

## "in the round"

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[See table of contents](#)

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## Law "in the round"

IN THE *ACADIENSIS* TRADITION, this review article surveys recently published material, in this case under the broad rubric of Canadian legal history.<sup>1</sup> Since — at least according to this reviewer's definition — legal history is an integral part of the larger history of social relations, the subjects range from popular resistance to the history of the Supreme Court of Canada. In addition to surveying this *potpourri*, the review tries to push Canadian legal history towards a relativist approach. In view of the close association of Canadian legal history with the pedagogy of our law schools, this approach seems both appropriate and important.

My bias is summed up by the view that legal historians must recognize the centrality of the law to class relations. This perception is summed up by Evgeny P. Pashukanis in these terms: "Law as a form does not exist in the heads and the theories of learned jurists. It has a parallel, real history which unfolds not as a set of ideas, but as a specific set of relations which men enter into not by conscious choice, but because the relations of production compel them to do so".<sup>2</sup> Such an approach has marked the scholarship of certain British, French and American intellectuals.<sup>3</sup> Scholars who have married parts of the British or European Marxist tradition to Canadian sources include Douglas Hay, George Rudé, Jean-Marie Fecteau, Paul Craven and Eric Tucker.<sup>4</sup>

A significant number of British sociologists and legal philosophers have taken up a Marxist *problématique*. Of particular use is Maureen Cain and Alan Hunt's *Marx and Engels on Law* (London, Academic Press, 1979), a good col-

This review benefited greatly from the comments and vetting of Blaine Baker, John Dickinson and Vince Masciotra.

1 For other reviews of Canadian legal history see David Flaherty, "Writing Canadian Legal History: An Introduction" in Flaherty, *Essays in the History of Canadian Law, Volume I* (Toronto, 1981), pp. 3-42; D.G. Bell, "The Birth of Canadian Legal History", *University of New Brunswick Law Journal*, 23 (1984), pp. 312-8; Barry Wright, "Towards a New Canadian Legal History", *Osgoode Hall Law Journal*, 22, no. 2 (Summer 1984), pp. 349-74; for surveys of some of the major works in Quebec legal history see André Morel, "Canadian Legal History — Retrospect and Prospect", *Osgoode Hall Law Journal*, 21, no. 2 (October 1983), pp. 159-64; Jean-Guy Belley, "Vers une sociologie historique de la justice québécoise. Réflexion en marge d'un ouvrage récent sur la justice civile sous le régime français", *Cahiers de droit*, 24 (1983), pp. 409-17.

2 Pashukanis, *Law and Marxism: a general theory* (London, 1978), p. 68.

3 The best examples are Douglas Hay, Peter Linebaugh, John G. Rule, E.P. Thompson, Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Middlesex, 1977) and E.P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (Middlesex, 1975).

4 Hay, Craven and Fecteau are treated below. For Rudé see *Protest and Punishment: the Story of the Social and Political Protesters Transported to Australia, 1788-1868* (Oxford, 1978); for Eric Tucker see "The Law of Employers' Liability in Ontario, 1861-1900", *Osgoode Hall Law Journal*, 22 (1984), pp. 213-80.

lection that groups documents in terms of specific themes such as property and the state and ideology. Short but important commentaries and bibliographies for each section are provided.<sup>5</sup> While the Cain and Hunt collection concentrates on property relations (with a particularly interesting chapter on law and the transition to capitalism), Hugh Collins' *Marxism and Law* (Oxford, Oxford University Press, 1984) takes up the "Rule of Law", disputing the autonomy of the law and the neutrality of the liberal state. This theme is pushed further in *Capitalism and the Rule of Law: From deviancy theory to Marxism*.<sup>6</sup>

The most outspoken American advocate of "law as class relations" has been Eugene Genovese. In *Roll, Jordan, Roll* (1974) and more recently with Elizabeth Fox-Genovese in *Fruits of Merchant Capital* (1983), he has interpreted the law as constituting "a principal vehicle for the hegemony of the ruling class" or, in even stronger terms, as "the means by which command of the gun becomes ethically sanctioned".<sup>7</sup> A Genovese student, Mark Tushnet, carries this forward in *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton, Princeton University Press, 1981). He goes far beyond Morton Horwitz's *Transformation of American Law, 1760-1860* in fixing law to social relations.<sup>8</sup> Tushnet brushes aside the importance of biography in legal history, dismissing the political and social backgrounds of individual judges as "homogeneous enough to ignore". The legal historian, he argues, needs a broad brush and catholic tastes that reach into the social sciences. He defines his own study, for example, "as one in Southern history, in legal history, and in the historical sociology of law".<sup>9</sup> The crucial interpretive part of his work is the legal dilemma caused by the fundamental contradiction between the master/slave relation and market relations.

While this group of scholars emphasize the law in a framework of *experience*,

- 5 See also Alan Hunt, *The Sociological Movement in Law* (London, 1978). For an exhaustive survey of English legal history, see David Sugarman, *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Abingdon, 1984). The Western legal tradition since the 11th century with particular emphasis on canon law is treated in Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, 1983). A far-reaching Marxist interpretation of the role of the law in the Greek and Roman world is in G.E.M. Ste. Croix, *The Class Struggle in the Ancient Greek World* (London, 1981), especially chapters 2 and 6.
- 6 This collection, edited by Bob Fine, Richard Kinsey, John Lea, Sol Picciotto and Jock Young (London, 1979) is drawn from papers given at the Conference of Socialist Economists and the National Deviancy Conference. Also useful is Colin Sumner, *Reading Ideologies: an investigation into the Marxist theory of ideology and law* (London, 1979).
- 7 *Roll, Jordan, Roll: The World The Slaves Made* (New York, 1976), pp. 25-6.
- 8 *The Transformation of American Law, 1760-1860* (Cambridge, 1977).
- 9 For a comprehensive survey of liberal and "critical" legal history in the United States see Robert W. Gordon, "Critical Legal Histories", *Stanford Law Journal*, 36 (January 1985), pp. 57-125. "Critical" legal historians emphasize the law as relative and partisan and as a physical and ideological force for class legitimization. For a good collection on American critical legal studies see David Kairys, *The Politics of Law: A Progressive Critique* (New York, 1982).

another Marxist tradition — French in origin and more closely linked to the Marx of *Grundrisse* — fixes law more rigidly in tandem with a mode of production and particularly the transition from a feudal to a capitalist mode of production. The law from this perspective is effectively seen in the work of Nicos Poulantzas, where the autonomy, custom and privilege of feudal relations are shown to give way to strong central governments and formal institutional structures of enforcement.<sup>10</sup> This emphasis on the state leads to the social control debate, to the question of legitimization and institutionalization, and to the particular influence of Michel Foucault. An interesting example of Foucault's influence is found in the work of Michael Ignatieff on authority and coercion. In his 1978 study of penitentiary development in England, Ignatieff identified philanthropy as "not simply a vocation, a moral choice; it is also an act of authority". By 1981 Ignatieff had doubts about the one-wayness of social control. Less sure of the state's monopoly in punitive relations, more cognizant of pre-industrial authority structures, and influenced by Gareth Stedman Jones and the *History Workshop* insistence on the dynamics of class relations, Ignatieff has distanced himself from a Foucaultian approach.<sup>11</sup>

Despite significant differences, these interpretations all proceed from the premise that legal history must be fitted into larger studies of society. But this intimacy of the legal and social, this ability — in Frank Scott's terms — to see "law in the round",<sup>12</sup> has only a weak tradition among Canadian legal scholars. This was pointed out three decades ago in Maxwell Cohen's report on legal education in Canada. He was seconded in the Canadian Bar Association's 1954 report on the state of legal research and more recently it has been the most important conclusion of *Law and Learning* (1983). *The Arthurs Report* emphasizes the relationship between law and "our histories and cultures" and contrasts this with the lack of "critical", "reflective", "scientific" and "interdisciplinary" legal scholarship in Canada.<sup>13</sup>

10 *Nature des choses et droit; essai sur la dialectique du fait et de la valeur* (Paris, 1965); *Pouvoir politique et classes sociales* (Paris, 1967).

11 See his *A Just Measure of Pain: the Penitentiary in the Industrial Revolution, 1750-1850* (New York, 1978) and "State, Civil Society and Total Institutions: a critique of recent social histories of punishment", in Stanley Cohen and Andrew Scull, *Social Control and the State* (Oxford, 1983), pp. 75-105. The same dilemma of authority and resistance is apparent in the study of Quebec legal history. On the one hand is the evident power of the colonial legal and judicial system — its class orientation, its authoritarian roots in British and French legal tradition, its function as an agent of coercion in the colony — and the evidence of strong resistance to justice in Quebec. The difficulty of holding jury trials, the charivaris and the lawlessness of the Gaspé and Eastern Townships are evidence of this.

12 Sandra Djwa and R. St J. Macdonald, eds., *On F.R. Scott: Essays on his Contributions to Law, Literature and Politics* (Montreal and Kingston, 1983), p. 108.

13 "The Condition of Legal Education in Canada", *Canadian Bar Review*, 28, (1950), pp. 267-314; "Report of the Committee on Legal Research", *Canadian Bar Review*, 34, (1956), pp. 999-1064; *Law and Learning* (The Arthurs Report) [Report to the Social Sciences and Human-

It is Frank Scott's search for fundamental principles in Canadian literature, politics and law that strikes the reader of Sandra Djwa and R. St. J. Macdonald, *On F.R. Scott: Essays on His Contributions to Law, Literature and Politics* (Montreal and Kingston, McGill-Queen's University Press, 1983). This is a collection of 15 essays presented at a 1981 symposium on Scott at Simon Fraser University. Thomas Berger, Gerald Le Dain, William Lederman, and Walter Tarnopolsky all agree on Scott's attempt in the classroom and courtroom to link the law to larger concerns of human rights and power. A sense of Scott's frustration runs through the volume as he locked horns with the larger conservative realities of his world: McGill University; Maurice Duplessis; and the Canadian party system.<sup>14</sup>

Thomas Berger's *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto, Clarke Irwin, 1981) exemplifies the liberal tradition of Canadian legal history; indeed Berger recognizes the central influence of Scott and the pre-1968 Pierre Elliott Trudeau. A distinguished judge and exponent of native peoples' rights, Berger sets out to fit minority rights into their historical context. Despite the dreary Canadian record which he compiles from the experience of the Acadians, minority schools outside Quebec, Jehovah Witnesses in Quebec, Japanese Canadians during the Second World War and Québécois in October 1970, Justice Berger remains a committed federalist, centralist and liberal democrat. In Canada "we respect human rights and the rule of law"; free from "mindless patriotism", we have an intellectual tradition based on "free inquiry and a long experience of the institutions of liberal democracy".

Berger is an incurable Whig optimist. Although the British North America Act of 1867 was not a compact between two peoples or nations but "the creation of an Imperial statute", the concept of a bicultural country with respect for minorities has seeped into our consciousness and has become the "unfinished business of Confederation". Berger's historical sleight-of-hand continues to the conclusion that "we are two distinct societies — two nations". Nor is Berger discouraged by Canada's dismal treatment of its minorities. Perhaps English-speaking Canadians did largely destroy the rights of francophones outside Quebec in the half-century before 1914, but after the First World War Ontarians "began to feel that they had treated Franco-Ontarians badly". And poor Sir Wilfrid Laurier, buffeted by the realities of Canadian racism and jingoism, and ultimately rejected by a majority insistent on conscription, emerges as "a paradigm of tolerance in a plural society". Berger turns the record of intolerance that he documents into a treatise showing faith in government, in a written constitution, in the basic goodness of the Canadian people and, above all, faith in the Canadian Charter of Rights.

ities Research Council of Canada by the Consultative Group on Research and Education in Law] (Ottawa, 1983).

<sup>14</sup> See also Douglas Schmeiser, *Civil Liberties in Canada* (London, 1964) and Walter Tarnopolsky, *Discrimination and the Law in Canada* (Toronto, 1982).

A conservative approach to native peoples' rights is developed in Thomas Flanagan's *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon, Western Producer Prairie Books, 1983). Flanagan, who has already published three books on Louis Riel, challenges what he calls the mythmaking of those who would grant Riel a posthumous pardon. He examines the Rebellion of 1885 from the standpoint of three essentially legal issues: Dominion land policy and Métis land claims, the Métis rights to aboriginal claims, and the fairness of the Riel trial. Flanagan argues that Riel received a "fair" trial that "stands up well as an example of the judicial process": his trial was not unduly fast, the death penalty was normal in such cases, the jury selection was not stacked, and the choice of venue was correct.

In his treatment of land rights Flanagan shows the inexorable alliance of the law (in this case, federal land-settlement acts) and state ideology. Concluding that the Métis over-reacted in taking up arms, Flanagan deals the Métis — and indeed any Canadian minority group — a stacked deck by starting from the premises that "the system could only work if its rules were generally enforced" and that the Métis were "treated exactly the same as all other settlers according to legislation and settled policy".<sup>15</sup> But Flanagan himself shows that the Métis form of economic organization, their agriculture, and their family structure were in fundamental contradiction with a centralized land policy geared to immigration, settlement and railway development. Ottawa's definition of "head of families", for example, posed great difficulties in the extended family organization of the Métis. Law was thus a crucible in this contradiction. While Flanagan downplays Métis claims, noting for example, that they "wanted money", he does quote Riel's insistence that a fundamental concept of natural property and ownership law was at issue:

When they [the French and English] have crowded their country because they had no room to stay anymore at home, it does not give them the right to come and take the share of all tribes besides them...God cannot create a tribe without locating it. We are not birds. We have to walk on the ground, and that ground is encircled of many things, which besides its own value, increases its value in another manner, and when we cultivate it we still increase that value (p. 84).

Biographical approaches are fairly common in legal history, as they have been in political history. Patrick Bode's *Sir John Beverley Robinson: Bone and Sinew*

15 The same acceptance of the ground rules is evident in Keith Walden's *Visions of Order: the Canadian Mounties in Symbol and Myth* (Toronto, 1982). At regular intervals (pp. 84, 144, 209) the reader is given an important definition of the *raison d'être* of law enforcement in Canada. The RCMP's "ultimate concern was not to protect property or to enforce a moral code or to sustain a particular political system. It was to ensure that the order on which civilization depended was sustained" (p. 84).

of the Compact (Toronto, The Osgoode Society, 1984) is an ambitious work but gets trapped by the confines of biography.<sup>16</sup> Robinson was a central member of Upper Canada's Family Compact. Solicitor General, Attorney General, member of the Legislative Assembly, and Chief Justice of Upper Canada, he was a star in the Upper Canadian crises of the early 19th century. He prosecuted Lord Selkirk, charged Robert Gourlay, intrigued in the Barnabas Bidwell affair, and negotiated in England during the Union discussions of 1822. Important social issues abound: land settlement, immigration of Irish paupers, crown and clergy reserves, social class, and the relationship of family, property, the state and the law in the colony's formative period. But Brode slides off and contents himself with narrative history. A section on the nature of Canadian toryism is inexplicably followed by a nature poem penned by the young Robinson; another important chapter ends with the whiggish platitude that Robinson "himself would live to see a great and prosperous Upper Canada".

The recently published work by James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto, The Osgoode Society, 1985) is an uneven institutional history.<sup>17</sup> The authors explain that they divided the project such that James Snell did personnel, government policy and public attitudes; Vaughan treated case law and jurisprudential issues. By these benchmarks, the book seems almost entirely the work of Snell. Minute attention is given in every chapter to judicial appointments, the court's housing crises, the intriguing participation of judges in non-judicial functions (particularly commissions), and to the failure of judges to follow up oral judgements with written decisions. Readers learn about justices' drinking habits, that certain judges drew their pay months in advance, and that others accepted payment for sittings of the Judicial Committee of the Privy Council which they did not attend.

On the other hand, far too little attention is paid to the court's major cases. One does learn that the court was at one time or another racist, sexist, centralist, and ignorant of the Quebec legal tradition. Indeed, the authors are blunt about the political reality that the court was "a minor political instrument at the disposal of the federal government". However, the ideology and reasoning of decisions concerning Manitoba Schools, the War Measures Act and conscription, and the upholding of federal disallowance of the Aberhart banking legislation receive summary treatment. Like Berger's work, *The Supreme Court of Canada* is upbeat. With the adoption of the Charter of Rights "the prologue is over" and the court is making a "cautious transition from the older conservatism to a bolder jurisprudence".

With no Canadian review in the field, promoters of Canadian legal history must rely on anthologies as a forum for publication.<sup>18</sup> The results are inevitably

16 See also David Williams, *Duff: A Life in the Law* (Toronto, 1984).

17 See also Ignace J. Deslauriers, *La cour supérieure du Québec et ses juges 1849 — 1er janvier 1980* (Quebec, 1980).

18 One of the earliest was Louis A. Knafla, ed., *Crime and Criminal Justice in Europe and*

uneven. A recent example of the genre is *Law in a Colonial Society: the Nova Scotia Experience* (Toronto, Carswell Company, 1984), edited by Peter Waite, Sandra Oxner and Thomas Barnes. This collection is drawn from 1983 symposia at the University of California Law School at Berkeley and at the Dalhousie Law School. Although unifying themes do not leap off the pages, Thomas Barnes' article on the Nova Scotian legal system after 1749 and the appendix on "Nova Scotia's Blackstone" are particularly stimulating to the extent that they show the continuance of French law and seigneurialism in Acadia from 1710 to 1749. They bear comparison to the organization and practice of civil law in Quebec from 1759 to 1866.<sup>19</sup> Sandra Oxner's survey of the evolution of the Lower Court of Nova Scotia is reminiscent of Frederick Armstrong's useful *Handbook of Upper Canadian Chronology and Territorial Legislation*.<sup>20</sup>

More ambitious are articles by Judith Fingard and Michael Cross. The latter treats popular resistance across British North America and has relatively little to say about Nova Scotia. Suggesting that the law was little more than "cobwebs" in the early period of industrialization, Cross assembles a panoply of armed resistance, arson, hornblowing, and the failure to convict of grand and coroners' juries. His conclusion is that authorities at mid-century were frightened and that they made concessions. It appears that popular resistance — at least in that particular period — could successfully challenge the state.<sup>21</sup>

Cross' interpretation does not jibe at all with that of his colleague at Dalhousie, Judith Fingard. Hostile to quantifiers and social-control interpretations, Fingard insists on the need for "the history of the individual". Taking 92 recidivists (32 per cent of those imprisoned by the Halifax Police Court, 1854-84) and six case histories, she constructs a sort of lifestyle of the poor and propertyless. Far from being an instrument of oppression, her Police Court becomes "a popular institution" used by families to imprison troublesome members and by the homeless to seek refuge from winter and unemployment. Her interpretation

*Canada* (Waterloo, 1979), a collection of essays drawn from a 1979 workshop at the University of Calgary. Of particular note is J.M. Beattie, "Judicial Records and the Measurement of Crime in Eighteenth Century England" and André Lachance, "Women and Crime in Canada in the Early Eighteenth Century, 1712-1759". See also Louis Knafla, ed., *The Canadian Society for Legal History: Proceedings 1977* (Toronto, 1977).

19 The best recent source for Quebec civil law is Evelyn Kolish's thesis, "Changements dans le droit privé au Québec et au Bas-Canada, entre 1760 et 1840. Attitude et réaction des contemporains", PhD, Université de Montréal, 1980.

20 (London, Ontario, 1977). It also bears comparison to Margaret Banks' article in Flaherty, *Essays in the History of Canadian Law, Volume II*.

21 Good support for Cross' argument of the ineffectiveness of state authority is found in Stephen Kenny, "'Cahots' and Catcalls: An Episode of Popular Resistance in Lower Canada at the Outset of the Union", *Canadian Historical Review*, LXV, 2 (June 1984), pp. 184-208; see also Cross, "Violence and Authority: the Case of Bytown", in D.J. Bercuson and L. Knafla, eds., *Law and Society in Canada in Historical Perspective* (Calgary, 1979), pp. 5-22.



of popular culture bears comparison not only to that of Cross but also to that of Hans Medick.<sup>22</sup>

*Manners, Morals & Mayhem: A Look at the First 200 Years of Law and Society in New Brunswick* (Fredericton, Public Legal Information Services, 1985) is an intriguing collection. Although the articles are too short and the pictures are placed indiscriminately, this unpretentious book reflects the enthusiasm of its editors and authors. Aimed at the general public, the first half of the book consists largely of popularized versions of scholarly articles published by David Bell. The articles are well-documented and give effective treatment of slavery, informal dispute resolution, and the role of justices of the peace. The second half of the volume, "Ordering the Frontier", is highlighted by sections dealing with the death sentence, the benefit of the clergy, and the auctioning of paupers.

The most ambitious collections in Canadian legal history have been compiled by David Flaherty for the Osgoode Society. Flaherty's published work, his courses at the University of Western Ontario, his graduate students, and his organization of the annual "Seminar in Legal History for Law Professors" make him a sort of Pied Piper of legal history. *Essays in the History of Canadian Law, Volume I* (Toronto, The Osgoode Society) was published in 1981 and several articles stand up well. Kathryn Bindon's "Hudson's Bay Company Law" looks at the confrontation between a mercantile company and native peoples. In his reprinted "Law and Economy in Mid-Nineteenth Century Ontario", Dick Risk shows the evolution of common law in industrializing Ontario. Paul Craven treats the same period effectively in an important article on the law of master and servant.

*Essays in the History of Canadian Law, Volume 2* (Toronto, The Osgoode Society, 1983) is perhaps less successful. The articles have increased in length (the average per article is 63 pages) and the volume lacks general or theoretical pieces equivalent to Flaherty's useful introduction to Volume I. Several — William Wylie's treatment of the relationship of merchants and courts in early Upper Canada, Paul Craven's description of Toronto police courts through the eyes of police reporters, Constance Backhouse's analysis of the evolution of 19th-century rape law — are particularly useful. The highlights of this volume are Blaine Baker's study of Upper Canadian legal education and Dick Risk's description of the origins of workers' compensation in Ontario. In showing the professionalization process, Baker emphasizes the mixing in legal education of apprenticeship and attendance at court and Osgoode Hall, the successful isolation of the training of Upper Canadian lawyers from the universities, the significant regional power of Toronto over the training process and, surprisingly, the indigenous and distinctive nature of Ontario legal education. Par-

22 Hans Medick, "Plebeian Culture in the Transition to Capitalism", in R. Samuel and G. Stedman-Jones, eds., *Culture, Ideology and Politics: Essays for Eric Hobsbawm* (London, 1982), pp. 84-112.

ticularly apt is his integration of legal training into the Family Compact's game plan for building an élite. Bishop Strachan put it best: "Lawyers must, from the very nature of our political institutions — from there being no great landed proprietors — no privileged orders — become the most powerful profession, and must in time possess more influence and authority than any other" (p. 55). And, if Baker can be believed, they succeeded.

Dick Risk's legal history is always thoughtful, meticulously researched — and a shade too timid. His research invariably, but only reluctantly, leads him to "law in the round". Risk analyses the fellow-servant rule, the preference of juries for worker plaintiffs in cases against companies, and other difficulties of the courts and common law in dealing with industrial accidents. As he suggests, the Workmen's Compensation Act of 1914 represented an attempt to compartmentalize law and politics and heralded a new interventionist role for the state. What Risk does not do, is relate this episode to the larger issue of the relations of capital and labour in early 20th century industrial society.

Writing on Quebec legal history has been strongly affected by European historiography. Nowhere is this clearer than in the work of Jean-Marie Fecteau. In his Université de Paris (VII) thesis and a recent article, Fecteau comes out slugging in the debate over whether Canada had a feudal system. He argues that England implanted a "feudal" system of criminal justice after the Conquest and indeed that French and English penal systems were based on "the same repressive logic".<sup>23</sup>

The Snell and Vaughan study of the Supreme Court bears comparison to John Dickinson's *Justice et justiciables. La procédure civile à la prévôté de Québec, 1667-1759* (Québec, Les presses de l'Université Laval, 1982), a history of the royal court of Quebec during the French régime. There are two fundamental differences, one of *problématique* and one of methodology. Referring to Frederick William Maitland's assertion that "legal history is history and not law", Dickinson insists that the historian must show the institution's "influence on the behaviour of the subjected population". In methodology, Dickinson imposes a complex quantifying system on 112 volumes of court registers. The results take him far beyond the court's structure and personnel into the geographic and social origins of the plaintiffs, the types of cases, their cost, and the length of trials. His comments on town/country relations, on the fact that a

23 Jean-Marie Fecteau, "Régulation sociale et répression de la déviance au Bas-Canada au tournant du 19e siècle (1791-1815)", *Revue d'histoire de l'Amérique française*, XXXVIII, 4 (printemps 1985), pp. 499-521. For his thesis see "La pauvreté, le crime, l'Etat. Essai sur l'économie politique du contrôle social au Québec, 1791-1840", Université de Paris VII, 1983. For other work on criminal justice in the period see Louis A. Knafla and T.L. Chapman, "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812", *Osgoode Hall Law Journal*, 21 (June 1983), pp. 245-74; Douglas Hay, "The Meaning of the Criminal Law in Quebec, 1764-1774", in Knafla, *Crime and Criminal Justice in Europe and Canada*, pp. 77-111; André Morel, "La réception du droit criminel anglais au Québec (1760-1892)", *Revue juridique thémis*, 13 (1978), pp. 449-541.

free and universal justice system was not a reality in New France, and on the similarity between judicial structures in New France and the metropolis have important implications for historians of New France.

In *Crimes et criminels en Nouvelle-France* (Montréal, Boréal Express, 1984), André Lachance notes his reliance on the works of Foucault, Robert Mandrou and Pierre Chaunu.<sup>24</sup> Like Dickinson, Lachance uses quantifying methods to build up a record of 995 cases from the records of the Sovereign Council, the Prévôté and district courts in Montreal and Trois-Rivières. Although Lachance downplays it, the level of female criminality (20 per cent of accused) and their concentration in crimes against property seem significant. The strong presence of soldiers (almost 25 per cent of those accused if both officers and men are counted) could perhaps be expected. More surprising is that 19 per cent of charges were brought against shopkeepers and artisans, especially by contrast with the criminality (under 11 per cent of the accused) of domestics, apprentices and journeymen.

In the end the reviewer is struck by the enormous comparative possibilities within Canadian legal history. The material surveyed invites comparisons of trial procedures or jury behaviour in different regions and jurisdictions — 1837, Riel, assizes in the Kamloops, police courts, or the Cape Breton trial of J.B. McLachlan.<sup>25</sup> The transmission of property — a fundamental aspect of social relations — needs further comparison in a time and place context across Canada.<sup>26</sup> Comparative work in legal history — like the entire historical tradition in Canada — is handicapped by unfamiliarity with Canada's different legal traditions. *La coutume de Paris* and the Civil Code of Quebec continue to baffle anglophone scholars, while francophones make few forays outside of Quebec law.

The relationship of the law to long-term economic change and particularly the transition from pre-industrial to industrial society is inherent in some of the recent work. But, with the prominent exception of Fecteau, this relationship is often not made explicit. Legal historians seem happiest in their judicial decisions; their analyses tend to the descriptive and usually fail to locate their findings within the larger socio-economic framework. More concern for periodization and more theoretical work are needed to bring law into "the round".

24 This should not be confused with Lachance's earlier *La justice criminelle du roi au Canada au XVIII<sup>e</sup> siècle* (Québec, Les presses de l'Université Laval, 1978).

25 David Frank, "The Trial of J.B. McLachlan", *Historical Papers/Communications historiques* (1983), pp. 208-25; for Kamloops see Hamar Foster, "The Kamloops Outlaws and Commissions of Assize in Nineteenth-Century British Columbia", in *Essays in the History of Canadian Law, Volume II*, pp. 308-64.

26 Nanciellen Davis, "'Patriarchy from the Grave': Family Relations in 19th Century New Brunswick Wills", *Acadiensis*, XIII, 2 (Spring 1984), pp. 91-100; Pauline Desjardins, "La coutume de Paris et la transmission des terres — le rang de la Beauce à Calixa-Lavalée de 1730 à 1975", *Revue d'histoire de l'Amérique française*, XXXIV, 3 (décembre 1980), pp. 331-9.

One comes away with a sense of an emerging consensus school among Canadian legal historians. Competent and careful but essentially conservative scholars such as Risk and Snell and Vaughan are assembling a centrist tradition. This is nurtured by the Osgoode Society which links academics and lawyers, as well as by the conservative nature of our law schools and the general state of Canadian academia. If Blaine Baker is correct in assessing 19th century legal education as "an instrument of class reproduction", what does this tendency in our writing of Canadian legal history mean today?

BRIAN YOUNG

### Développement et régions périphériques au Québec

DEPUIS LA CRÉATION DU RÉSEAU des Universités du Québec à la fin des années 1960s, les études régionales ont connu une recrudescence au Québec. L'espace régional dont il est question ici concerne la région périphérique, celle qui se situe plus ou moins à la marge des grands centres urbains comme Québec ou Montréal. Parmi celles-ci, distinguons la Mauricie, le Saguenay-Lac-Saint-Jean, l'Est du Québec (Gaspésie/Bas-Saint-Laurent) et l'Abitibi-Témiscamingue.

Dans le volume *Forêt et société en Mauricie* (Boréal Express/Musée national de l'Homme, Montréal, 1984), René Hardy et Normand Séguin, deux professeurs de l'Université du Québec à Trois-Rivières, poursuivent leurs analyses sur le secteur forestier comme facteur d'appropriation de l'espace régional. Rappelons que Séguin, anciennement professeur à l'Université du Québec à Chicoutimi, a articulé dans son volume *La Conquête du sol au 19e siècle* (Boréal Express, 1977), la théorie du développement inégal appliquée aux régions. S'inspirant des modèles empruntés à André Gunder Frank (développement du sous-développement) et à Samir Amin (développement inégal), et approfondissant la réflexion amorcée par Alfred Dubuc,<sup>1</sup> Séguin tentait de démontrer que cette théorie pouvait mieux rendre compte du développement économique des régions du Québec que celle des pôles urbains. Appliquée à la périphérie, la thèse voulait que la coexistence de deux secteurs économiques dans un même territoire, l'un moderne et dynamique, l'autre traditionnel et stationnaire, ait pour effet de créer une situation chronique de sous-développement. Chez Séguin le secteur dynamique était le bois, le secteur traditionnel, l'agriculture. La parution du volume de Séguin sur la *Conquête du sol* a lancé le débat au Québec.<sup>2</sup> Depuis ce

1 Alfred Dubuc, "Le développement du sous-développement" et "Recul de Montréal ou sous-développement du Québec", *Le Devoir* (Montréal), 2, 3 mars 1973.

2 Voir le compte-rendu de Fernand Ouellet, *Histoire sociale/Social History*, X, 20 (novembre