

RECENT DEVELOPMENTS IN CANADIAN LAW: LEGAL HISTORY

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I. INTRODUCTION

Just five years ago writing a survey article on Canadian legal history would have been the height of folly and conducive to plunging its author into the depths of despair. The paucity of scholarship would scarcely have justified a brief comment. An article would have been out of the question. Ten years ago the subject, if it existed at all, did so as an ideal in the minds of a handful of scholars.¹ Canadian legal history could not even be said to have succeeded criminal law as the Cinderella of the law school curriculum. The subject simply did not exist.

Yet, in the past decade, and particularly in the past half-decade, a new and lively subject has not only been born into the family of scholarship, but appears to be growing like Topsy, if it has not, in fact, appeared full-grown. At a time when new books and articles of a uniformly high quality appear frequently, and when a generation of young legal scholars eschews the role of Hessian trainer for the practising bar in favour of legal scholarship for its own sake, it is appropriate that the OTTAWA LAW REVIEW should add a survey article on Canadian legal history to its inventory. This, then, is the inaugural survey for the OTTAWA LAW REVIEW on Canadian legal history.²

The Oxford English Dictionary defines the noun "survey" as a "[g]eneral view, casting of eyes or mind over something; inspection of the condition, amount, etc., of something, account given of result of this".

The verb "to survey", is defined in a similar fashion: "Let the eyes pass over, take general view of, form general idea of the arrangement and chief features of."

This survey will closely honour these primary definitions by taking a general view of the Canadian legal history done to date. But it will also do so from a particular prospect. The high point from which any plain is surveyed will determine the content of the subsequent account of it. Different prospects give different perspectives and only a survey combining the observations made from all prospects will result in as complete an account as possible. Such an enterprise is beyond the capabilities of this surveyor, whose sole self-justification is to remind readers of Professor Graham Parker's thesis that so manifold is the research task of the legal historian that masochism is a necessary, if insufficient requisite, for his character.³ Nevertheless, a peculiarly Canadian perspective is already offered to the beginning surveyor by the Canadian legal history literature itself. Thus, it seems appropriate in an inaugural article to engage in a

¹ See, e.g., R.C.B. Risk, *A Prospectus for Canadian Legal History* (1973) 1 DAL. L.J. 227; G. Parker, *The Masochism of the Legal Historian* (1974) 24 U.T.L.J. 279. Both Professors Risk and Parker have equal claim to the title of "doyen" of Canadian legal history.

² I wish to express my gratitude to the OTTAWA LAW REVIEW for entrusting me with a project which over time will involve chronicling for posterity the growth and evolution of Canadian legal historiography.

³ Parker, *supra*, note 1.

comparison of what the leading scholars in the field have said should be done at the outset of the enterprise, with what, in fact, has been done over the course of the first decade. Indeed, this approach is peculiarly Canadian! For as long as legal history has been done in Canada, scholars have been as much concerned with prescribing the future course of the discipline as with engaging in the practice of legal history itself. The historiography of English and American legal history in contrast is one of doing history first and philosophizing about it afterward.⁴ Thus, the first part of this paper will analyze the various research agenda which have been prescribed for the future of Canadian legal historical scholarship and the succeeding parts will examine the extent to which the Canadian legal history done to date has produced the results contemplated by the prescriptions' authors.

At the outset and prior to the comparative analysis to which this first survey will be devoted, it is useful to recount in broad generalizations precisely what has occurred in the past decade and to state in broad terms what sort of legal history has been written to date. It must also be stated that these are observations and not criticisms. There are many gaps in the research effort to date, as there must be in such a young discipline. The high quality of the work, however, more than compensates for what few lacunae there are.

First, the preponderance of published work takes the form of articles rather than books and these are contained both in scholarly journals as well as bound collections of articles. This is hardly surprising given the youth of the discipline, the length of time required to research and write a full-scale book, and the difficulty in doing so when there are so few guides to the primary sources or models for published books. Articles constitute excellent training exercises in newly learned scholarly techniques and also encourage detailed analyses of discrete and refined topics. The best known of these are the two volumes edited by Professor David H. Flaherty, *ESSAYS IN THE HISTORY OF CANADIAN LAW*, published by the Osgoode Society in 1981 and 1983 respectively.⁵ Modelled on the English Selden Society, which was founded in 1887 by a group of leading English legal historians including Frederic William Maitland, the Osgoode Society

⁴ The earliest writing in Canadian legal history was about how to do it, not actually doing it. See Risk, *supra*, note 1; Parker, *supra*, note 1; D.H. Flaherty, *Writing Canadian Legal History: An Introduction* in D.H. Flaherty, ed., *ESSAYS IN THE HISTORY OF CANADIAN LAW*, vol. 1 (Toronto: Univ. of Toronto Press, 1981) 3 at 3; A. Morel, *Canadian Legal History — Retrospect and Prospect* (1983) 21 O.H.L.J. 159; D.G. Bell, *The Birth of Canadian Legal History* (1984) 33 U.N.B.L.J. 312; B. Wright, *Towards a New Canadian Legal History* (1984) 22 O.H.L.J. 349; G. Parker, *Canadian Legal Culture* in L.A. Knafka, ed., *LAW AND JUSTICE IN A NEW LAND: ESSAYS IN WESTERN CANADIAN LEGAL HISTORY* (Toronto: Carswell, 1986) 3.

⁵ Vol. 1 (Toronto: Univ. of Toronto Press, 1981) [hereinafter *ESSAYS*, VOL. 1]; D.H. Flaherty, ed., *ESSAYS IN THE HISTORY OF CANADIAN LAW*, vol. 2 (Toronto: Univ. of Toronto Press, 1983) [hereinafter *ESSAYS*, VOL. 2].

was founded in Toronto in 1979 for the purpose of stimulating legal historical scholarship in Canada, with a primary focus on Ontario. Like the Selden Society before it, the Osgoode Society has supported and undertaken numerous projects including the preservation and cataloguing of written records, the recording of reminiscences of leading members of the Bar and of the Bench in its oral history project, as well as the publication of eight volumes in its first seven years.⁶ Four other important volumes of essays have also been published since 1981. Of these, one has been published in Toronto, that is, the special legal history edition of the OSGOODE HALL LAW JOURNAL;⁷ two have been published in Western Canada and one in Eastern Canada. The two western volumes, both edited by Professor Louis A. Knafla, are CRIME AND CRIMINAL JUSTICE IN EUROPE AND CANADA⁸ and LAW AND JUSTICE IN A NEW LAND: ESSAYS IN WESTERN CANADIAN LEGAL HISTORY.⁹ The former volume contains a wide variety of essays of which only a handful are about the legal history of Western Canada; however, the latter volume is entirely devoted to Western Canadian legal history and demonstrates the virility and maturity of legal historical scholarship in and about the West. The final collection of essays, LAW IN A COLONIAL SOCIETY: THE NOVA SCOTIA EXPERIENCE,¹⁰ originates from Nova Scotia and is comprised of a variety of articles about Nova Scotian legal history.

A second observation is that the work published to date as monographs falls neatly into two categories of legal biography and legal institutions. In the former are the two biographies written by David R. Williams, THE MAN FOR A NEW COUNTRY: SIR MATTHEW BAILLIE BEGBIE¹¹ and DUFF: A LIFE IN THE LAW;¹² the study by Patrick Brode of SIR JOHN BEVERLEY ROBINSON: BONE AND SINEW OF THE COMPACT¹³ and somewhat

⁶ These are as follows: ESSAYS, VOL. 1, *ibid.*; ESSAYS, VOL. 2, *ibid.*; M. MacRae & A. Adamson, CORNERSTONES OF ORDER: COURTHOUSES AND TOWN HALLS OF ONTARIO, 1784-1914 (Toronto: Clarke, Irwin, 1983); P. Brode, SIR JOHN BEVERLEY ROBINSON, BONE AND SINEW OF THE COMPACT (Toronto: Univ. of Toronto Press, 1984); D.R. Williams, DUFF, A LIFE IN THE LAW (Vancouver: Univ. of British Columbia Press, 1984); J.G. Snell & F. Vaughan, THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION (Toronto: Univ. of Toronto Press, 1985) [hereinafter Snell]; M.L. Friedland, THE CASE OF VALENTINE SHORTIS: A TRUE STORY OF CRIME AND POLITICS IN CANADA (Toronto: Univ. of Toronto Press, 1986); P. Romney, MR. ATTORNEY: THE ATTORNEY-GENERAL FOR ONTARIO IN COURT, CABINET AND LEGISLATURE, 1791-1899 (Toronto: Univ. of Toronto Press, 1986) [hereinafter MR. ATTORNEY].

⁷ (1983) 21 O.H.L.J.

⁸ 2d ed. (Waterloo: Wilfrid Laurier Univ. Press, 1985) [hereinafter CRIME AND CRIMINAL JUSTICE].

⁹ (Toronto: Carswell, 1986) [hereinafter LAW AND JUSTICE].

¹⁰ P. Waite, S. Oxner & T. Barnes, eds., LAW IN A COLONIAL SOCIETY: THE NOVA SCOTIA EXPERIENCE (Toronto: Carswell, 1984) [hereinafter LAW IN A COLONIAL SOCIETY].

¹¹ (Sidney, B.C.: Gray's Publishing, 1977).

¹² *Supra*, note 6.

¹³ *Supra*, note 6.

loosely attached to this category is *THE CASE OF VALENTINE SHORTIS: A TRUE STORY OF CRIME AND POLITICS IN CANADA*,¹⁴ by Professor Martin L. Friedland. To date, only two Canadian legal institutions have been the subject of monographs: the Supreme Court of Canada in *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION*¹⁵ by Professors James G. Snell and Frederick Vaughan; and the first "common law" law faculty in Canada is the subject of a gossipy biography by Professor John Willis entitled *A HISTORY OF DALHOUSIE LAW SCHOOL*.¹⁶ Biographies, whether of judges or institutions, are easier to accomplish successfully than are other possible topics. This is because the individual or the institution under inspection provides a single focus whereas a legal history project with social, economic and political implications cannot be as singular in its scope.

A third observation is that while there are to date no integrated interdisciplinary monographs of more difficult topics, there are ongoing research projects which have culminated in a series of articles about the same subject, which in effect amount to a single monograph by the author. Two such series are particularly noteworthy. First, Professor R.C.B. Risk has published a series of articles about law and the economy in nineteenth century Ontario which, when read together, constitute an important primer on that subject.¹⁷ Secondly, Professor Constance B. Backhouse has more recently published another series of lengthy articles exploring selected topics in family law and on the rights of women and children in nineteenth century Ontario.¹⁸ In addition, the recently published works of several scholars together amount to an integrated body of research in relation to employer and employee relations in late nineteenth and early twentieth century Ontario.¹⁹

¹⁴ *Supra*, note 6.

¹⁵ *Supra*, note 6.

¹⁶ (Toronto: Univ. of Toronto Press, 1979).

¹⁷ Chronologically, these articles are: *The Nineteenth Century Foundations of the Business Corporation in Ontario* (1973) 23 U.T.L.J. 270; *The Golden Age: The Law about the Market in Nineteenth Century Ontario* (1976) 26 U.T.L.J. 307; *The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century* (1977) 27 U.T.L.J. 199; *The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective* (1977) 27 U.T.L.J. 403. This series is reprinted in *ESSAYS*, VOL. 1, *supra*, note 5 at 88.

¹⁸ Chronologically, these articles are: *Shifting Patterns in Nineteenth Century Canadian Custody Law* in *ESSAYS*, VOL. 1, *supra*, note 5 at 212 [hereinafter *Canadian Custody Law*]; *Nineteenth Century Canadian Rape Law 1800-1892* in *ESSAYS*, VOL. 2, *supra*, note 5 at 200 [hereinafter *Canadian Rape Law*]; *Involuntary Motherhood: Abortion, Birth Control and Law in Nineteenth Century Canada* (1983) 3 WINDSOR Y.B. ACC. JUS. 61 [hereinafter *Involuntary Motherhood*]; *Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada* (1984) 34 U.T.L.J. 447 [hereinafter *Desperate Women*]; *Pure Patriarchy: Nineteenth Century Canadian Marriage* (1986) 31 MCGILL L.J. 264 [hereinafter *Pure Patriarchy*].

¹⁹ R.C.B. Risk, 'This Nuisance of Litigation': *The Origins of Workers' Compensation in Ontario* in *ESSAYS*, VOL. 2, *supra*, note 5 at 418 [hereinafter *Nuisance*]; P. Craven, *The Law of Master and Servant in Mid-Nineteenth Century Ontario* in *ESSAYS*, VOL. 1, *supra*, note 5 at 175 [hereinafter *Master and Servant*]; E. Tucker, *The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory* (1984) 22 O.H.L.J. 213.

The fourth observation is that, when taken as a whole, the published work to date shows a relatively even geographical and regional distribution of scholarly interest. Until perhaps as late as 1986 this could not be said. However, so meagre are the publications to date on Canadian legal history that the appearance of a single book in Western Canada and a single book in Atlantic Canada is sufficient to redress the balance. At the same time, it is important to state that the preponderance of legal history being done is about nineteenth century Ontario with particular emphasis on Toronto.²⁰ However, the lively attitudes toward legal history and recent published output at the Universities of Calgary and Victoria, and Dalhousie University would suggest that the geographical distribution of publication in the future will be more evenly balanced across Canada. However, to date, little work has been done with regard to Manitoba, New Brunswick, Prince Edward Island or Newfoundland.

Fifthly, while geographical distribution is relatively even at this early stage, it can be said that the topical distribution of published materials is not. The preponderance of articles concern criminal law topics. These span a wide range of subjects from the origins of the *Criminal Code*,²¹ to the methodological and philosophical problems in measuring and assessing criminality in the past,²² to specific criminal trials²³ or criminal persons,²⁴ to criminal law and morality.²⁵ It is possible to discern a greater interest in criminal matters in Western Canadian legal historiography than

²⁰ See, e.g., Bell, *supra*, note 4 at 316-7.

²¹ See G. Parker, *The Origins of the Canadian Criminal Code* in ESSAYS, VOL. 1, *supra*, note 5 at 249. See also D. Hay, *The Meanings of the Criminal Law in Quebec* in CRIME AND CRIMINAL JUSTICE, *supra*, note 8 at 77; S. Verdun-Jones, 'Not Guilty by Reason of Insanity': *The Historical Roots of the Canadian Insanity Defence, 1843-1920* in CRIME AND CRIMINAL JUSTICE, *supra*, note 8 at 179; M.W. Melling, *Cleaning House in a Suddenly Closed Society: The Genesis, Brief Life and Untimely Death of the Habitual Criminals Act, 1869* (1983) 21 O.H.L.J. 315.

²² See J.M. Beattie, ATTITUDES TOWARDS CRIME AND PUNISHMENT IN UPPER CANADA, 1830-1850: A DOCUMENTARY STUDY (Toronto: Univ. of Toronto Press, 1977); Hay, *ibid.*; T.L. Chapman, *The Measurement of Crime in Nineteenth Century Canada: Some Methodological and Philosophical Problems* in CRIME AND CRIMINAL JUSTICE, *supra*, note 8 at 147; L.A. Knafla & T.L. Chapman, *Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada 1760-1812* (1983) 21 O.H.L.J. 245.

²³ See H. Foster, *The Kamloops Outlaws and Commissions of Assize in Nineteenth-Century British Columbia* in ESSAYS, VOL. 2, *supra*, note 5 at 308; W.F. Bowker, *The Sproule Case: Bloodshed at Kooteney Lake, 1885* in LAW AND JUSTICE, *supra*, note 9 at 233; Friedland, *supra*, note 6.

²⁴ See P. Romney, 'The Ten Thousand Pound Job': *Political Corruption, Equitable Jurisdiction, and the Public Interest in Upper Canada 1852-6* in ESSAYS, VOL. 2, *supra*, note 5 at 143; W.A. Calder, *Convict Life in Canadian Federal Penitentiaries* in CRIME AND CRIMINAL JUSTICE, *supra*, note 8 at 297; J. Fingard, *Jailbirds in Victorian Halifax* in LAW IN A COLONIAL SOCIETY, *supra*, note 10 at 81; Friedland, *ibid.*

²⁵ See Parker, *supra*, note 21; Melling, *supra*, note 21; Romney, *ibid.*; G. Parker, *The Legal Regulation of Sexual Activity and the Protection of Females* (1983) 21 O.H.L.J. 187; T.L. Chapman, *Male Homosexuality: Legal Restraints and Social Attitudes in Western Canada* in LAW AND JUSTICE, *supra*, note 9 at 277; M.E. Langdon, *Female Crime in Calgary, 1914-1941* in LAW AND JUSTICE, *supra*, note 9 at 293.

in the published research from Eastern Canada, perhaps reflecting the fact that the settlement of the West was so recent, bringing into focus the obvious role of the criminal law in the settlement process.

Second in size to the body of literature on criminal law topics is that on the courts as legal institutions. The historical evolution of our courts is an obvious topic, given their centrality in legal administration and the remarkable fact that until recently we knew so little about their origins, growth and role.²⁶ Most of the research to date has dealt with the evolution of the courts in nineteenth century Ontario, particularly the creation of Chancery in 1837.²⁷ However, two other foci have also appeared in the literature: the evolution of the earliest Canadian common law courts in Nova Scotia²⁸ and the role of frontier courts during the colonial period in Western Canada.²⁹ Publications about the courts as legal institutions have proved more imaginative than the topic would otherwise suggest. Thus, in addition to those articles which have set out the basic evolution of the courts,³⁰ there have been attempts to explain that evolution in the context of the political feuds and personalities of the day,³¹ for example, articles demonstrating an Horwitzian instrumentalism in the civil courts of Upper Canada,³² the ideological uses of police courts³³ and the political patronage involved in Canadian judicial appointments from the start.³⁴

²⁶ The only monograph on the subject is by W.R. Riddell, *THE BAR AND COURTS OF UPPER CANADA OR ONTARIO* (Toronto: Osgoode Hall, 1928).

²⁷ See J.D. Blackwell, *William Hume Blake and the Judicature Act of 1849: The Process of Legal Reform at Mid-Century in Upper Canada* in *ESSAYS*, VOL. 1, *supra*, note 5 at 132; E. Brown, *Equitable Jurisdiction and the Court of Chancery in Upper Canada* (1983) 21 O.H.L.J. 275; M.A. Banks, *The Evolution of the Ontario Courts, 1788-1981* in *ESSAYS*, VOL. 2, *supra*, note 5 at 492; W.N.T. Wylie, *Instruments of Commerce and Authority: The Civil Courts in Upper Canada, 1789-1812* in *ESSAYS*, VOL. 2, *supra*, note 5 at 3.

²⁸ See T.G. Barnes, 'As Near as May Be Agreeable to the Laws of this Kingdom': *Legal Birthright and Legal Baggage at Chebucto, 1749* in *LAW IN A COLONIAL SOCIETY*, *supra*, note 10 at 1; S.E. Oxner, *The Evolution of the Lower Courts of Nova Scotia* in *LAW IN A COLONIAL SOCIETY*, *supra*, note 10 at 59. Also, the account of early Nova Scotia courts given by Chief Justice Townsend remains definitive: *Historical Account of the Courts of Judicature of Nova Scotia* (1899) 19 CAN. L.T. 25.

²⁹ See K.M. Bindon, *Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54* in *ESSAYS*, VOL. 1, *supra*, note 5 at 43; Foster, *supra*, note 23; D.R. Williams, *The Administration of Criminal and Civil Justice in Mining Camps and Frontier Communities in British Columbia* in *LAW AND JUSTICE*, *supra*, note 9 at 215 [hereinafter *Mining Camps*].

³⁰ E.g., Banks, *supra*, note 27.

³¹ See Blackwell, *supra*, note 27; Brown, *supra*, note 27.

³² See Wylie, *supra*, note 27; P. Craven, *Law and Ideology: The Toronto Police Court, 1850-80* in *ESSAYS*, VOL. 2, *supra*, note 5 at 248.

³³ See Craven, *ibid*.

³⁴ See Snell, *supra*, note 6; J.G. Snell, *Frank Anglin Joins the Bench: A Study of Judicial Patronage, 1897-1904* (1980) 18 O.H.L.J. 664; J.G. Snell, *The West and the Supreme Court of Canada: The Process of Institutional Accommodation of Regional Attitudes and Needs* (1985) 14 MAN. L.J. 287; J.G. Snell, *Relations Between the Maritimes and the Supreme Court of Canada: The Patterns of the Early Years* in *LAW IN A COLONIAL SOCIETY*, *supra*, note 10 at 143; H. Foster, *The Struggle for the Supreme Court: Law and Politics in British Columbia, 1871-1885* in *LAW AND JUSTICE*, *supra*, note 9 at 167.

Only two other topics have attracted much research and writing to date: law and the economy in nineteenth century Ontario, and women's and children's issues in nineteenth century Ontario. Each of these has been the special project of two scholars, as stated earlier, with Professor Risk mining the former topic and Professor Backhouse the latter.

Some attention has been given to several actors in the legal process, such as judges³⁵ and attorneys general,³⁶ and some attention has been given to legal education.³⁷ There are clearly numerous topics left untouched and numerous topics in the fields already explored for generations of future Canadian legal historians to chronicle.

The sixth and final preliminary observation is that to date there is no single style or ideological position characteristic of Canadian legal historiography. While it is possible to discern the historians from the "lawyers turned legal historians" by their preference for historical topics and sources rather than legal sources, it is fair to say that most scholars have permitted their topics and the primary sources about those topics to dictate the substance and structure of the resulting work. Thus, scholars who deliberately choose to study the nineteenth century Ontario courts' attitudes to industrial change look more to traditional legal materials and less to purely historical ones;³⁸ and conversely, those who are more concerned with a "law in society" topic — whether it be political or economic society — look more to historical sources than to such narrow legal materials as law reports or legislation.³⁹ Whatever the topic, it may be tritely remarked that we are all Horwitzians now.⁴⁰ All are conscious

³⁵ See Williams, *supra*, notes 6 and 11; Brode, *supra*, note 6; D. Howes, *Property, God and Nature in the Thought of Sir John Beverley Robinson* (1985) 30 MCGILL L.J. 365.

³⁶ See M. Beck, *The Rise and Fall of Nova Scotia's Attorney-General: 1749-1983* in LAW IN A COLONIAL SOCIETY, *supra*, note 10 at 125; P.B. Waite, *An Attorney-General of Nova Scotia, J.S.D. Thompson, 1878-1882: Disparate Aspects of Law and Society in Provincial Canada* in LAW IN A COLONIAL SOCIETY, *supra*, note 10 at 165; MR. ATTORNEY, *supra*, note 6.

³⁷ See Willis, *supra*, note 16; G.B. Baker, *Legal Education in Upper Canada 1785-1889: The Law Society as Educator* in ESSAYS, VOL. 2, *supra*, note 5 at 49. See also B.D. Bucknall, T.C.M. Baldwin & J.D. Lakin, *Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957* (1968) 6 O.H.L.J. 137. Indicative of how little has been done in this area is the fact that when the Osgoode Society publishes in 1987 the as yet untitled monograph by C. Ian Kyer and Jerome Bickenbach the published work will double.

³⁸ See J. Nedelsky, *Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930* in ESSAYS, VOL. 1, *supra*, note 5 at 281; J. Benidickson, *Private Rights and Public Purposes in the Lakes, Rivers and Streams of Ontario 1870-1930* in ESSAYS, VOL. 2, *supra*, note 5 at 365.

³⁹ E.g., Romney, *supra*, note 24.

⁴⁰ The reference is, of course, to Morton Horwitz's widely acclaimed, controversial and seriously-flawed book, *TRANSFORMATION OF AMERICAN LAW 1780-1860* (Cambridge: Harvard Univ. Press, 1977) which argues that American legal developments during this period were dictated by the needs of the commercial and entrepreneurial classes.

of interdisciplinary approaches and attempt to exploit these to a greater or lesser extent.

However, a handful of Canadian legal historians go beyond a trite Horwitzianism to espouse ideological approaches to their subjects. A prime example of this is the research of Professor Backhouse who views nineteenth century paternalism towards women and children with late twentieth century feminist spectacles. Although the absence of writing by other scholars in this field means that it is too early to judge with authority, it may be that this ideological perspective does not do justice to the entire context of paternalism, especially in its religious, moral and socio-economic dimensions. Certainly, none of these dimensions are explored by Professor Backhouse in any depth. As well, some of the research that has been done on employer and employee relations is explicitly Marxist,⁴¹ while other scholars have adopted what would appear to be a "Critical Legal Studies" stance from which to view legal historiography generally.⁴² Still others adopt an anti-authority ideological stance from which to view the criminal justice process.⁴³

II. THE PRESCRIPTIONS FOR CANADIAN LEGAL HISTORY

Writing in 1974 about the state of affairs in Canadian legal history, Professor Parker distressingly remarked, "[a] cynic, surveying the bleak state of writing and teaching of the history of Canadian law might simply implore the law schools to do something".⁴⁴ This "do something-anything" imprecation lay at the root of the earliest prescriptions for developing a discipline of legal history in Canada. This attitude can be seen especially in the first attempt to define legal history's future substance in Professor Risk's "prospectus".⁴⁵ As Professor Risk remarked at the outset of his analysis, "[t]herefore, the study of Canadian legal history should be respectable and flourishing, but it is not. . . . The result is that we know almost nothing about our legal past. We have not even accumulated and organized most of the major facts, let alone thought about them."⁴⁶

Professor Risk's own prospectus for Canadian legal history proceeded in three stages: (i) definition of the proper scope and scholarly orientation of the subject, that is, a definition of legal history; (ii) the delineation of substantive themes or projects peculiar to Canadian legal history; (iii) discussion of one theme which Professor Risk had chosen for himself by 1974 and which subsequently constituted his own scholarly project for the next decade, namely, the law and the economy in mid-

⁴¹ E.g., Tucker, *supra*, note 19.

⁴² E.g., Wright, *supra*, note 4.

⁴³ E.g., *Master and Servant*, *supra*, note 19.

⁴⁴ Parker, *supra*, note 1 at 317.

⁴⁵ Risk, *supra*, note 1.

⁴⁶ *Ibid.* at 227.

nineteenth century Ontario.⁴⁷ As to defining the scope of legal history, so extensive is the field's ambit and depth that Professor Risk described his own conception of legal history as a "grand challenge".⁴⁸ Thus, he wrote that "I conceive legal history to be a study of the legal processes, and this conception can be elaborated in three overlapping elements: the influences that have shaped law; the effect of law; and the structure, procedures and functions of legal institutions."⁴⁹

The comprehensiveness of the above three elements may best be exemplified when they are restated as follows: history's effect on law, law's effect on history and law *per se*. One might well ask whether Professor Risk would replace theology with legal history as the "*regina scholarum*"! At any rate, he does concede that no one person can accomplish the agenda established by his concept of legal history. He writes, "[b]ut realism demands modesty. Useful contributions can be made without seeking to meet the entire challenge. Choice of limits emphasis must be personal preferences".⁵⁰

At the second stage of his prospectus, Professor Risk lists eight "large themes in Canadian legal history" for the post colonial period, but he proffers these with becoming modesty, stating that "[t]hey are not proclamations of an exclusive domain for legal history. They are ways of ordering Canadian history that seem to me to be useful for legal history."⁵¹ The major themes may be listed as follows:

1. The function of law in the creation and expression of a distinctive Canadian identity, with particular regard to the two cultures, regionalism and metropolitanism, and classes and elites.
2. The English, American and French influence on Canadian law.
3. The role of law in economic regulation, with particular regard to the growth of public power at the expense of private ordering especially in the financial marketplace, business organizations and the allocation of losses caused by economic activity.
4. The role of law in the community, with particular regard to the growth of the welfare state in place of individual responsibility for economic and physical well-being.
5. The impact of law on individuals, with particular regard to individual life-choices, family life, privacy and freedom.
6. The role of law in the exploitation of the physical environment, with particular regard to natural resources, urban planning and the control of use.
7. The role of law in controlling violence and other anti-social conduct.

⁴⁷ See, *supra*, note 1.

⁴⁸ Risk, *supra*, note 1 at 229.

⁴⁹ *Ibid.* at 228.

⁵⁰ *Ibid.* at 229.

⁵¹ *Ibid.*

8. The structures, procedures and functions of the legal institutions, especially the constitution, legislatures, courts, administrative agencies and the legal profession.

To underline the breadth and depth of the Canadian legal historian's task, Professor Risk, in the third and final stage of his prospectus, offers some preliminary thoughts about his preferred area for study: the law and the economy in Ontario from 1841 to 1867. His choice was made not only for constitutional reasons but also because there were significant social and economic changes through this period in Ontario history. These preliminary thoughts were subsequently articulated in four seminal articles by Professor Risk published in the *UNIVERSITY OF TORONTO LAW JOURNAL*.⁵² The articles demonstrate his particular legal historiography. In giving an account of the legal development of the market, business organizations, the allocation of natural resources and transportation, Professor Risk ranges widely over political, economic and social history as well as over reported caselaw and legislation. He does this in order to understand the interrelation of legal developments in business such as negotiable instruments, mortgages, guarantees, business corporations and financial institutions. The interdependence and mutual influence of law and the economy are illuminated as a result. Moreover, Professor Risk's research facilitates some convincing conclusions about the beliefs and values of the age which were expressed in the law, including the mid-nineteenth century belief that law could help achieve economic development in Ontario; that development could best be achieved through private initiative; that each individual should bear responsibility for himself; that private power should be dispersed; and that the state should encourage private initiative.⁵³

The expansive nature of Professor Risk's definition of the scope of legal history as well as the research agenda awaiting legal historians for the next generation or two is, at first sight, paradoxical. Canadian legal history is meaningfully defined yet so extensively conceived as to be meaningless. This indicates the enormity of the task ahead but also the need for more closely defined goals, research strategies and projects. This is, after all, a prospectus, not a detailed route map.

Professor Risk's breadth of vision is not original; rather it is intimately influenced by the pioneering American legal historian, J. Willard Hurst, who has produced a number of seminal works since the 1940's.⁵⁴

⁵² See *supra*, note 17.

⁵³ Risk, *supra*, note 1 at 243.

⁵⁴ E.g., *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (Boston: Little Brown, 1950); *LAW AND THE CONDITION OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (Madison: Univ. of Wisconsin Press, 1956); *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (Ann Arbor: Univ. of Michigan Press, 1960); *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915* (Cambridge, Mass.: Belnap Press, 1964); *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970* (Charlottesville: Virginia Univ. Press, 1970). Hurst's work has been the subject of adulation and criticism: see

Of these, perhaps the most influential exemplar for Professor Risk has been *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*.⁵⁵ In his work, Professor Hurst wrote an integrated description and analysis of the rise and decline of the lumber industry in Wisconsin together with the history of the concurrent social processes, including the law. He examines *all* possible sources of information, including social history, economic history, court cases, legislation and newspapers. In this book, as well as in his other books, Professor Hurst devised broad generalizations to explain the role of law in society and tested these hypotheses in his empirical research so as to understand and explicate how the nineteenth century American legal processes worked. The importance of Hurst's approach resided not only in interdisciplinary analysis and a willingness to exploit the insights of other disciplines, but also in his belief that important questions and propositions must be posited before engaging in detailed empirical research and that legal historians must be prepared to provide as a result of their researches meaningful generalizations about the role of law in society. Thus, in *LAW AND THE CONDITION OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES*,⁵⁶ Professor Hurst argued that two fundamental normative assumptions undergirded the legal process: the legal system should protect and promote individualism, and it should also promote the environment and use of resources so as to increase individual opportunity for advancement.

Professor Risk's prospectus is clearly Hurstian in style. Risk willingly asserts that there are broad Canadian themes which should be the focus for Canadian legal history and he further refines these by topic. His own subsequent work exemplified the utility of this approach as he illuminated much of the legal-economic life of mid-nineteenth century Ontario.

But Professor Risk's work also exemplifies Hurstianism at its best. Professor Hurst's own work has been criticized for the woolliness of his generalizations, the boring, repetitive, tortuous and incohesive nature of his historical narrative, as well as his turgid writing style which skilfully disguises the precise point which he seems to wish to make.⁵⁷ Professor Parker wittily sums up the dangers of pure Hurstianism as a scholarly model by warning: "Let us hope that the Hurstian influence will not lead to the construction of woolly theories of law arising from some young

H.N. Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst* (1970) 75 A. HIST. R. 744; D.H. Flaherty, *An Approach to American History: Willard Hurst as Legal Historian* (1970) 14 A.J.L.H. 222; M. Tushnet, *Lumber and the Legal Process* [1972] Wisc. L.R. 114; R.W. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography* (1976) 10 L. & SOC'Y R. 9. See also Note, *A Bibliography of Works by and about Willard Hurst* (1976) 10 L. & SOC'Y R. 325.

⁵⁵ *Ibid.*

⁵⁶ *Supra*, note 54.

⁵⁷ See Parker, *supra*, note 1 at 313-6.

scholar's exhaustive examination of the North Florida doughnut industry from 1948-55."⁵⁸ These criticisms cannot be levelled at Professor Risk, whose work is realistic, measured and restrained and whose broad themes and theses both inform his empirical research and are proved or modified by that research accordingly.

A second prescription for Canadian legal history was written by Professor Flaherty in 1981,⁵⁹ almost a decade after that of Professor Risk. Professor Flaherty also espouses the view that Canadian legal historiography should be comprehensive and that Hurst offers a model for Canadian legal historians in his willingness to postulate broad themes and a daring conceptual framework for the legal processes in society. But whereas Professor Risk attempts to find themes in Canada (especially in Ontario) similar to those which Hurst purported to discover for America, Professor Flaherty more explicitly advocates that the role of Canadian legal history is to uncover peculiarly Canadian themes in Canadian legal history. Thus, he advocates wide and systematic reading in general Canadian historical literature to formulate working hypotheses and conceptual frameworks for use in designing empirical research projects.⁶⁰ This literature must be read with caution, however, because as Professor Flaherty indicated, Canadian historians have neglected the Canadian legal system as a significant part of our past. Rather, Canadian historians have tended to regard the legal system as passive rather than as instrumental in the historical development of Canada. Thus, H.A. Innis's "staple theory" explanation for the geographical basis of Canadian development,⁶¹ Donald Creighton's adulation of the commercial empire and business elite along the St. Lawrence River prior to Confederation,⁶² or J.M.S. Careless's emphasis on the influence of metropolitan centres in Canadian history⁶³ all ignore the role of law and the legal system in Canadian development.⁶⁴ Even given the inadequacies of Canadian history in this regard, the admonition to read widely in general Canadian history is, nevertheless, an important one.

⁵⁸ *Ibid.* at 316.

⁵⁹ Flaherty, *supra*, note 4.

⁶⁰ *Ibid.* at 9.

⁶¹ See, e.g., H.A. Innis, A.R.M. Lower, eds., *SELECT DOCUMENTS IN CANADIAN ECONOMIC HISTORY, 1497-1783* (Toronto: Univ. of Toronto Press, 1929); *PROBLEMS OF STAPLE PRODUCTION IN CANADA* (Toronto: Ryerson Press, 1933); H.A. Innis, A.F.W. Plumptre, eds., *THE CANADIAN ECONOMY AND ITS PROBLEMS* (Toronto: Univ. of Toronto Press, 1934); *THE COD FISHERIES: THE HISTORY OF AN INTERNATIONAL ECONOMY*, Rev. ed. (Toronto: Univ. of Toronto Press, 1954); *FUR TRADE IN CANADA: AN INTRODUCTION TO CANADIAN ECONOMIC HISTORY*, Rev. ed. (Toronto: Univ. of Toronto Press, 1956); M.Q. Innis, ed., *ESSAYS IN CANADIAN ECONOMIC HISTORY* (Toronto: Univ. of Toronto Press, 1956).

⁶² *THE COMMERCIAL EMPIRE OF THE ST. LAWRENCE, 1760-1850* (Toronto: Ryerson Press, 1937).

⁶³ *Frontierism, Metropolitanism and Canadian History* (1954) 35 *CANADIAN HISTORICAL REVIEW* 1; *Aspects of Metropolitanism in Atlantic Canada* in M. Wade, *REGIONALISM IN THE CANADIAN COMMUNITY, 1867-1967* (Toronto: Univ. of Toronto Press, 1969) at 117-29.

⁶⁴ Flaherty, *supra*, note 4 at 9-10.

Professor Flaherty also places greater emphasis on a theme expounded by the American legal historian, Robert W. Gordon, who distinguishes between what he called internal and external legal history. Professor Gordon's distinction was inspired by a speech given in 1963 by the Italian classical scholar, Arnaldo Momigliano, who proclaimed:

It is conceivable today that the history of literature, history of art, history of science, and history of religion can each retain some sort of autonomy, inasmuch as each is concerned with a specific activity of man. But what is no longer conceivable is that history of law should be autonomous; for by its very nature it is a formulation of human relations rooted in manifold human activities. And if, in some civilization, there is a class of jurisconsults with special rules of conduct and of reasoning, this too is a social phenomenon to be interpreted.⁶⁵

Professor Gordon re-conceptualized this idea as a "box" which contains whatever appears autonomous about the legal order, such as courts, equitable maxims or motions for summary judgment. Outside the box are such things as political, economic, religious or social influences which have input into the contents of the box.⁶⁶ In this respect, he writes:

The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects.⁶⁷

Professor Flaherty appears to advocate that legal historians take a more self-conscious approach to doing external and internal history than does Professor Risk, whose own research is based on more "in the box" than "out of the box" sources. As models for external legal history, Professor Flaherty suggests two American legal historians who have been heavily influenced by Professor Hurst. The first is Lawrence M. Friedman whose *A HISTORY OF AMERICAN LAW*⁶⁸ is a social history of American law which, "treats American law, then, not as a Kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as

⁶⁵ *The Consequences of New Trends in the History of Ancient Law* in A.D. Momigliano, ed. *STUDIES IN HISTORIOGRAPHY* (London: Weidenfeld & Nicolson, 1966) 239 at 240-1. Also cited in Gordon, *supra*, note 54 at 9.

⁶⁶ See Gordon, *ibid.* at 9-11; see also R.W. Gordon, *Historicism in Legal Scholarship* (1981) 90 *YALE L.J.* 1017.

⁶⁷ J. Willard Hurst and the *Common Law Tradition in American Legal Historiography*, *ibid.* at 11.

⁶⁸ (New York: Simon & Schuster, 1973).

autonomous, everything as relative and molded by economy and society."⁶⁹ The second model is, of course, Morton Horwitz's *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*,⁷⁰ which argues that the commercial classes and the judiciary allied in the nineteenth century to transform the legal system into an instrument for the direct promotion of American economic growth. This theory holds that the judiciary devised common law rules which permitted the flowering of capitalism, while at the same time giving these rules the appearance of being autonomous, self-contained and apolitical.

It is unclear from Professor Flaherty's analysis in what way Friedman and Horwitz should be regarded as models of external legal history for Canadian legal historians other than in a general way. He cannot mean that themes such as Horwitz's instrumentalism should be found when the raw historical data in Canada is to the contrary. Thus, one assumes that Professor Flaherty simply offers them as examples of how to do legal history generally, rather than as methodological and substantive guides to Canadian legal history.

Third, and finally, Professor Flaherty follows Professor Risk's lead in suggesting themes for new external Canadian legal history projects from nineteenth century Ontario. These include Loyalist influences on the Upper Canadian legal system, the role of the legislature in economic growth, the role of the courts in economic growth, the influence of English settlers and the English legal system, and the role of significant legal actors such as Sir John Beverley Robinson, William Hume Blake or Sir Oliver Mowat.

In contrast to Professor Risk's attempts to define a Canadian agenda for Canadian legal history, Professor Flaherty's agenda appears to be American in its orientation and has been criticized for being so.⁷¹ However, Professor Flaherty's greater emphasis on the use of external sources such as general Canadian historiography is welcome, although it could be said to be implicit in Professor Risk's prospectus as well. Yet, it remains important to permit the Canadian materials to determine the

⁶⁹ *Supra*, note 4 at 10. Friedman's book has been criticized for being too eclectic and for ignoring the autonomous development and ideological functions of the law: see M.V. Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law'* [1977] WISC. L.R. 83.

⁷⁰ (Cambridge: Harvard Univ. Press, 1977).

⁷¹ See Bell, *supra*, note 4 at 318. Bell writes further at 318:

Canadians seem to have an almost bottomless capacity for intellectual colonialism. Our lawyers and our legal academics have long been willing colonials for English law. The result has been the near total inability of Canadian courts to think for themselves, even in such wholly un-English fields as aboriginal entitlement. Lately, however, as Canadians have come to take their LL.M.'s in the U.S. rather than the U.K., one notices an increasing tendency for legal academics to trumpet the forty-year old insights of American legal realism with all the fervour of an immediate revelation from heaven. It would be unfortunate indeed if this country's emerging legal historians were to join this trend by embarking on a breathless and unreflecting rush to an American model for Canadian legal history.

themes and generalizations so as to arrive at a realistic understanding of our own past.

For all their differences of emphases, Professors Risk and Flaherty both espouse a Hurstian vision of Canadian legal history which even their respective emphases cannot disguise. Their prescription for Canadian legal history is, in fact, remarkably simple. First, it must be interdisciplinary. Secondly, it must be informed by Canadian historical scholarship. Thirdly, it must be comprehensive. Fourthly, it must postulate broad themes and generalizations which explain the interrelationship of law and society and explicate how the Canadian legal process works. Both historians suggest specific research topics which overlap to a great extent, as one would expect, given that many topics are obvious in a newly begun scholarly discipline.

A different approach would appear to be advocated by a final⁷² writer on Canadian legal historiography, Professor Barry Wright.⁷³ In a thoughtful article in 1984, Professor Wright sought to establish a model for what he called "progressive legal history". Wright does not appear to claim that his progressive vision is original; rather, he tries to articulate the model which he sees emerging in some of the "better work" done to date. For Professor Wright legal historical scholarship is at a crossroads and methodological concerns acquire increased importance if legal history is to be done "correctly" in the future.

Professor Wright suggests that progressive legal history has three concerns: "First, history must be taken seriously by legal historians. Second, new legal history requires interdisciplinary scope. Finally, it must be concerned with methodology."⁷⁴ In Professor Wright's view, if progressive legal history is to be truly historical it must focus on the centrality of change, which means that it must demystify notions of continuity and illustrate contradiction. Historicity also involves study of "the law in action" and a refusal to assume the impartiality of the legal system.⁷⁵ Again, according to Professor Wright, interdisciplinary scope means that progressive legal history must come to terms with the law's relationship to its environment, which is "external".⁷⁶ Finally, Professor Wright argues that methodological concerns become important; however, he appears to assert nothing further than that the progressive approach "strives for a marriage of theory and empirical research",⁷⁷ and continually reaches out beyond explicitly legal materials to other materials in its research. Further clarification is found in the two examples of progressive

⁷² I will not discuss the short pieces by Professor Morel, *supra*, note 4 or by Mr. Bell, *supra*, note 4, because neither adds to the major contributions of Professors Risk and Flaherty.

⁷³ Wright, *supra*, note 4.

⁷⁴ *Ibid.* at 361.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* This would appear to be an unacknowledged echo of Robert Gordon's external-internal dichotomy.

⁷⁷ *Ibid.* at 362.

legal historians whom Professor Wright invokes to illustrate his vision, namely Professor Horwitz and Professor Douglas Hay. Of these historians, Professor Wright states that "Horwitz and Hay display the various qualities of progressive legal historians. They demonstrate the historical contingency of the law, develop approaches that explain the relationship of the legal system with its environment and methodically examine a variety of sources."⁷⁸

Finally, Professor Wright follows in the footsteps of Professors Risk and Flaherty by suggesting some Canadian legal themes, including regional legal differences, institutional conservatism (including judicial conservatism) and the law and Canadian economic development.

One might wonder whether this model for "progressive legal history" differs substantively from the visions of Professors Risk and Flaherty. In fact, one of the most impressive features of discussion on how to do Canadian legal history is the unanimity in views of the proper methodology. These can be restated as follows:

1. It must be interdisciplinary.
2. It must be informed especially by Canadian historical scholarship.
3. It must be comprehensive.
4. It must postulate broad themes which meaningfully explicate Canadian law and legal processes in the entire Canadian context.

III. CANADIAN LEGAL HISTORY: 1973-1986

It remains, then, to survey the research in Canadian legal history that has been published over the past decade or so, measuring it against the criteria established by those scholars who have thought about methodological problems. Research to date may be placed in the following general categories: (A) Legal Institutions and Court Structures; (B) Legal Biography; (C) Legal Education and Ideas; (D) Law and the Economy; (E) Law and the Family; and (F) Criminal Law.

A. *Legal Institutions and Court Structures*

It seems remarkable that we know so little about the history of our courts. Legal historians must still devote considerable energy to tracing the evolution of our courts, with a view to establishing such basic facts as the introduction of new courts, the changes in names of various courts or the jurisdictions of various courts over the past two centuries or so. Nevertheless, one discrete body of legal history over the past decade is devoted to determining precisely these aspects. This work constitutes the necessary backdrop for more interesting research on the work of these courts or on the ideological roles which particular courts have played.

⁷⁸ *Ibid.* at 365.

For Ontario, the basic outline of the evolution in court structure has recently been plotted by Margaret A. Banks.⁷⁹ Her work canvasses the period from 1788 to 1981; from when the territory of Upper Canada was divided into four districts each with their own Court of Common Pleas to the date of completion of the article. Professor Bank's study is a straightforward, if somewhat dry, narrative of the various transformations and permutations of courts, judges and jurisdictions over the two hundred year period. It does not consider the historical context of various changes, in particular, the political, social or economic forces and personalities which went into each transformation of the legal process; but it assumes that changes occurred as required by the needs of the day. More specialized studies of one important change, the introduction of Equity and a Court of Chancery, have also been published. Each of these studies considers in greater detail the context for change as well as the political struggles behind that change. Thus, John D. Blackwell⁸⁰ examines the economic reasons for the creation of Chancery in 1837 to serve the increasingly sophisticated commercial requirements of the Upper Canadian business elite, the difficulties which were experienced during the first decade of Chancery's existence and the move for law reform at the end of the 1840's which resulted in the *Judicature Acts* of 1849.⁸¹ The Acts which, *inter alia*, created a Chancery bench of a Chancellor and two Vice-Chancellors, expanded Chancery jurisdiction and simplified pleadings and Chancery practice so as to expedite trials, are shown by Blackwell to owe much to the vision of William Hume Blake. Blake pamphleteered and lobbied in the 1840's for changes and implemented these when elected to the House of Assembly in 1848. He was subsequently named Solicitor General for Canada West. Blake, who himself later became Chancellor of Ontario, is clearly a topic for a full-scale biography. A second study of Chancery by Elizabeth Brown⁸² traces the history of Chancery from 1837 to *The Ontario Judicature Act, 1881*,⁸³ which abolished the old courts and established a single Supreme Court of Judicature. Writing "in the box" legal history, Brown discusses the changing jurisdictions and substantive legal interests of Chancery over this period as well as the various internal administrative changes in the way in which the court operated and was administered.

⁷⁹ Banks, *supra*, note 27.

⁸⁰ Blackwell, *supra*, note 27.

⁸¹ *An Act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of Common Law and also a Court of Error and Appeal, in Upper-Canada, and for other purposes*, S.C. 1849, 12 Vict., c. 63; *An Act for the more effectual Administration of Justice in the Court of Chancery of the late Province of Upper-Canada*, S.C. 1849, 12 Vict., c. 64; *An Act to amend and extend the provisions of the Act of this Province, intituled, An Act to amend, consolidate and reduce into one Act the several Laws in force, establishing or regulating the practice of the District Courts in the several Districts of that part of this Province formerly Upper-Canada*, S.C. 1849, 12 Vict., c. 66.

⁸² Brown, *supra*, note 27.

⁸³ S.O. 1881, c. 5.

As important as it is to establish these facts (and clearly more work is required on Chancery as well as the common law courts and lower court structure throughout the province), it must be stated that the most interesting and exciting work is that found in two other articles written about the Ontario court system by William W.T. Wylie⁸⁴ and Paul Craven.⁸⁵

Wylie's chosen topic is the development from 1789-1812 of the earliest courts in Upper Canada. He shows how the demand for courts came from the leading merchants and administrators of Upper Canada, who saw the value of English-model courts as a unifying force in Upper Canadian society along with their value as facilitators of commerce and the economic growth expected to enrich the merchant classes. In a colony with virtually no government and a small military to control a large area, civil courts could legitimize the conservative social order which the first elite of Upper Canada wished to establish. They could also be used by the merchants themselves to indicate their new social status by accepting appointments to the predominantly lay bench. Wylie traces the earliest history of the Courts of Common Pleas, Courts of Request, District Courts and the Court of King's Bench (established in 1794). His work shows the growing centralization of judicial administration in York, the professionalization of the Bench and the increasing demands made by a burgeoning and increasingly complex society on the originally unsophisticated judicial structures. These pressures ultimately led to the major reforms of the mid-nineteenth century.

In contrast, Craven has chosen a later period and a more narrowly defined topic, undertaking an examination of the police court column in *The Globe* and *The Leader* from 1850 to 1880 with a view to establishing the ideological functions of the reports in relation to the readers of those newspapers. Inspired by Professor Douglas Hay's seminal article on the ideological function of the eighteenth century English criminal assizes,⁸⁶ Craven's study differs from Hay's work in several respects. First, whereas Hay was concerned with the ideology embodied in the substantive criminal law and criminal procedure of the eighteenth century, Craven is less concerned with law and more concerned with the ambience of the police court as portrayed in the newspapers — as theatre with a didactic moral purpose. Secondly, whereas Hay regarded the ideology of the law as aimed at the oppressed in eighteenth century England, Craven is concerned more with how the law was vicariously experienced by Toronto's professional and merchant classes through their reading of the papers.

⁸⁴ Wylie, *supra*, note 27.

⁸⁵ Craven, *supra*, note 32.

⁸⁶ *Property, Authority and the Criminal Law* in D. Hay et al., eds., *ALBION'S FATAL TREE. CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (New York: Random House, 1975) 17. *But see* the criticism in J.H. Langbein, 'Albion's' Fatal Flaws (1983) 98 *PAST AND PRESENT* 96.

Finally, whereas Hay was not obliged to cope with the neutrality of his primary sources, Craven of necessity was, since he was dealing with newspaper reports not law reports. Craven shows how the journalists treated police court reports as theatre — as a “theatre of life”, a Victorian melodrama with stereotypical characters: the Villain, the Helpless Poor, the Foolish Young Man, Innocence Defiled. He shows how the police court columns vindicated the “respectable” classes of Victorian Toronto to themselves, including the respectable poor who stayed respectable by staying out of the police court. In short, Craven engages in the sort of study approved by Professor Gordon and Professor Flaherty in that he focuses on both internal and external legal history and postulates some grand themes about the relationship of law and society in mid-Victorian Toronto, based on an interdisciplinary approach to his chosen topic.

There is clearly much to be done even in Ontario in relation to establishing the history and character of our legal institutions. So too in other parts of the country. It is therefore not surprising to learn that aspiring legal historians in Nova Scotia and in Western Canada have in the past few years begun to trace the evolution of their respective court structures and legal institutions. In the 1984 volume of essays, *LAW IN A COLONIAL SOCIETY: THE NOVA SCOTIA EXPERIENCE*, Professor Thomas G. Barnes⁸⁷ examines the establishment of the legal order by the first governor of the colony, General Cornwallis. The collection highlights the difficulties involved in establishing a legislative assembly, council and courts, and the difficulties involved in determining what laws were received in that colony in the mid-eighteenth century. He accomplishes this through a comparative analysis with the New England Plantations which in their earlier days had experienced similar problems.⁸⁸ Again, building on the late nineteenth century work of Chief Justice Townsend,⁸⁹ Judge Sandra Oxner,⁹⁰ in the same 1984 volume, traces the evolution of the lower courts, the courts of General Sessions of the Peace and the Inferior Court of Common Pleas from 1749 until 1841 when the Inferior Court of Common Pleas was dissolved and its functions were assumed by an enlarged Supreme Court.

Whereas research in Ontario and Nova Scotia has concentrated on the state-created progenitors of our modern legal institutions, research in Western Canada has focused on the frontier courts in the period before there was any settled government. Especially interesting in this regard is the article by Professor Katherine Bindon⁹¹ on the Hudson's Bay Company

⁸⁷ Barnes, *supra*, note 28.

⁸⁸ The reception question had provoked earlier research. See generally J.E. Cote, *The Introduction of English Law into Alberta* (1964) 3 ALTA. L.R. 262; J.E. Cote, *The Reception of English Law* (1977) 15 ALTA. L.R. 29; D.G. Bell, *A Note on the Reception of English Statutes in New Brunswick* (1979) 28 U.N.B.L.J. 195; D.G. Bell, *The Reception Question and the Constitutional Crisis of the 1790's in New Brunswick* (1980) 29 U.N.B.L.J. 157.

⁸⁹ Townsend, *supra*, note 28.

⁹⁰ Oxner, *supra*, note 28.

⁹¹ Bindon, *supra*, note 29.

law in Rupert's Land and the first Recorder of Rupert's Land, Adam Thom. Professor Bindon demonstrates how this reactionary, Francophobic, stubborn Scots lawyer proved to be disastrous despite his considerable legal abilities which are made evident by the law codes which he drafted and by his legal analytical skills, evidenced in his writings and decisions. Thom was overly zealous in the protection of the Hudson's Bay Company monopoly to the point of alienating the traders and Indians on whom the company depended. As a result, he was relieved of his position.

If bringing law and order to trappers and hunters is the subject of Professor Bindon's essay, bringing justice to miners in nineteenth century British Columbia is the subject of an essay by David R. Williams.⁹² Williams shows how the miners, many of whom had come north from California, had been obliged to set up their own systems of justice modelled on those devised in California. These systems only lasted until the proclamation of the *Gold Fields Act*⁹³ in 1859 by Governor James Douglas. That Act provided for Gold Commissioners and Mining Boards with both administrative duties in relation to claims, and the criminal jurisdiction of justices of the peace. These bodies were subsequently superseded by the first judge, Sir Matthew Baillie Begbie, who rode into the interior on circuit dispensing common sense as much as common law.

As important and useful as these studies are, each is an isolated attempt to illuminate a small chosen topic in relation to our earliest institutions. Nevertheless, a number of areas of the country have yet to attract this type of embryonic work and much needs to be done even with respect to Ontario, which is the most studied jurisdiction to date. However, these pioneering studies into the history of local courts are excellent examples and provide some theories which must be probed and tested further.

In recent years, only one full scale monograph has been written about one institution in our court system;⁹⁴ that is, *THE SUPREME COURT OF CANADA: HISTORY OF THE INSTITUTION*⁹⁵ by Professors James G. Snell and Frederick Vaughan. The volume represents an attempt to write a chronological history of the Supreme Court of Canada by examining its personnel, its position in the Canadian polity, its relationship with its political masters, the intellectual, environmental and representative aspects of its jurisprudence as well as the way in which the institution has been perceived by the public and the legal profession. The authors find certain basic themes in their research, in particular, judicial conservatism, mechanical application of precedent, strict constructionism and an unwillingness to change the law which was uniformly regarded as a legislative prerogative. The authors also find that the Court has been regarded as insignificant by governments and citizens alike and not highly regarded either within Canada or abroad for the quality of its judicial work.⁹⁶

⁹² *Mining Camps*, *supra*, note 29.

⁹³ B.C. List of Proclamations, 1858-1864, P.A.B.C., as cited in *Mining Camps*, *supra*, note 29 at 222, n. 19.

⁹⁴ That is to say, only one as part of the new Canadian legal history.

⁹⁵ Snell, *supra*, note 6.

⁹⁶ *Ibid.* at xi.

Written by an historian and a political scientist, THE SUPREME COURT OF CANADA not surprisingly focuses on the political nature of the judicial appointment process in Ottawa rather than on any detailed case analysis or attempt to place judicial decisions in their entire historical setting. Not surprisingly, the book is superficial in almost every possible way. In the space of two hundred and fifty pages it is not possible to do much more than list succeeding benches. Indeed, that is about all the book does. Thus, there are potted judicial biographies (about a paragraph or two on each judge), potted assessments of judges (mostly disputable) and potted statements about important decisions (mostly misunderstood). Further, there is no real understanding of how the Court operates, no attempt to relate decisions and judges to their own historical backgrounds, no real criticism of the bald patronage in judicial selection and no real understanding of caselaw or analytical skill in examination of it. In short, the overall impression is that the book amounts to mere journalism rather than real legal history.⁹⁷

B. *Legal Biography*

The new Canadian legal history industry has produced three biographical monographs to date,⁹⁸ two by David R. Williams on Sir Matthew Baillie Begbie⁹⁹ and Sir Lyman Poore Duff¹⁰⁰ and one by Patrick Brode on Sir John Beverley Robinson.¹⁰¹ All are of a fine quality.

All three biographies share common stylistic features. All trace in considerable detail the chronology of their respective subject's careers. All trace their personal and family lives, as far as sources permit, so as to give as good an account of their characters and personalities as extant letters, diaries and the like permit. The three studies give convincing accounts of their subjects' personal and political philosophies. As well, they all succeed in relating these to the subjects' judicial pronouncements or other political involvements. In short, after reading each volume the reader is left with firm impressions of what manner of man and judge each was.

Sir Matthew Baillie Begbie has become somewhat legendary for his judicial forays into the rough and ready communities of the interior of British Columbia, where he dispensed justice from 1858 to 1894. However, the main strength of this first biography of him by Williams is that it shows not only this legendary side of the Begbie legacy, but also the fact that Sir Matthew defined the early law of British Columbia in decisions still cited today together with the fact that he formulated and drafted much of the important early legislation for the colony and province. It

⁹⁷ See also the earlier articles, *supra*, note 34.

⁹⁸ The old Canadian legal history could boast of the odd biographical article in provincial Bar journals, for example, the ADVOCATE in B.C. or the Law Society of Upper Canada GAZETTE in Ontario.

⁹⁹ *Supra*, note 11.

¹⁰⁰ DUFF, *supra*, note 6.

¹⁰¹ Brode, *supra*, note 6.

further demonstrates the formidable moral position which he held in the province and the great veneration which he was accorded by contemporaries toward the end of his life and career.

Sir Matthew spent thirty-six years on the bench. The subject of Williams's second judicial biography, Chief Justice Duff, spent forty years, thus suggesting that longevity is a guarantee of biographical greatness if nothing else. The Duff biography is more personal in its focus than that of Begbie, though it is not difficult to understand why. As Mr. Williams suggests between the lines, Duff's decisions were less than intellectually scintillating because he was too much the "Canadian judge", that is, he was unwilling to make law in place of the legislature and was very much a legal formalist. While Duff undoubtedly had a brilliant analytical legal mind, his decisions relied on technical constructions and show a total absence of humanity and imagination. Duff, the man, was, as portrayed by Williams, a contrast: chronically alcoholic, sexually impotent, always in debt and generally incapable of running his own life until taken in hand by his sister late in life. The dry legal formalist and the inadequate human failure may well be opposite sides of the same character.

In contrast to Duff, a man coming apart from the centre, Sir John Beverley Robinson is portrayed by his biographer as a completely integrated person. His personal philosophy, his upbringing and education, his piety, his family life, his political life and finally his judicial career demonstrate Robinson's own internal unity, self-knowledge and psychological integrity despite the fact that his public life was one of conflict and in the end one of failure. The son of a Loyalist family which had left behind in Virginia considerable wealth in order to start afresh in Upper Canada, Robinson had wanted to reproduce eighteenth century England in The New World with a landed aristocracy, informed by faith in a paternalistic Toryism and an established Anglican Church. The vision failed. Yet, as Brode shows, while Robinson's achievements fell short of his aspirations, his vision for Upper Canada had a significant effect on the future development of Ontario and on the Canadian legal heritage, confirming it in its Anglophilia until the late twentieth century. Despite this, Brode also presents Chief Justice Robinson as a likeable and thoroughly decent man who simply lived in the wrong century and the wrong country.

C. *Legal Education and Ideas*

As yet, the new Canadian legal history has attracted few publications in the area of legal education.¹⁰² The topic is a broad one, encompassing the history of individual law faculties both extant and non-extant, edu-

¹⁰² There have been a few good articles such as B.D. Bucknell, T.C.H. Baldwin & J.D. Lakin, *Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957* (1968) 6 O.H.L.J. 137. Also, John Willis, *supra*, note 16, has written a history of Dalhousie Law School which exemplifies how the history of legal education should not be written.

cational requirements and programmes sponsored by the various law societies across the country, the curriculum contents, the attitudes and ideas promoted by legal education, the law student societies and clubs which have been a feature of Canadian legal education, the textbook tradition and so on. One writer, Professor G. Blaine Baker, could be said to occupy the entire field by virtue of his two seminal articles: *Legal Education in Upper Canada 1785- 1889: The Law Society as Educator*¹⁰³ and *The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire*.¹⁰⁴ Each article is almost one hundred pages in length and indicates fulsomely Professor Baker's capacity to undertake highly original and extensive research where no one has ever left so much as a footprint to date.

In the former paper Professor Baker examines how the Law Society of Upper Canada (L.S.U.C.) exercised its monopoly over legal education in the nineteenth century. This monopoly was neither delegated to nor shared with the universities which only sporadically attempted to mount law courses. Baker argues that not only did legal education dominate the business of the Law Society but, in fact, that in comparison to other legal education programmes in the common law world in the nineteenth century, the Law Society conducted the most sophisticated and intensive programmes. Baker also shows that legal education consisted not only of scholarly work but, more importantly in the minds of the Benchers, professional *formation*. The function of Osgoode Hall was to inculcate future members of the Ontario Bar with the right attitudes so as to produce a governing elite of lawyers for Ontario.

Professor Baker has reconstructed each stage of the training for the Bar from pre-legal education to Bar admission examinations throughout the nineteenth century. What is noteworthy is that he has done so through extensive researches in primary sources which are virtually unstudied by anyone else to date. He reconstructs the social classes represented by law students, the relative importance of certain immigrant groups (in particular the Irish), the periodic and unsuccessful challenges from the universities (inspired by the growth of the university law schools in America) and the various identity crises and periods of indecision to which the L.S.U.C. fell victim.

Professor Baker is able to draw a number of important conclusions from his work. First, in contrast to America or England, legal education in Ontario evolved in a distinctive fashion in that the governing professional body took its monopoly seriously so that university law schools fashioned on the American model never appeared. However, the Law Society also took education for the Bar seriously, unlike the English Inns of Court which provided virtually no education at all until this century. Secondly, academic standards were high and the emphasis throughout was meritocratic, as a result of which scions of the Family Compact were

¹⁰³ Baker, *supra*, note 37.

¹⁰⁴ (1985) 3 L. AND HIST. R. 219.

regularly ploughed while impoverished immigrants were passed. Thirdly, through its educational functions the Law Society deliberately attempted to cultivate a legal elite. Fourthly, and most importantly, the legal education programme was distinctly Upper Canadian, that is, indigenous and relatively uninfluenced by foreign models. Ontario legal education, Professor Baker argues, did not become colonial until the twentieth century.

The view that Ontario's legal culture became colonial in the twentieth century is substantiated in Professor Baker's other seminal article which attempts to reconstruct the legal culture of Upper Canada between 1800 and 1920.¹⁰⁵ As he notes, this reconstruction was a difficult process since the law libraries of Upper Canada have long since migrated to the United States. It is now difficult to know what books lawyers used regularly in their practices. Professor Baker has managed to track down some of these libraries in the United States and has inspected the holdings of books and book request orders for indigenous law libraries such as the Great Library at Osgoode Hall to determine what legal literature was used. He further notes the complaints about the paucity of legal literature in Upper Canada and suggests that the reason for the dispersal of the books had much to do with the marketing practices of nineteenth century law publishers. The publishers persuaded Ontario lawyers to exchange their old books for new texts and promptly sold these older books at higher prices to the new American law school libraries which were anxious to build up their holdings. The result is a cultural discontinuity in the legal culture of Ontario. In the early part of the nineteenth century, libraries boasted a catholic selection of both common and civil law materials from other countries as well as indigenous texts. Consequently, there is considerable evidence of an indigenous, if eclectic, legal culture in Upper Canada — one of the characteristics of which was ambivalence toward English law.

By the end of the century this perspective is replaced by the success of the Imperial ideal in Canadian cultural life generally, which in law meant an anglophilic following of English legal precedents and a turning away from the indigenous legal culture of nineteenth century Ontario. In the midst of the great social and economic change which occurred at the turn of the century (during which the Ontario Bar started to slide from its position as the untitled aristocracy of Ontario) it was easy to slip into the Imperial mode and the legal formalism which accompanied it, and which has lasted almost to this day.

D. *Law and the Economy*

As stated above, the earliest work in the new Canadian legal history was that done by Professor Risk on law and the economy in mid-nineteenth century Ontario,¹⁰⁶ which culminated in the paper published in the first volume of the Osgoode Society collection.¹⁰⁷ Professor Risk's work in-

¹⁰⁵ *Ibid.*

¹⁰⁶ *Supra*, note 17.

¹⁰⁷ *Ibid.*

dicates that while the courts presented an appearance of formalism, when faced with market problems calling for the choice between conflicting principles, even Chief Justice Robinson was conscious of the need to select the law most suitable to Canadian conditions. Thus, despite the appearance of obeisance to English law, there is additional evidence of an indigenous legal culture in Ontario.

After extensive examination of all the reported mid-century cases relating to commercial matters, Professor Risk is able to identify both the values espoused by the courts and the influences on their decision-making in that period. He argues that three values appear in the cases: (i) the encouragement of private initiative, which involved individual responsibility, the legal protection of "useful" private effort and a belief in a high degree of dispersal of economic power so as to avoid monopoly; (ii) the belief that legal powers should be used to achieve progress, if only by not deliberately impeding it; and (iii) a slight preference for the public interest over the private interest, where the public interest coincided with material productivity and progress.

These values, not surprisingly, were typically those of the day: pragmatic, action-oriented, individualistic and the pursuit of material progress with restraint. Not surprisingly, Professor Risk has found greater reliance on American caselaw and legislative models than has been the case in Canada since. American industrialization was more similar to that of Canada than was the English experience. Nevertheless, while sympathetic to American legal solutions to the problems created by industrialization, Professor Risk asserts several important differences between Ontario and the United States. Specifically, Ontario courts did not think they had a role to play in industrialization and thus Horwitzian instrumentalism cannot be posited for Ontario. Also, one does not find discussions of change or even any debate about social values in Ontario law journals or textbooks. In contrast, the American courts were perceived as the place where social values were to be discussed. Furthermore, there were numerous extracurial commentators willing to assist in those discussions.

Professor Risk's conclusions have inspired their re-examination by other legal historians interested in the industrialization process in Ontario, in particular, that undertaken by Professors Jennifer Nedelsky¹⁰⁸ and Jamie Benidickson.¹⁰⁹ Professor Nedelsky seeks to test the thesis that the Ontario courts were conservative and mere passive followers of English precedent in relation to the adaptation of the law of nuisance to the problems created by industrialization. After an extensive examination of the nuisance cases decided between 1880 and 1930, she concludes that the courts were indeed conservative but in a special way. In order for Ontario courts not to accommodate industrialization, they were obliged to be ingenious in the circumvention of English caselaw, which had been more sympathetic to

¹⁰⁸ Nedelsky, *supra*, note 38.

¹⁰⁹ Benidickson, *supra*, note 38.

industrialization. This approach favoured the protection of traditional individual and property rights rather than corporate interests. Ontario judicial conservatism was a product of principle not passivity. It was not simply a species of formalism, since legal precedents had more often to be avoided than applied. Instead, Ontario courts took the view that the regulation of industrialization was the proper role of the legislature and not the courts. This view existed, not because the judiciary was democratically minded, but because the same elite populated the legislature and the bench. The courts did not fear attacks on property rights similar to those which had occurred in the American legislatures when confronted with industrialization.

These same theses are expounded by Professor Benidickson in his examination of the management of natural resources, in particular, lumber and hydro-electric power, in late nineteenth century Ontario. Again, the same shift from regulation of disputes by the courts to legislative regulation of these new industries is shown. Not only did the courts not want to get involved in disputes, but they proved to be singularly inept when obliged to do so. Both courts and industry benefited from this situation. The integrity of the courts was protected when they were no longer placed in the difficult position of choosing between public and private proprietary interests, while the legislatures were better able to provide an overall regulatory environment for the development of industry.

Perhaps predictably, the theme of judicial conservatism is also found in relation to the law of master and servant and related matters in nineteenth century Ontario. This has provided a second research focus to industrialization for legal historians. Thus, Professor Craven¹¹⁰ has shown that until the legislature was obliged to mitigate the rigours of the law which regarded disobedient servants as criminals and enforced criminal sanctions against them, the courts were quite harsh in their response to employer-employee problems, favouring the employer/master. Again, Professor Tucker¹¹¹ reveals how unsympathetic the courts were towards employer liability for accidents in the workplace until the legislature stepped in as a result of the increasing role of organized labour in Ontario politics toward the end of the century.¹¹² In examining the history of the introduction of workers' compensation legislation in Ontario, Professor Risk reaches the same conclusion, this being that the lot of the working person was improved by the legislatures and not by the courts.

E. *Law and the Family*

But for the work of Professor Backhouse,¹¹³ very little research has been published to date on the broad area of law and the family, which is

¹¹⁰ *Master and Servant*, *supra*, note 19.

¹¹¹ Tucker, *supra*, note 19.

¹¹² *Nuisance*, *supra*, note 19.

¹¹³ *Supra*, note 18.

defined to include women's issues such as rape.¹¹⁴ Moreover, Professor Backhouse's work, while it extends to custody law, rape law, abortion and birth control, infanticide and marriage law itself, is devoted to the one narrow theme of the role of patriarchal notions towards women and children as expressed in the law in nineteenth century Ontario. Her feminist perspective colours her interpretation of her findings considerably.

Her first significant piece of research traced the shifting patterns of nineteenth century Ontario custody law.¹¹⁵ Her research contrasts the view that at the beginning of the century children were simply the property of their fathers so that custody should invariably go to fathers, with the view held at the end of the century that mothers should also have a right to custody provided they were living under the protection of a male, whether husband, father or brother, and were able to provide a family life for the child. Professor Backhouse argues that increased grants of custody to mothers reflected less an impulse to grant increased justice and equality to women than a reflection of the Victorian ideal of home-life as a cosy escape from industrial society and the marketplace, the role of the mother in the home and emerging notions of childhood and adolescence as separate stages in human life. Professor Backhouse has used much of the nineteenth century caselaw and legislation to exemplify these themes. She also makes reference to the extreme conservatism of courts which favoured inactivity in the absence of substantive legislative changes in the law in favour of custody rights for mothers.

Patriarchal family ideals are also found by Professor Backhouse in relation to birth control¹¹⁶ and infanticide¹¹⁷ in nineteenth century Ontario. Once more, caselaw and legislation reveal that whereas at the beginning of the century there was no legal regulation of abortion or birth control and substantial evidence to suggest that these were regarded as permissible, by the end of the century there was considerable legislation — particularly criminal legislation — which sought to punish abortion, the sale and distribution of birth control devices, and even public discussion of birth control. Consequently, women lost control over their reproductive functions in favour of Victorian family life. Again, the few cases of infanticide which were litigated and subsequently reported show a somewhat surprising sympathy for women who killed unwanted children. However, as Professor Backhouse shows, these acquitted women were not dangerous criminals; rather, they were almost invariably unmarried and unable to provide a family life for their children who were, in any case, regarded by the law as their property, given the women's refusal to identify the fathers.

¹¹⁴ *Canadian Rape Law*, *supra*, note 18.

¹¹⁵ *Canadian Custody Law*, *supra*, note 18.

¹¹⁶ *Involuntary Motherhood*, *supra*, note 18.

¹¹⁷ *Desperate Women*, *supra*, note 18.

Finally, Professor Backhouse, not surprisingly, finds attitudes toward rape¹¹⁸ and marriage¹¹⁹ to be purely patriarchal. She traces the rape offences over the century from its beginning as a crime against male property rights in women through its later development as a crime against women themselves. However, rape was not a crime against women as persons; but rather the paternalistic reason still prevailed (if in the changed form) of regarding rape as an attack on the idealized Victorian woman by male predators. Throughout this transformation, male defendants continued to be acquitted.

Professor Backhouse's conclusions have been heavily influenced by feminist writing. However, her research and the statistical and factual evidence which she has collected is impressive in its depth and scope, and invaluable in its own right. Whether her radical conclusions entirely reflect legal attitudes toward women and children or explain them in their own historical context remains to be seen.

F. *Criminal Law*

The reconstruction of our criminal past has attracted the most work to date. Indeed, the range of topics is so broad and the style of work so varied that it is difficult to decipher any coherent body of research. There are a number of scholars in the general area and each has produced several works, but there is still no integrated body of scholarship on any one sub-topic, and broad themes have yet to emerge. Methodological problems in measuring and assessing criminality have yet to be solved.¹²⁰ Specific criminal statutes or offences have yet to be studied in detail, although recently some work has been done in this area.¹²¹ The problems of criminal law in society, especially in relation to public morality, have not yet been addressed in other than cursory fashion.¹²² And while there have been several superb studies of criminal individuals or criminal incidents, which make for exciting reading in their own right, there have not yet been enough of these to discern patterns or themes or to assess their significance in the history of Canadian criminal law.¹²³

None of this is surprising since criminal law is by far the largest area of study for Canadian legal historians. The surface has scarcely been scratched.

IV. CONCLUSION

The overwhelming impression made by the output of legal historical scholarship in the past decade is one of high quality, scholarly maturity

¹¹⁸ *Canadian Rape Law*, *supra*, note 18.

¹¹⁹ *Pure Patriarchy*, *supra*, note 18.

¹²⁰ *See supra*, note 22.

¹²¹ *See supra*, note 21.

¹²² *See supra*, note 25.

¹²³ *See supra*, notes 23 and 24.

and sophistication. The second impression is that it meets the criteria formulated at the outset. Much of it is interdisciplinary — informed especially by Canadian historical scholarship — and often comprehensive and daring in its choice of broad themes. Issues such as the conservatism of the Ontario judiciary in dealing with the challenges of industrialization, the voluntary subservience of the courts to the legislatures and the vitality of the indigenous Canadian legal culture in the nineteenth century which gave way to a colonial legal culture in the twentieth century (opting first for England and then America) have all been meaningfully explicated. These are themes which seem to be viscerally correct and demand further exploration.