a pre-existing legal system: "From a series of *ad hoc* and pragmatic accommodations," he argues, "a structure emerged that the parties themselves recognized to be normative and that they customarily invoked to resolve intercommunal conflict."¹⁶⁰

Several specific studies of inter-cultural interaction in relation to legal standards, notable in themselves for thoroughness and originality, already provide legal historians and other inquirers with opportunities for assessing Webber's analysis. Homicide trials of aboriginal people accused of killing non-natives in New France,¹⁶¹ British Columbia,¹⁶² and the north¹⁶³ are the subject of detailed research studies. More recent attempts to reconcile northern aboriginal cultural values within the Canadian legal system are chronicled in the memoirs of Mr Justice William Morrow who in 1960 accepted a position as volunteer defence counsel, and in 1966 began a ten year term on

¹⁵⁷ J. Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Mikmaq Model" in (1995) 23 Manitoba Law Journal 1

¹⁵⁸ R.C. Macleod, "Law and Order on the Western-Canadian Frontier" in *Law for the Elephant, Law for the Beaver*, *supra* note 156, 90 at 94.

¹⁵⁹ For a case study of law making and enforcement by the Hudson Bay Company, centred primarily on the control of 'private trading' and 'conversing' with Indians at Fort Albany up to 1800, see R. Linden and R. Smandych "Administering Justice Without the State: A Study of the Private Justice System of the Hudson's Bay Company to 1800" (1996) 11 Canadian Journal of Law and Society 1. See also, D. Gibson, "Company Justice: Origins of Legal Institutions in Pre-Confederation Manitoba" (1995) 23 Manitoba LJ 247.

¹⁶⁰ J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall LJ 624 at 655.

¹⁶¹ J.A. Dickinson, "Native Sovereignty and French Justice in Early Canada" in *Crime and Criminal Justice* *supra* note 28 at 17.

¹⁶² H. Foster, "'The Queen's Law Is Better Than Yours': International Homicide in Early British Columbia" in *Crime and Criminal Justice* *supra* note 28 at 41; T. Loo, "The Road from Bute Inlet: Crime and Colonial Identity in British Columbia" in *Crime and Criminal Justice* *supra* note 28, 112.

¹⁶³ A. Grove, "'Where is Justice, Mr Mills?': A Case Study of R. v. Nantuck" in *British Columbia and the Yukon*, 87; and G. Price, "The King v. Alikomiak" in *Glimpses* *supra* note 50, 213.

the Territorial Court of the Northwest Territories.¹⁶⁴ The *Shawanakiskie* case¹⁶⁵ also came under re-examination in a paper arguing that under the Crown Indian policy for Upper Canada, "there were grounds upon which to argue that native nations in the province were, in law, distinct political units having jurisdiction over their internal affairs."¹⁶⁶ The author candidly acknowledges his hope that the research "contributes to both the historical and contemporary understandings of native legal status in Canada."¹⁶⁷ A study of the evolution and operation of the notorious potlatch law illustrates the particularities and differentiation of the experience.¹⁶⁸

Douglas Harris interprets a significant gesture on the part of the Nlha7kapmx in the late 1870s as a deliberate attempt to demonstrate their good faith and loyalty to the Queen for the purpose of ensuring that they would, in turn, be treated fairly and would enjoy the safeguards and protections of the rule of law against the risk of arbitrary and oppressive provincial actions.¹⁶⁹ The Nlha7kapmx undertook to adopt local government institutions and "wanted to know what the law was so that they could live by it, but also, and more importantly, so that they could require White settler society to live by the law as well."¹⁷⁰ In the face of provincial hostility, however, the federal government allowed the initiative to lapse, and in so doing, "shattered what might have become a relationship based on trust and the rule of law."¹⁷¹ Likewise, Jonathan Swainger's study of the prerogative of mercy in capital cases in the years immediately following British Columbia's entry into Confederation is simultaneously a study of the differential application of law to natives and non-natives convicted in the province's courts.¹⁷²

Apart from its intrinsic interest, the status and significance of aboriginal history for legal proceedings attracted considerable commentary, particularly in the aftermath of some major land claims decisions. In Ontario, the decision of Justice Steele in *Bear Island*¹⁷³ and in British Columbia, Chief Justice McEachern's decision in *Delgamuukw*¹⁷⁴ stimulated reflection about appropriate mechanisms for presenting aboriginal community history in a legal context.¹⁷⁵ Other papers and materials, more generally outlining the

¹⁶⁴ W.H. Morrow, ed. *Northern Justice: The Memoirs of Mr Justice William G. Morrow* (Canada: Osgoode Society and the Legal Archives Society of Alberta, 1995).

¹⁶⁵ *Supra* note 24.

¹⁶⁶ M.D. Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: reconsidering the Shawanakiskie Case (1822-26)" (1996) UTLJ 273 at 309. See also Harring, *supra* note 155 at 345-60.

¹⁶⁷ Walters, *ibid.* at 277.

¹⁶⁸ D. Cole and I. Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast*, (Vancouver: Douglas & McIntyre, 1990). See also T. Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol and Rhetoric in British Columbia," 73 CHR(1992), 125-65.

¹⁶⁹ D. Harris, "The Nlha7kapmx Meeting at Lytton, 1879, and the Rule of Law" (Winter 1995-96) 108 BC Studies 5.

¹⁷⁰ *Ibid.* at 25.

¹⁷¹ *Ibid.*

¹⁷² J. Swainger, "A Distant Edge of Authority: Capital Punishment and the Prerogative of Mercy in British Columbia, 1872-1880" in *British Columbia and the Yukon* *supra* note 66, 204.

¹⁷³ *A.G. Ontario v. Bear Island Foundation et al* (1984), 49 O.R. (2d) 353.

¹⁷⁴ (1991), 79 D.L.R.(4th) 185; [1991] 5 C.N.L.R. 1 (B.C.S.C.).

¹⁷⁵ F. Cassidy, ed. *Aboriginal Title in B.C.: Delgamuukw v. The Queen* (Lantzville B.C.: Oolichan Books and IRPP, 1992); M. Asch and C. Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: an analysis of Delgamuukw" (1994) 19 Queen's LJ 503;

nature and significance of aboriginal history as well as related evidentiary issues, also appeared.¹⁷⁶

VII. CONCLUSION

This account of recent work in Canadian legal history has followed a route leading from the experiences of individuals to the conjunction of world views with institutional, ideological and doctrinal explorations along the pathway. For some readers, that degree of variety may revive questions about the nature of the enterprise, about its coherence, methodological integrity, and indeed about the claim that there is a field of study here at all. I have no definitive position to assert on the matter beyond a general willingness to accept that there is some potential for communication, and thus, mutual enrichment in this assemblage of writings. By way of example, anyone disinclined to peruse the biographical entries amongst recent legal historical writings on the grounds of their irrelevance to larger themes would miss Williams' discussion of early twentieth century British Columbia land claims litigation or Boyer's account of twentieth century penitentiary reforms in which his protagonist, J. C. McRuer, had some involvement. But by the same token it might be suggested that these particular biographical works might have been strengthened by more extensive reference to the context in which their protagonists' lives unfolded.

For those who are nonetheless surprised to find Grace Marks rubbing shoulders with distinguished members of the legal profession, (including some affectionately known as "The Supremes") all in the presence of penitentiary inmates and aboriginal communities, both groups concerned with the internal ordering of their societies, think of this paper simply as a dating service that offers to bring together some rather isolated people, curious about their counterparts, and anxious to find potential soulmates somewhere in the crowd.

Why might there be soulmates, or any form of readership at all for scholars who choose to write about what lawyers have said to each other in after-dinner speeches, let alone the terms of their partnership agreements? The authors of an inquiry into the judicial careers of Justices Rand, Kerwin and Martland found themselves asking "Are Judges Worth Studying?" and experienced serious hesitation about the challenges of examining judicial personalities.¹⁷⁷ At the outset of their study, David Stager and Harry

G. Sherrott, "The Court's Treatment of Evidence in *Delgamuukw*" (1992) 56 Sask LR 441; A special issue of *BC Studies* presented the observations - for the most part, highly critical - of historians and anthropologists about *Delgamuukw*. See D. Wilson-Kenni, "Time of Trial: The Gitksan and Wet'suwet'en in Court;" R. Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw v. B.C.*;" J. Cruikshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*;" R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*;" B. Miller, "Common Sense and Plain Language;" and D. Culhane, "Adding Insult to Injury: Her Majesty's Loyal Anthropologist" all in (Autumn 1992) 95 *BC Studies*.

¹⁷⁶ Institute of Continuing Education, *Aboriginal Law: Issues that Matter in the 1990s* (Toronto: Canadian Bar Association, 1995); W.B. Henderson, "Evidentiary Problems in Aboriginal Title Cases" in (1991) *Special Lectures of the Law Society of Upper Canada*, 165; Champlain Society, *Gin Das Winan: - Documenting Aboriginal History in Ontario*.

¹⁷⁷ Balcome et al, *supra* note 19 at 2-3, 7-20.

Arthurs similarly confronted the formidable question "Why study lawyers?:"

First, they are as essential to the provision of justice as doctors are to the provision of health care — and each of these professions also ultimately determines the availability and cost of its services. Second, payments for lawyers' services represent a growing part of expenditures in the economy's service sector. Third, many lawyers move on from the practice of law to other influential positions in the economic and political system. And fourth, major changes in the legal profession during the 1970s and 1980s affected the cost and availability of legal services and widened the range of careers for law graduates.¹⁷⁸

Perhaps few of us could do better, but the level of excitement generated by this defence of the enterprise may go a long way to account for the comparative appeal of *Alias Grace*. That's too bad, really, for as much as Atwood's fiction welcomes sojourners into the realm of legal history, there is a wealth of other fascinating material to read and perhaps even to enjoy.

Legal historians do crave an audience and some are even prepared to admit it. One of the breed explicitly expressed an ambition to "reach beyond the small circle of legal history scholars, to describe the world of women in the nineteenth century to a general audience."¹⁷⁹ Regrettably, *Petticoats and Prejudice* will not match *Alias Grace* for audience appeal for it is enormously rich in insights into the evolving human condition. Many academic writers have aspirations — seldom realized, of course — to reach a wider public, for the pleasures and satisfactions of obscurity are ultimately limited. Therefore, rather than concluding with reflections on the uncharted terrain that lies ahead, or with reference to key transitions in historiography, I simply wish to observe that much of what I have read strikes me as well worth a televised 'historical minute' or perhaps even deserving of a place in a McDonald's restaurant's cartoon history of the nation. More people need to know about the evolution and development of Canadian law and legal institutions: the materials surveyed here do much to help bring this about.

¹⁷⁸ *Supra* note 113 at 3.

¹⁷⁹ *Petticoats and Prejudice*, *supra* note 30 at xii.

